Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Canadian Union of Public Employees,
Airline Division, Air Canada Component,

complainant,

and

Air Canada,

respondent.

Board File: 28180-C
Neutral Citation: 2011 CIRB **599**
July 4, 2011

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to both section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* and section 156(1) of the *Canada Labour Code (Part II–Occupational Health and Safety)* (the *Code*). A hearing on certain preliminary objections was held by videoconference on February 3, 2011, with the Board in Ottawa, Ontario, and participants in Toronto, Ontario, and Montréal, Quebec.

Representatives of Record

Mr. James Robbins, for the Canadian Union of Public Employees, Airline Division, Air Canada Component;

Ms. Rachelle Henderson, for Air Canada.

I–Nature of the Complaint

[1] On June 4, 2010, the Canadian Union of Public Employees, Airline Division, Air Canada Component (CUPE) filed complaints under Parts I and II of the *Code* against Air Canada. CUPE represents Air Canada flight attendants.

[2] The complaints arise from the same set of facts related to the parties' Joint Health and Safety Policy Committee (Policy Committee) and whether Air Canada's decision to give letters to certain CUPE members violated the *Code*.

[3] In its June 22, 2010 response, Air Canada raised three preliminary objections. First, Air Canada argued that CUPE's complaint under section 133 of the *Code* had failed to respect a necessary condition precedent (an employee's complaint to a supervisor) as allegedly required by section 127.1 of the *Code*.

[4] Second, Air Canada argued that the Board should exercise its discretion under section 16(*l*.1) of the *Code* to defer hearing the complaints in favour of arbitration or an alternate method of resolution.

[5] Third, for the Part I complaint, Air Canada requested that the Board dismiss the complaint under section 98(3) of the *Code*, on the basis that it could be decided by an arbitrator appointed under the parties' collective agreement.

[6] Exceptionally, the Board decided to hear argument on the preliminary objections, in particular since the Board had not previously issued a decision which examined in detail whether section 127.1 constituted a condition precedent for the filing of section 133 complaints.

[7]The Board proposed hearing argument on September 17, 2010, but one of the parties was not available. The matter was rescheduled to be heard on February 3, 2011 by way of videoconference which linked the Board's offices in Toronto, Ottawa and Montréal. After a full day of argument, the Board took the preliminary objections under advisement.

[8] The Board has concluded that the addition of section 127.1 to the *Code* in 2000 did not create a condition precedent before an employee could file a reprisal complaint under section 133 of the *Code*. The Board was also not persuaded, despite the parties' current involvement in an in-depth mediation-arbitration process, to defer deciding CUPE's complaints pursuant to section 16(*l*.1) of the *Code*.

[9] Air Canada did convince the Board, however, that CUPE's Part I complaint could be dealt with by an arbitrator pursuant to the parties' collective agreement. That complaint alone, as long as Air Canada confirms it accepts arbitration of that matter on its merits, will be dismissed pursuant to section 98(3).

II–Background

[10] Air Canada and CUPE have been involved in a significant amount of litigation over the years with regard to Occupational Health and Safety (OHS) matters under Part II of the *Code*. Those issues have involved various adjudicative bodies including this Board and Health and Safety Officers (HSO), as well as judicial reviews to the Federal Court of Canada.

A–*Air Canada*, 2006 CIRB 358

[11] In *Air Canada*, 2006 CIRB 358 (*Air Canada 358*), the Board considered, *inter alia*, the remuneration of flight attendants for Health and Safety Committee work under the *Code*.

[12] In *Air Canada 358*, the Board determined, *inter alia*, the appropriate remuneration for flight attendants performing these Part II duties. CUPE filed an application for reconsideration on September 6, 2006.

B–*Air Canada*, 2007 CIRB 394

[13] A reconsideration panel in *Air Canada*, 2007 CIRB 394 (*Air Canada 394*), overturned *Air Canada 358* and found that Part II of the *Code* did not give the Board jurisdiction to establish

something such as the appropriate remuneration for Part II work. Those types of questions went beyond the Board's Part II jurisdiction which was limited to employee reprisal complaints.

[14] In *Air Canada 394*, the Board described the limits of its Part II 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*. Section 147 provides as follows:
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> > 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 Air Canada acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.
>
> [61] The argument that in order to determine whether the employer has imposed a financial penalty in contravention of a statute of Parliament, one implicitly has jurisdiction to determine the regular rate of pay, is not convincing. Asking the Board to first set the rate of pay and then determine whether the wages paid by the employer meet that rate, is like asking a traffic court magistrate to first set the speed limit for a section of highway and then determine whether the speed traveled by a motorist contravened that limit. Just as the magistrate only has jurisdiction to determine whether the speed traveled by the motorist is in compliance with the predetermined speed limit, this Board only has jurisdiction to determine whether the actual wages paid by the employer are in compliance with the regular rate of pay that has already been predetermined—predetermined by the parties and not the Board. It is only once the regular rate of pay has been determined by the parties that this Board would then be in a position to assess whether section 147 has been contravened.

