Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Lloyd Butt et al.,

applicants,

and

Communications, Energy and Paperworkers Union of Canada,

bargaining agent,

and

XL Digital Services Inc., doing business as Dependable HomeTech,

employer.

Board File: 28968-C
Neutral Citation: 2012 CIRB **621**
January 13, 2012

The Canada Industrial Relations Board was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. David P. Olsen and Norman Rivard, Members.

The majority reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson. Concurring reasons were written by Mr. David P. Olsen, Member.

Representatives

Mr. Lloyd Butt, for the applicants;
Mr. J. James Nyman, for the Communications, Energy and Paperworkers Union of Canada; and
Mr. Ross Jepsen, for XL Digital Services Inc., doing business as Dependable HomeTech.

I–Background

[1] Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*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 decide this revocation application without an oral hearing.

[2] On September 22, 2011, the Board received a revocation application from Mr. Lloyd Butt. Mr. Butt, on behalf of himself and others, applied for revocation under section 38 of the *Code*. Pleadings closed following Mr. Butt's final submission, received on January 4, 2012.

[3] Mr. Butt sought revocation of the certification granted to the Communications, Energy and Paperworkers Union of Canada (CEP) for a bargaining unit at XL Digital Services Inc., doing business as Dependable HomeTech (XL Digital Services) (Order no. 9974-U):

> all employees of XL Digital Services Inc., doing business as Dependable HomeTech, working in and out of London, Ontario, **excluding** managers and those above the rank of manager.

[4] The Board, after confirming its constitutional jurisdiction in *XL Digital Services Inc., doing business as Dependable HomeTech*, 2010 CIRB 543 (*XL Digital 543*), issued an interim order certifying the CEP for the bargaining unit on August 23, 2010 and, after disposing of other issues, issued a final order for the bargaining unit description on December 9, 2010.

[5] The Federal Court of Appeal confirmed the Board's jurisdiction in *XL Digital Services Inc.* v. *Communications, Energy and Paperworkers Union of Canada*, 2011 FCA 179.

[6] The CEP and XL Digital have yet to conclude a first collective agreement.

[7] For the reasons set out herein, the Board has decided to dismiss Mr. Butt's section 38 revocation application. The *Code* grants a heightened protection to a bargaining agent negotiating a first collective agreement. The CEP is entitled to the protection that Parliament included in the *Code* for first contract situations.

II–Analysis and Decision

[8] Sections 38 and 39 of the *Code* govern Mr. Butt's application:

> 38. (1) Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.
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> (2) An application for an order pursuant to subsection (1) may be made in respect of a bargaining agent for a bargaining unit,
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> > (a) where a collective agreement applicable to the bargaining unit is in force, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24 unless the Board consents to the making of the application for the order at some other time; and
> >
> > (*b*) where no collective agreement applicable to the bargaining unit is in force, at any time after a period of one year from the date of certification of the trade union.
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> (3) Where a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by the Board, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the bargaining unit.
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> (4) An application for an order pursuant to subsection (3) may be made in respect of a bargaining agent for a bargaining unit,
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> > (*a*) during the term of the first collective agreement that is entered into by the employer of the employees in the bargaining unit and the bargaining agent,
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> > > (i) at any time during the first year of the term of that collective agreement, and
> > >
> > > (ii) thereafter, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24; and
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> > (*b*) in any other case, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24.

(5) An application under subsection (1) or (3) must not, except with the consent of the Board, be made in respect of the bargaining agent for employees in a bargaining unit during a strike or lockout of those employees that is not prohibited by this Part.

39. (1) Where, on receipt of an application for an order made under subsection 38(1) or (3) in respect of a bargaining agent for a bargaining unit, and after such inquiry by way of a representation vote or otherwise as the Board considers appropriate in the circumstances, the Board is satisfied that a majority of the employees in the bargaining unit no longer wish to have the bargaining agent represent them, the Board shall, subject to subsection (2), by order,

(a) in the case of an application made under subsection 38(1), revoke the certification of the trade union as the bargaining agent for the bargaining unit; or

(b) in the case of an application made under subsection 38(3), declare that the bargaining agent is not entitled to represent the employees in the bargaining unit.

(2) Where no collective agreement applicable to a bargaining unit is in force, no order shall be made pursuant to paragraph (1)(a) in relation to the bargaining agent for the bargaining unit unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit.

(emphasis added)

[9] It is instructive to compare the level of effort the Legislator required of a bargaining agent in section 39(2), with that required to meet the obligation to bargain in good faith at section 50(a):

50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement;

(emphasis added)

[10] The obligation to bargain in good faith requires the parties to "make every reasonable effort to enter into a collective agreement". Following an initial certification, section 39(2) of the *Code* protects a new bargaining agent against a revocation application, unless it has "failed to make a reasonable effort to enter into a collective agreement".

[11] In *Leona Genge et al.*, 2007 CIRB 395 (*Genge 395*), the Board reviewed the traditional analysis used by its predecessor, the Canada Labour Relations Board (CLRB), when interpreting section 39(2) (formerly section 138(2)):