C–Framework Med-Arb Agreement

[15] On December 12, 2008, CUPE filed a different Part II complaint with the Board (file no. 27225-C). At the parties' request, the Vice-Chairperson hearing the case mediated the complaint in order to explore whether there might be another mechanism to assist the parties in resolving their long-standing differences over the application of Part II of the *Code*.

[16] The parties negotiated a "Framework Med-Arb Agreement" (Framework Agreement) which sent their various disputes to a mediator-arbitrator. The parties appointed Mr. Michel Picher to act as mediator-arbitrator.

[17] Under the Framework Agreement, both CUPE and Air Canada submitted issues to the mediator-arbitrator including, but not limited to, an issue proposed by Air Canada: "to whom are employees released pursuant to section 135.1(10) accountable?"

[18] In part, Air Canada relied on the ongoing Picher mediation/arbitration process in support of its three preliminary objections.

D–Picher Mediation/Arbitration

[19] This mediation/arbitration process is ongoing. The parties advised the Board at the hearing that it will be long and detailed. Hearings had been scheduled to continue in March and April, 2011.

[20] CUPE also advised the Board that it had objected to Arbitrator Picher's jurisdiction at one point in the proceedings and was continuing with the mediation/arbitration process on a without prejudice basis.

[21] Air Canada suggested that CUPE's Parts I and II complaints could be dealt with by Arbitrator Picher. CUPE argued that the matters covered by the complaints were not before Arbitrator Picher and that, in any event, he lacked the jurisdiction to resolve them.

III–Facts

[22] CUPE and Air Canada described the situation giving rise to the complaints differently.

[23] Air Canada gave "letters of expectation" and "letters of warning" to CUPE members on the Policy Committee.

[24] For example, on March 30, 2010, Air Canada provided this letter of warning to certain employees following events which transpired at a meeting of the Policy Committee:

> I understand that you refused to take part in a policy committee meeting last week in Montreal because you did not recognize an employer representative's alternate. I have reviewed the minutes that you drafted, which state:
>
> > "The Employee Co-Chair stated that we do not agree on holding the meeting with Stacey participating today, as a fourth employer member of the PC. Furthermore, her presence had not been agreed to. She suggested the meeting takes place, without Stacey, and as originally planned, as there is a lot of work to cover. The employer alternate co-chair refused.
> >
> > Employee co-chairperson then suggested postponing the meeting to a later date when all committee members could attend."
>
> Julie, you are expected to participate in PC meetings regardless of whether you agree with the presence of an employer alternate, and had no right to shut down the meeting last Thursday. You are free to grieve or take another recourse later but you must still perform the work you are released and paid to perform. This is the basic principle of "work now, grieve later" and it applies to all employees, including health and safety committee members.
>
> Julie-Anne Lambert informs me that she will probably be unable to attend a PC meeting on any two consecutive days in the near future and will have to send an alternate on at least one day. I understand that earlier today you advised Isabelle Jourdain in an email that you will reschedule the PC meeting on a without prejudice basis. This is the appropriate approach. Failure to schedule or participate in a PC meeting because you disagree with the participation of an employer alternate will result in discipline.
>
> Regards, ...

[25] On April 19, 2010, Air Canada provided letters of expectation to certain employees which arose from events in April, 2010, with the Policy Committee:

> I am advised that you are available for a Policy Committee meeting on April 26 and 27 but that the employee co-chair refuses to agree to the meeting unless Air Canada backfills Julie Pelletier, who has requested a union business release.
>
> I am also informed that April 26 and 27 are the dates originally agreed upon for this meeting and that the

> employer representatives are only available on those dates.
>
> Please be advised that, as an employee representative, you are not entitled to refuse to attend a Policy Committee meeting for which you are available just because you, Ms. Paquet or your union disagree with Air Canada's interpretation of the backfill provisions of the June 2009 MOA.
>
> Accordingly, you are expected to attend the meeting of the Policy Committee on April 26 and 27, failing which you will be subject to discipline. If you have any concerns about the convening of the committee meeting on April 26 and 27, you may grieve later.
>
> Regards ...

[26] Air Canada took the position that it retained supervisory authority over its employees, even when they were released for Policy Committee work. Air Canada argued it was paying the employees for this Part II related work and that that work became their actual assignment. In Air Canada's view, a failure to attend a Policy Committee meeting can result in discipline.

[27] One of the issues that Air Canada submitted to Mediator-Arbitrator Picher concerned to whom employees released to sit on the Policy Committee were accountable under section 135.1(10) of the *Code*:

> 135.1 (10) The members of a committee are entitled to take the time required, during their regular working hours,
>
> (*a*) to attend meetings or to perform any of their other functions; and
>
> (*b*) for the purposes of preparation and travel, as authorized by both chairpersons of the committee.

[28] Air Canada argued that the issue at the heart of CUPE's complaint is actually before Arbitrator Picher, who has a large discretion to determine his jurisdiction under the Framework Agreement.

[29] Moreover, Air Canada submitted that the Board did not have jurisdiction under Part II of the *Code* to interpret and apply articles like 135.1(10) and relied on the Board's comments about its Part II jurisdiction in *Air Canada 394*, *supra*.

[30] This decision does not deal with the extent of the Board's jurisdiction to consider the merits of CUPE's complaints, but is limited to deciding Air Canada's preliminary objections.

[31] CUPE argued that its complaint did not concern to whom an employee is accountable when on paid leave for Policy Committee duties. Instead, CUPE argued that its main concern has been whether employer representatives outnumber employee representatives on the Policy Committee, given section 135.1(1) of the *Code*:

> 135.1(1) Subject to this section, a policy committee or a work place committee shall consist of at least two persons and at least half of the members shall be employees who
>
> (*a*) do not exercise managerial functions; and
>
> (*b*) subject to any regulations made under subsection 135.2(1), have been selected by
>
> (i) the employees, if the employees are not represented by a trade union, or
>
> (ii) the trade union representing employees, in consultation with any employees who are not so represented.

[32] CUPE also argued that the Board's obligation to decide reprisal complaints, necessarily includes interpreting sections like section 135.1(1).

[33] In CUPE's view, a disagreement it had with Air Canada about proper Part II procedure for the Policy Committee led to the disciplinary letters. CUPE also commented on a related request for a release for union business under the collective agreement.

[34] CUPE expressed its concern that Air Canada could force them, under the threat of discipline, to attend Policy Committee meetings with unequal numbers of representatives on the employer's side compared to the union's side.

[35] CUPE also raised an issue regarding the use of its logo on documents emanating from the Policy Committee.

[36] In its reply, Air Canada disagreed there was any discipline arising from differences of opinion over procedure. However, Air Canada maintained it was entitled to issue the letters quoted

previously, in response to the actions of certain employees sitting on the Policy Committee.

IV–Issues

[37] The Board has to decide the merits of the following three preliminary objections raised by Air Canada:

> 1) Is section 127.1 a condition precedent to the filing of a Part II complaint under section 133?;
> 2) Should the Board defer deciding the complaints pursuant to section 16(*l*.1) of the *Code*?; and
> 3) Should the Board dismiss CUPE's Part I unfair labour practice complaint under section 98(3) of the *Code* on the basis that the matter could be decided by an arbitrator appointed under the parties' collective agreement?

V–Applicable Statutory Provisions

[38] During oral argument, the parties referred in some detail to certain provisions in Part II of the *Code*. For ease of reference, we will reproduce sections 127.1, 128, 129, 132, 133, 145(1) and 147 in their entirety:

Section 127.1:

> INTERNAL COMPLAINT RESOLUTION PROCESS
>
> 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.
>
> *Resolve complaint*
>
> (2) The employee and the supervisor shall try to resolve the complaint between themselves as soon as possible.
>
> *Investigation of complaint*
>
> (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.

Notice

(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.

Recommendations

(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.

Employer's duty

(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.

Stoppage of Activity

(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.

Referral to health and safety officer

(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.

Investigation by health and safety officer

(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).

Duty and power of health and safety officer

(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).

Interpretation

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

(emphasis added)

Section 128:

128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

(*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;

(*b*) a condition exists in the place that constitutes a danger to the employee; or

(*c*) the performance of the activity constitutes a danger to the employee or to another employee.

No refusal permitted in certain dangerous circumstances

(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if

(*a*) the refusal puts the life, health or safety of another person directly in danger; or

(*b*) the danger referred to in subsection (1) is a normal condition of employment.

Employees on ships and aircraft

(3) If an employee on a ship or an aircraft that is in operation has reasonable cause to believe that

(*a*) the use or operation of a machine or thing on the ship or aircraft constitutes a danger to the employee or to another employee,

(*b*) a condition exists in a place on the ship or aircraft that constitutes a danger to the employee, or

(*c*) the performance of an activity on the ship or aircraft by the employee constitutes a danger to the employee or to another employee,

the employee shall immediately notify the person in charge of the ship or aircraft of the circumstances of the danger and the person in charge shall, as soon as is practicable after having been so notified, having regard to the safe operation of the ship or aircraft, decide whether the employee may discontinue the use or operation of the machine or thing or cease working in that place or performing that activity and shall inform the employee accordingly.

No refusal permitted in certain cases

(4) An employee who, under subsection (3), is informed that the employee may not discontinue the use or operation of a machine or thing or cease to work in a place or perform an activity shall not, while the ship or aircraft on which the employee is employed is in operation, refuse under this section to use or operate the machine or thing, work in that place or perform that activity.

When ship or aircraft in operation

(5) For the purposes of subsections (3) and (4),

> (*a*) a ship is in operation from the time it casts off from a wharf in a Canadian or foreign port until it is next secured alongside a wharf in Canada; and
>
> (*b*) an aircraft is in operation from the time it first moves under its own power for the purpose of taking off from a Canadian or foreign place of departure until it comes to rest at the end of its flight to its first destination in Canada.