> [24] Given the CLRB's interpretation of the *Code*, it had no choice in *J. Phillips et al.*, [(1978), 34 di 603; and (1979) 1 CLRBR 180 (CLRB no. 168)] but to reject the trade union's argument that section 39(2) applied to any bargaining situation, as long as a bargaining agent had made a reasonable effort to conclude a collective agreement:
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> > The union argues for an interpretation of "in force" that would give it application in all states of union-employer relationship, even where there has been a long bargaining relationship, successive collective agreements and the employees have had the experience of the collective bargaining regime and their bargaining agent. It submits the intent is to encourage collective bargaining and to achieve this intent section 138(2) [now section 39(2)] restricts employee freedom to revoke certification but section 124(2) [now section 24(2)] allows for change of bargaining agents. The mischief perceived by the union is too wide. There is a sound experiential base for section 138(2) [now section 39(2)] applying in the two situations we have concluded it was intended to apply. We can see no sound policy reason for Parliament to restrict employee freedom to the extent advocated by the union in its interpretation. ...
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> > (*J. Phillips et al.*, *supra*, pages 613; and 188)
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> [25] If section 39(2) does apply to a particular case, then *J. Phillips et al.*, *supra*, and subsequent Board decisions have held that a bargaining agent will be protected as long as it demonstrates that it has negotiated with the employer and consulted/communicated with members of the bargaining unit.
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> [26] In short, the CLRB, in *J. Phillips et al.*, *supra*, was not prepared to limit employee freedom of choice so that a reasonable effort by the bargaining agent to conclude a collective agreement would prevent any revocation application. Rather, by interpreting the *Code* and the different states of the bargaining relationship between employers and trade unions, the CLRB concluded that Parliament intended section 39(2) to apply only to a bargaining agent that was certified but had yet to conclude a collective agreement or when the parties had acquired the right to strike or lockout.
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> [27] The CLRB, in *J. Phillips et al.*, *supra*, also determined that the Board examines the situation as of the date of the filing of the revocation application rather than at the date of the Board's decision, given that the parties' situation could change in the interim.
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> [28] This Board has accepted and applied this longstanding interpretation of section 39(2) in similar situations (see *Les Meszaros et al.*, [2002] CIRB no. 188; and 95 CLRBR (2d) 124).
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> [29] In summary, a bargaining agent can seek the protection available under section 39(2) of the *Code* if:
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> 1. it is negotiating a first collective agreement or if the parties have acquired the right to strike or lockout;
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> 2. it has made a reasonable effort to enter into a collective agreement with the employer; and
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> 3. subject to the nuances in the Board's case law, it has consulted with and kept members of the bargaining unit informed about the progress of the negotiations.

[12] When the Board applies the facts in the instant case to the three-part test in *Genge 395*, it is clear that the CEP is entitled to the protection found at section 39(2) of the *Code*. The Board will consider each element of the test separately.

1. Is this a first collective agreement situation?

[13] The parties do not dispute that the CEP and XL Digital are negotiating a first collective agreement for this bargaining unit. The parties have not acquired the right to strike or lockout.

2. Has the CEP made "a reasonable effort" to negotiate a first collective agreement?

[14] Section 39(2) requires that a bargaining agent make "a reasonable effort" in order to avoid the revocation of its new certificate. In this case, the CEP has not, following its certification, remained inactive or merely sat on its exclusive right to represent employees in its bargaining unit.

[15] For example, the CEP contested XL Digital's application for judicial review of the Board's finding that it had constitutional jurisdiction over the employees who provided services to customers of Rogers Cable Communications Inc.

[16] Since issuing its certification order, the Board has been called upon to deal with various matters filed by the CEP on behalf of its bargaining unit at XL Digital. These included an allegation that XL Digital had violated the statutory freeze at section 50(b) and had not bargained in good faith under section 50(a). The ultimate resolution of these complaints matters little for this case, but they do demonstrate the CEP's efforts on behalf of its newly certified unit.

[17] The pleadings, including those of Mr. Butt, confirm that the CEP has been negotiating with XL Digital for a collective agreement. XL Digital and the CEP have bargained on several occasions. The Minister of Labour appointed a conciliation officer to assist the CEP and XL Digital with their negotiations.

[18] Overall, these efforts show that the CEP has made "a reasonable effort" to enter into a collective agreement.

3. Has the CEP kept members of its bargaining unit informed about negotiations?

[19] The CEP has also taken steps to keep bargaining unit members informed of its progress. It has created a website they can visit. It has also held meetings, including an August 17, 2011 meeting that Mr. Butt appears to have attended personally.

[20] While Mr. Butt disputes the quality of the CEP's efforts, his pleadings nonetheless confirm that the CEP, in various ways, has continuously communicated with bargaining unit members. Some bargaining unit members may be of the opinion that their newly certified bargaining agent could be doing things differently. The Board doubts there is ever unanimity on such matters.

[21] But those subjective opinions do not determine whether the bargaining agent has kept bargaining unit members informed of its efforts.

III–Conclusion

[22] On the facts in this case, the Board must dismiss Mr. Butt's section 38 revocation application. The CEP is entitled to the protection of section 39(2) of the *Code*.

[23] Mr. Butt alleged in his application that employees had originally been misled when signing membership cards, since they were advised that the Board would hold a representation vote.

[24] For a section 38 revocation application like the one Mr. Butt filed, the reasons why employees want revocation are not at issue. Rather, unless section 39(2) applies as it did in this case, a revocation application for which there is employee support over 50% will be decided based solely on the results of a representation vote.

[25] The Board would point out, however, that its Information Circular No. 7 about certification applications, posted on its public website, provides general information about the certification process. As indicated in Information Circular No. 7, representation votes are not mandatory. In most cases, if the signed membership cards demonstrate a trade union has majority support, no vote is held. The *Code*'s card-based certification system is well-known in the labour relations community and has been in place now for 40 years.

[26] The Board accordingly applies section 39(2) of the *Code* and dismisses Mr. Butt's application.

Graham J. Clarke
Vice-Chairperson

Norman Rivard
Member

Concurring reasons of Mr. David P. Olsen, Member

[27] I concur with the Board's conclusion to dismiss the section 38 revocation application, however I do so on the basis that the applicant, on the evidence filed with the Board, does not represent the majority of employees in the bargaining unit.

David P. Olsen
Member