Report to employer

(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

Select a remedy

(7) Where an employee makes a report under subsection (6), the employee, if there is a collective agreement in place that provides for a redress mechanism in circumstances described in this section, shall inform the employer, in the prescribed manner and time if any is prescribed, whether the employee intends to exercise recourse under the agreement or this section. The selection of recourse is irrevocable unless the employer and employee agree otherwise.

Employer to take immediate action

(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.

Continued refusal

(9) If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.

Investigation of report

(10) An employer shall, immediately after being informed of the continued refusal under subsection (9), investigate the matter in the presence of the employee who reported it and of

(*a*) at least one member of the work place committee who does not exercise managerial functions;

(*b*) the health and safety representative; or

(*c*) if no person is available under paragraph (a) or (b), at least one person from the work place who is selected by the employee.

If more than one report

(11) If more than one employee has made a report of a similar nature under subsection (9), those employees may designate one employee from among themselves to be present at the investigation.

Absence of employee

(12) An employer may proceed with an investigation in the absence of the employee who reported the matter if that employee or a person designated under subsection (11) chooses not to be present.

Continued refusal to work

(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

Notification of steps to eliminate danger

(14) An employer shall inform the work place committee or the health and safety representative of any steps taken by the employer under subsection (13).

(emphasis added)

Section 129:

129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is

(*a*) an employee member of the work place committee;

(*b*) the health and safety representative; or

(*c*) if a person mentioned in paragraph (*a*) or (*b*) is not available, another employee from the work place who is designated by the employee.

Employees' representative if more than one employee

(2) If the investigation involves more than one employee, those employees may designate one employee from among themselves to be present at the investigation.

Absence of any person

(3) A health and safety officer may proceed with an investigation in the absence of any person mentioned in subsection (1) or (2) if that person chooses not to be present.

Decision of health and safety officer

(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

Continuation of work

(5) Before the investigation and decision of a health and safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternative work, and shall not assign any other employee to use or operate the machine or thing, work in that place or perform the activity referred to in subsection (1) unless

(*a*) the other employee is qualified for the work;

(*b*) the other employee has been advised of the refusal of the employee concerned and of the reasons for the refusal; and

(*c*) the employer is satisfied on reasonable grounds that the other employee will not be put in danger.

Decision of health and safety officer re danger

(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

Appeal

(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

(emphasis added)

Section 132:

132. (1) In addition to the rights conferred by section 128 and subject to this section, an employee who is pregnant or nursing may cease to perform her job if she believes that, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the foetus or child. On being informed of the cessation, the employer, with the consent of the employee, shall notify the work place committee or the health and safety representative.

Consult medical practitioner

(2) The employee must consult with a qualified medical practitioner, as defined in section 166, of her

choice as soon as possible to establish whether continuing any of her current job functions poses a risk to her health or to that of the foetus or child.

Provision no longer applicable

(3) Without prejudice to any other right conferred by this act, by a collective agreement or other agreement or by any terms and conditions of employment, once the medical practitioner has established whether there is a risk as described in subsection (1), the employee may no longer cease to perform her job under subsection (1).

Employer may reassign

(4) For the period during which the employee does not perform her job under subsection (1), the employer may, in consultation with the employee, reassign her to another job that would not pose a risk to her health or to that of the foetus or child.

Status of employee

(5) The employee, whether or not she has been reassigned to another job, is deemed to continue to hold the job that she held at the time she ceased to perform her job functions and shall continue to receive the wages and benefits that are attached to that job for the period during which she does not perform the job.

(emphasis added)

Section 133:

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.

Time for making complaint

(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.

Restriction

(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.

Exclusion of arbitration

(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.

Duty and power of Board

(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.

Burden of proof

(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.

(emphasis added)

Section 145(1):

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.

(emphasis added)

Section 147:

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.

(emphasis added)

VI–Analysis and Decision

1–Is section 127.1 a condition precedent to the filing of a complaint under section 133?

[39] The Board will summarize the main arguments put forward by Air Canada and CUPE. It will then provide its analysis and decision.

[40] In the 2000 amendments to Part II of the *Code*, the Legislator added, via section 127.1, a process described as the "Internal Complaint Resolution Process" (ICRP). The ICRP requires employees, as a first step, to raise alleged Part II contraventions with their supervisor (section 127.1(1)).

[41] The ICRP involves a graduated investigation process designed to resolve the matter. If no resolution occurs, the matter may be referred to an independent expert, the HSO, for a binding determination (sections 127.1(8)–(11)).

A–Air Canada's Position

[42] Air Canada argued that section 127.1 obliges an employee, as a condition precedent, to first raise a retaliation concern with his or her supervisor given the use of this phrase at section 127.1: "[a]n employee 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."

[43] Sections 128, 129 and 132 of Part II of the *Code*, quoted earlier, deal with work refusals when this is a concern about danger. Section 133, which deals with employee complaints, is not explicitly excluded from section 127.1.

[44] Air Canada argued that, since section 127.1(1) only expressly excluded those sections involving the exercise of the right to refuse unsafe work, then a complaint to a supervisor is a mandatory condition precedent before an employee can exercise "any other recourse". In Air Canada's view, the expression "any other recourse" includes the filing of a reprisal complaint under section 133 of

the *Code.* A reprisal can arise from the exercise of the right to refuse unsafe work or for raising other Part II concerns, as described in sections 133 and 147 of the *Code*.

[45] In short, Air Canada argued employees must always start with the ICRP, except in work refusal situations. Only then may they access other Part II recourses, such as a section 133 reprisal complaint.

[46] In support of its section 127.1 interpretation, Air Canada referred to *Canadian Union of Public Employees, Air Canada Component* v. *Air Canada*, [2009] FCA 356, in which the Federal Court of Appeal accepted the following description of the ICRP regime:

> [5] In our view, on the record before him, Barnes J. correctly found:
>
> the grounding of the aircraft satisfied the employer's obligation under subsection 128(8) of the Code to take immediate action to protect the employee;
>
> the complaint therefore was grounded in section 127.1 rather than section 128 of the Code;
>
> section 127.1 stipulates that alleged contraventions of the Code must be submitted to the internal complaint resolution process before other recourse is sought and its language is mandatory;
>
> the intent of section 127.1 is to allow the parties to pursue a mutually agreeable solution before seeking outside involvement and to provide the HSO with the benefit of a written investigation report or, in the case of disagreement, two reports;
>
> section 145 of the Code is a remedial provision which is engaged only when an HSO is carrying out an investigation authorized by some other provision of the Code;
>
> where an employee initiates a complaint under section 127.1 of the Code, it is necessary to exhaust the internal complaint resolution process before the employee, or the union on the employee's behalf, can request an investigation by an HSO;
>
> Transport Canada's decision not to get involved was legally correct.

B–CUPE's Position

[47] CUPE had two alternative positions.

[48] First of all, even if Air Canada's interpretation of Part II of the *Code* were correct, CUPE alleged that the matters in dispute were clearly raised with Air Canada supervisors, in satisfaction of section 127.1. CUPE argued that a finding on this point, which Air Canada disputed, would have

to be determined at a hearing, even if the Board accepted Air Canada's interpretation of section 127.1.

[49] However, CUPE's main argument posited that section 127.1 did not constitute a condition precedent for an employee filing a retaliation complaint under section 133.

[50] CUPE argued that section 133 of the *Code* existed in its current form prior to the addition of the ICRP at section 127.1. The addition of section 127.1 was not designed to oblige employees to first raise reprisal issues with their supervisors. Rather, section 133 itself already contained the only conditions precedent for a valid reprisal complaint.

[51] CUPE referred to section 133(3), which obliged employees who exercised their right to refuse unsafe work, as a condition for filing a reprisal complaint, to advise their employer of the circumstances of the work refusal under section 128(6). In addition, CUPE noted that section 133(2) established a 90-day limit for the filing of a reprisal complaint, a second condition precedent.

[52] If the Legislator had wanted to add other preconditions for a section 133 complaint, CUPE argued it could have added a reference to section 127.1.

[53] The Board asked CUPE why the Legislator, in section 127.1, did not exclude section 133 explicitly, given it had clearly excluded sections 128, 129 and 132 from the application of section 127.1.

[54] In response, CUPE referred the Board to *Erb Transport Ltd. and Vey*, 2006 C.L.C.A.O.D. No. 12 (*Erb Transport*). In this decision, an Appeals Officer under Part II of the *Code* explained the difference between this Board's jurisdiction and that of an HSO:

> **43** The evidence also shows that D. Vey's complaint under the Code was directly related to his dismissal alleging that it had been made following his refusal of work.
>
> **44** Section 133 of the Code clearly stipulates that where an employee alleges than an employer has taken or threatens to take any disciplinary action against the employee because he or she exercised rights under the Code, the employee may make a complaint in writing to the Canada Industrial Relations Board. Pursuant to section 134 of the Code, the Board has the exclusive jurisdiction to deal with contraventions

> of section 147 of the Code regarding disciplinary actions. In addition, no provisions of the Code give a health and safety office a remedial power to deal with a complaint of an employee alleging that he or she has been disciplined by the employer following the exercise of his or her right of refusal to work under the Code.
>
> (emphasis added)

[55] In *Gilmour* v. *Canadian National Railway*, [1995] FCA 1601 (*Gilmour*), the Federal Court of Canada–Trial Division, albeit in a decision prior to the 2000 amendments to Part II of the *Code*, also commented on the separate roles of the Board and an HSO:

> (9) The roles of the Board and of the safety officer are separate and distinct. The only legislated exception is in respect of matters provided in subsection 129(5) where the Board may review a decision of the safety officer. Pursuant to section 134, the Board has exclusive jurisdiction to deal with contravention of paragraph 147(*a*) of the *Code* (disciplinary measures). Nowhere in Part II of the *Code* is the safety officer given the remedial power to deal with disciplinary measures taken by the employer by reason of the employee's exercise of his or her rights under that Part. The record shows that the applicant herein made a complaint to the Board, but that it was judged by the Board to be out of time by reason of the provisions of subsection 133(2) of the *Code*. Subsection 145(1) does not provide the employee with an alternative recourse to a safety officer in such cases.
>
> (emphasis added)

[56] The Board notes that the Court's 1995 reference in *Gilmour*, *supra*, to the Board's review power over HSO decisions subsequently disappeared with the amendments in 2000 to Part II.

[57] CUPE emphasized that a clear division remained, even after the amendments in 2000 to Part II of the *Code*, between an HSO's jurisdiction and that of the Board. This division explained why the text of section 127.1 did not need to exclude explicitly section 133.

C–Analysis and Decision

[58] Section 127.1, on its face, does not explicitly exclude the *Code*'s section 133 reprisal provision. Therefore, if a section 133 reprisal complaint is considered a "recourse" under Part II, then Air Canada has an intriguing argument that an employee's obligation to complain first to his or her supervisor constitutes a condition precedent to a reprisal complaint.

[59] However, the Board has concluded that section 127.1 does not refer explicitly to section 133 because it does not need to. Section 127.1, when analyzed in the overall context of Part II of the *Code*, is necessarily limited in scope to those matters which ultimately an HSO can resolve. An HSO has an active role in determining whether danger exists and any Part II contravention issues. But it is this Board, and not an HSO, which has the exclusive jurisdiction over reprisal complaints.

[60] In other words, as noted in the decisions in *Erb Transport* and *Gilmore*, *supra,* the Board and an HSO have different mandates and jurisdictions under Part II. The Board recently described the difference between these two distinct regimes in *Lewis Rathgeber*, 2010 CIRB 536:

> [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*:
>
> ...
>
> [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 nonunionized 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 pu*nished 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.

...

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:

...

[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.

[61] The Legislator amended Part II of the *Code* in 2000 by adding the IRCP, which obliges an employee to first complain about an alleged Part II contravention to his or her supervisor.

[62] However, section 127.1 deals with contraventions of Part II of the *Code* that an HSO can remedy under section 145(1). Section 133 of the *Code* deals with reprisals. In the Board's view, these two regimes remain distinct. The expression "any other recourse" in section 127.1 refers to those recourses which fall within an HSO's jurisdiction over Part II contraventions and allegations concerning workplace dangers.

[63] The explicit reference in section 127.1 to sections 128, 129 and 132 is necessary because these work refusal provisions overlap. For example, section 127.1(7) covers work refusals due to danger. Section 127.1(10) refers to an HSO's authority to remedy a dangerous situation.

[64] An employee's ability to refuse work due to danger would be delayed by having to follow the process in section 127.1, including calling in a safety officer under section 127.1(8), only to be obliged to restart the process under section 128. The parties might also be obliged, a second time, to call on the services of an HSO (section 129) for the same workplace issue.

[65] The explicit reference to sections 128, 129 and 132 prevents an employee from having to follow a duplicative procedure for work refusals. The reference to "any other recourse" in section 127.1 is accordingly limited to those situations which involve an HSO's jurisdiction.

[66] The Board is satisfied that imposing an obligation to follow the section 127.1 ICRP process first, despite an HSO having absolutely no jurisdiction over reprisals, goes against the *Code*'s clear intent

that health and safety issues must be dealt with expeditiously. Section 133(2) of the *Code* established a 90-day time limit for reprisal complaints, given the need for expediency.

[67] Moreover, section 133(5) encourages the Board to assist the parties to resolve a reprisal complaint. This obligation would be superfluous, or at least duplicative, if the section 127.1 process had already been followed. Did the Legislator's addition of section 127.1 really intend for both an HSO and later the Board to attempt to resolve a retaliation complaint, even though an HSO has no jurisdiction over reprisals?

[68] The Board agrees with CUPE that the only limitations for reprisal complaints are found in section 133 itself. Section 133(2) contains a 90-day time limit. Section 133(3) requires an employee to respect the section 128(6) notice requirement found.

[69] If the Board's interpretation is wrong , then the section 127.1 ICRP seems to force an employee, who may have been terminated as a reprisal for exercising his or her Part II rights, to return first to the workplace to raise the matter with his or her supervisor. This obligation to return and follow an internal process, while not determinative, seems to make little labour relations sense, especially in the context of a dismissal.

[70] While Air Canada suggested that an employee may only need to start the section 127.1 process, but would not need to exhaust it before filing a section 133 complaint, the Board prefers the interpretation that the HSO's compliance and the Board's reprisal regimes are distinct. The procedural requirements in one were never meant to delay the efficiency and effectiveness of the other.

[71] In summary, the section 127.1 ICRP applies to the compliance regime that the parties, Health and Safety Committees, HSOs and others administer under the *Code*. The ICRP has no bearing on the separate reprisal regime that the *Code* has assigned exclusively to the Board.

[72] Accordingly, the Board dismisses Air Canada's argument that a complainant must file a complaint under section 127.1, prior to being able to file a reprisal complaint under section 133 of the *Code*.

2–Should the Board defer deciding the complaints pursuant to section 16(*l*.1) of the *Code*?

[73] In the 1999 amendments to the *Code*, the legislator granted the Board at section 16(*l*.1) a discretion to defer deciding any matter. The Board can defer in favour of the parties' arbitration process or in favour of "an alternate method of resolution":

Section 16(*l*.1):

> *Powers and Duties*
>
> ...
>
> 16. The Board has, in relation to any proceeding before it, power
>
> ...
>
> (*l*.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution;
>
> ...

A– Air Canada's Position

[74] Air Canada argued that the parties submitted their ongoing issues about Part II of the *Code* to Arbitrator Picher, including the previously-quoted section 135.1(10) interpretation issue. In Air Canada's view, the ultimate resolution by the mediator/arbitrator will assist the Board and therefore it should defer hearing the complaints as a result.

[75] Air Canada also reminded the Board that CUPE had filed a grievance related to a request for union leave. In Air Canada's view, an arbitrator under the collective agreement has appropriate jurisdiction for that issue and the parties have granted Arbitrator Picher a large jurisdiction to deal with their ongoing Part II issues.

B–CUPE's Position

[76] CUPE argued that the *Code* at section 133(4) prevented a reprisal complaint from being referred to arbitration or adjudication:

> 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.

[77] CUPE argued that the *Code* requires the Board to deal exclusively with Part II complaints; they cannot be deferred to arbitration.

[78] CUPE also argued that the Picher process will take a long time and has been described as a "Royal Commission" during the ongoing proceedings.

[79] CUPE suggested that where the Board defers a matter under section 16(*l*.1) the purpose is so that the matter will be decided definitively elsewhere. In CUPE's view, Arbitrator Picher does not have jurisdiction to decide retaliation complaints under Part II of the *Code* or unfair labour practice complaints under Part I of the *Code*.

C–Analysis and Decision

[80] The Board has not been persuaded that it can or should defer deciding the Part II complaint under section 16(*l*.1). For the Part II complaint, the Board is of the view that section 133(4) gives it exclusive jurisdiction to resolve the matter: *Shawn Cahoon*, 2010 CIRB 548.

[81] A Part II reprisal complaint under section 133(1) can only be brought by an employee or his/her designate, in this case, CUPE. A reprisal complaint is personal to an employee. It is not a general recourse to decide Part II interpretation disputes between an employer and a certified trade union.

[82] CUPE has been designated by those members who received letters to bring reprisal allegations to the Board. Neither the employees nor their designate CUPE can take these Part II issues to arbitration.

[83] The Board accepts that, while the parties granted arbitrator Picher a large jurisdiction in the hope of ending or limiting their ongoing OHS disputes, nothing within his mandate relates to the Part II retaliation provisions. In any event, this Board has exclusive jurisdiction over such matters.

[84] The Board will not exercise its discretion under section 16(*l*.1) to defer the Part II complaint. The Board will deal with CUPE's Part I unfair labour practice (ULP) complaint in its consideration of section 98(3) of the *Code*.

3–Should the Board dismiss CUPE's Part I ULP complaint under section 98(3) of the *Code* on the basis that the matter could be decided by an arbitrator appointed under the parties' collective agreement?

[85] CUPE filed an ULP complaint alleging, *inter alia*, that Air Canada interfered with its legitimate activities contrary to section 94(1)(*a*) of the *Code*:

> *Unfair Practices*
>
> 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...

[86] In appropriate cases, the Board may dismiss a ULP complaint where it is satisfied that the complainant could refer the matter to an arbitrator under the collective agreement:

> 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.

[87] Section 98(3) deals only with "complaints", as opposed to section 16(*l*.1) of the *Code* which allows the Board to defer hearing any "matter" over which it has jurisdiction. An exercise of the discretion under section 98(3) results in the complaint being dismissed, as opposed to only deferred.

A–Air Canada's Position

[88] Air Canada argued that the Part I ULP complaint concerned letters that Air Canada gave to members of the bargaining unit. Air Canada referenced the parties' collective agreement and particularly article 2.03 (discrimination clause):

> 2.01 **UNION RECOGNITION** - The Company recognizes the Union as the sole bargaining agent for all Cabin Personnel employed by Air Canada, including all cabin personnel operating flights at ZIP in accordance with the certification issued by the Canadian Industrial Relations Board [*sic*] to CUPE to represent all cabin personnel at Air Canada under the provisions of the Canada Labour Code.
>
> 2.02 In performance of their normal Cabin Personnel duties, Union officials and representatives shall not be subject to more severe discipline than other employees in the bargaining unit
>
> 2.03 No employee covered by this Agreement will be interfered with, restrained, coerced, or discriminated against by the Company because of membership in or lawful activity on behalf of the Union.
>
> (emphasis added)

[89] Air Canada also referred to article 21.04 of its collective agreement dealing with Health and Safety Committees:

> 21.04 **SAFETY AND HEALTH COMMITTEES**: The Union and the Company agree to promote safe practices to ensure the safety and health of employees, and to establish safety and health committees, in accordance with Part II of the Canada Labour Code [*sic*].

[90] Article 13 of the parties' collective agreement deals with grievances:

> 13.01 For the purpose of this Collective Agreement, the word grievance means all differences concerning the interpretation, application, administration, or alleged violation of the Collective Agreement.

[91] Air Canada argued that the complaint under Part I of the *Code* can be fully dealt with by an arbitrator and referred to the five factors set out in *Wardair Canada Inc.* (1988), 76 di 103:

> 1) The existence of a collective agreement;
> 2) An anti-union discrimination clause in the collective agreement;
> 3) The ability to file a grievance for anti-union animus cases;
> 4) The chance of a grievance reaching arbitration; and
> 5) The arbitrator's jurisdiction to grant redress.

B–CUPE's Position

[92] CUPE argued that its section 94 ULP complaint is intertwined with its section 147 complaint. The issues concern anti-union animus and interference. These are not the type of issues that are before Arbitrator Picher in the mediation/arbitration.

[93] CUPE also argued that the concept of interference can extend beyond bargaining unit employees who are covered by the collective agreement.

[94] CUPE expanded on its position at paragraph 22 of its written reply dated July 2, 2010:

> 22. The issues in the present case concern Air Canada's interference with the Union and its representation of employees in health and safety matters generally, not just discrimination or interference with employees covered by the Collective Agreement. Representatives employed by the Union are not covered by the Collective Agreement. Nor are CUPE-employed staff members covered by the Collective Agreement...

C–Analysis and Decision

[95] The Board has been persuaded that it can exercise its discretion under section 98(3) to have the parties submit the Part I ULP complaint to arbitration. This exercise of discretion is conditional on Air Canada agreeing to arbitrate the matter, even if a grievance has not yet been filed.

[96] The Board will hear CUPE's Part II complaint concerning retaliation. But there is a fundamental difference in the Board's view between an employee's Part II reprisal complaint and a more general labour relations dispute between an employer and a certified trade union. The Board will hear and decide whether individual employees suffered a retaliation under Part II when they received letters from Air Canada. Those employees are entitled to have CUPE argue their retaliation cases as their designate.

[97] The *Code* at section 133(4) obliges the Board to deal with these complaints.

[98] But for a Part I ULP complaint, the Board is satisfied that the parties' collective agreement, and the *Code*, provide an arbitrator with appropriate jurisdiction. That jurisdiction can also encompass allegations of anti-union animus relating to the disputed letters and the related release for union business under the collective agreement. A grievance has already been filed for the latter issue.

[99] The practical reasoning set out by the Board's predecessor, the Canada Labour Relations Board, in *Canada Post Corporation* (1989), 76 di 212 (CLRB no. 729), is applicable to the current situation:

> ...Applying the five-step criterion from Bell Canada, the Board is almost obligated to hear all such complaints. In the respectful opinion of this panel of the Board, this should not be so. We think perhaps the time has come for the Board to take another look at its practice vis-à-vis section 98(3) and lean towards giving more priority to the private dispute resolution mechanisms that are mandatory in each collective agreement under the Code. Particularly where there has been a longstanding relationship between the parties, where the dispute arises from their day-to-day operations and where there are no important matters of public policy under the Code at stake.
>
> [*sic*]

[100] The parties disagree whether the collective agreement is broad enough to deal with allegations regarding interference. The Board is satisfied the *Code*, at section 60(1)(*a*.1), now grants an arbitrator jurisdiction to examine such allegations:

> 60. (1) An arbitrator or arbitration board has
>
> ...
>
> (*a.1*) the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement.

[101] Accordingly, the Board has been persuaded that CUPE's Part I ULP complaint, which in substance is very different from a Part II retaliation complaint, can and should be dealt with under the collective agreement.

VII–Conclusion

[102]The Board has considered three preliminary objections from Air Canada.

[103] The Board has not been convinced that the addition of the section 127.1 ICRP was intended to constitute a condition precedent to the filing of section 133 reprisal complaints. The Board has a jurisdiction distinct from that of HSOs. Section 127.1 is directed solely to cases falling under the jurisdiction of HSOs.

[104] Air Canada did not convince the Board to defer deciding these matters pursuant to section 16(*l*.1) of the *Code*. Section 133(4) of the *Code* obliges the Board to decide employee reprisal

complaints; those complaints cannot be sent to arbitration. In addition, the Framework Agreement does not provide Mediator/Arbitrator Picher with the jurisdiction to decide Part II reprisal complaints.

[105] Finally, the Board accepts Air Canada's preliminary objection that CUPE's Part I ULP complaint can be dealt with by an arbitrator under the parties' collective agreement. The parties have negotiated a non-discrimination clause and the Board is satisfied an arbitrator would have sufficient jurisdiction to deal with those differences between the parties to the collective agreement.

[106] The Board's decision to exercise its section 98(3) discretion is contingent upon Air Canada agreeing to have those matters taken to arbitration. The Board understood this to be Air Canada's position if the discretion at section 98(3) was exercised in its favour, even if grievances had not yet been filed.

_____

Graham J. Clarke
Vice-Chairperson