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Reasons for decision

Grain and General Services Union (ILWU–Canada),

applicant,

and

Viterra Inc.,

employer.

Board File: 28978-C

Neutral Citation: 2012 CIRB 633

March 9, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

These reasons for decision were written by Mr. Graham J. Clarke.

Parties' Representatives

Mr. Hugh J. Wagner, for the Grain and General Services Union (ILWU–Canada);

Ms. Chantel T. Kassongo, for Viterra Inc.

I–Nature of the Application

[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 determine this certification application without an oral hearing.

[2] On September 29, 2011, the Board received from the Grain and General Services Union (ILWU–Canada) (GSU) a certification application for a bargaining unit of employees working at a feed processing mill operated by Viterra Inc. (Viterra):

All employees working at the Viterra feed processing mill in Chilliwack BC excluding the Office Staff, Assistant Managers, and those above.

[3] The GSU estimated there were 42 employees in the unit, which it described as covering the production and maintenance employees.

[4] Viterra contested the GSU’s proposed unit and argued in favour of a broader unit which would include, *inter alia*, the office staff. Viterra’s proposed unit would increase the number of employees in the bargaining unit to approximately 76.

[5] The Board has considered the parties’ submissions, along with the applicable *Code* provisions. The Board decided to certify the GSU for the type of unit it proposed. On February 16, 2012, the Board issued its certification order (Order no. 10143-U).

[6] The Board indicated to the parties that, exceptionally, it would provide them with more detailed reasons about its decision to certify. These are the reasons.

II–Background

[7] Viterra is involved in the grain handling and agri-business industry. It operates a global business. The Chilliwack Feed Mill (Mill) produces, sells and distributes animal feed products and nutrients for the livestock and pet food industries. The Mill is a part of Viterra’s processing operations in Canada.

[8] The GSU has applied to represent the production and maintenance employees at the Mill. Viterra disputed the appropriateness of the GSU’s proposed unit and argued that it should include office and administrative staff (including sales staff) as well as assistant managers (including supervisory staff).

[9] Viterra, in detailed submissions, argued that an all-employee unit would be desirable for its facility. The Mill is a highly integrated facility and undue fragmentation of employees among bargaining units would not lead to effective collective bargaining.

[10] Viterra referred to its other bargaining units that the Board had certified. They are broad in scope and often cover all the employees at a particular facility. In Viterra’s view, the history of the bargaining relationship between Viterra and the GSU demonstrated the need for a single unit to cover all employees of the Mill.

[11] Viterra further argued that those individuals holding the positions of Assistant Manager and Maintenance Supervisors are hands-on employees who do not have the power to hire or fire. They should consequently also be placed in the unit.

[12] The GSU emphasized that this is the first certification application for a group of employees at the Mill. It reminded the Board that one important factor in deciding whether to certify a bargaining unit included giving access to collective bargaining. The GSU argued that, while it represents large all-encompassing bargaining units at Viterra, many of these units have been the result of mergers over the years.

[13] The GSU also emphasized that the Board's role on a certification application is to examine whether its proposed unit was appropriate; the question was not what would be the most appropriate unit.

[14] Following receipt of the Board's Industrial Relations Officer's (IRO) report, the parties each submitted more information. This led to various reformulations of each party's proposed bargaining unit description. Despite these competing descriptions, the Board is satisfied that the GSU had at all times sought to represent the operations and maintenance workers at the Mill. Viterra, by comparison, had maintained that the unit should include all employees, such as office and sales staff, subject only to excluding those individuals who are not employees under the *Code*.

III–Analysis and Decision

i) The Legal Framework

[15] This certification application for employees employed by the Mill falls within the Board's jurisdiction due to the Declaration found at section 76 of the *Canada Wheat Board Act* (R.S.C., 1985, c. C-24):

76. For greater certainty, but not so as to restrict the generality of any declaration in the *Canada Grain Act* that any elevator is a work for the general advantage of Canada, it is hereby declared that all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore constructed or hereafter to be constructed, are and each of them is hereby declared to be works or a work for the general advantage of Canada and, without limiting the generality of the foregoing, every mill or warehouse mentioned or described in the schedule is a work for the general advantage of Canada.

[16] Section 2(*h*) of the *Code* refers expressly to such Declarations:

2. In this Act, "*federal work, undertaking or business*" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(*h*) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces...

[17] As the Board reviewed in *Coastal Shipping Limited*, 2005 CIRB 309 (*Coastal 309*), section 28 of the *Code* sets out the analytical framework for certification applications:

28. Where the Board

- (a) has received from a trade union an application for certification as the bargaining agent for a unit,
- (b) has determined the unit that constitutes a unit appropriate for collective bargaining, and
- (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,

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.

[18] The Board will first examine the three components set out in section 28:

- a) The Certification Application;
- b) The Bargaining Unit;
- c) The Trade Union's Support;

a) The Certification Application (section 28(a))

[19] An applicant applying for certification must meet the definition of a “trade union”, as defined in section 3 of the *Code*:

3. (1) In this Part,

...

“*trade union*” means any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees;

[20] The GSU has a long history as a trade union and holds many certifications from the Board. There is no issue that the GSU continues to be a trade union under the *Code*.

[21] Section 24(1) of the *Code* confirms that the trade union initially provides the description of the unit that it seeks to represent:

24. (1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit.

(emphasis added)

[22] The GSU has sought to represent a unit of production and maintenance employees, even though there are other types of employees working at the Mill.

b) The Bargaining Unit (section 28(b))

[23] The majority of the issues the Board considers in certification applications arise at this stage of the analysis.

i) Employee Status

[24] An individual must be an “employee”, as defined in section 3 of the *Code*, to be included in a bargaining unit:

3. (1) In this Part,

...

“employee” means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;

(emphasis added)

[25] The *Code* at section 3 provides specific definitions for the terms “dependent contractor” and “private constable”, as they are used in the definition of “employee”. They are not relevant for the GSU’s current certification application.

[26] The *Code* does not define further “a person who performs management functions”, or a person who “is employed in a confidential capacity in matters relating to industrial relations”. The Board’s case law has examined and interpreted these concepts extensively.

[27] If the Board is satisfied that an individual performs “management functions”, or falls within the “confidential capacity” exception, then that person is not an employee under the *Code*. Such individuals cannot be included in a bargaining unit. As will be examined, *infra*, the *Code* distinguishes between someone “who performs management functions” and “supervisors”.

[28] The issue of whether someone “performs management functions”, or falls within the “confidential capacity” exception, is also separate and distinct from the later analysis which examines which “employees” will be included in, or excluded from, the bargaining unit.

ii) Bargaining Unit Description

[29] The Board, while it will examine the trade union’s proposed unit, has the ultimate authority to determine an appropriate bargaining unit:

27. (1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.

(emphasis added)

[30] The Board examines what is an appropriate bargaining unit; it does not determine the most appropriate bargaining unit: see, generally, *Alberta Government Telephones Commission* (1989), 76 di 172 (CLRB no. 726).

[31] Section 16 of the *Code* similarly emphasizes the Board’s power over bargaining units:

16. The Board has, in relation to any proceeding before it, power

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

...

(v) a group of employees is a unit appropriate for collective bargaining...

(emphasis added)

[32] The determination of bargaining unit descriptions, which is a question of fact rather than a question of law, lies at the heart of the Board's specialized labour relations expertise: *Coastal 309*, *supra*, at paragraph 27.

[33] When a trade union files an application for certification, the Board, based on its labour relations experience, will examine whether the proposed unit "is a unit appropriate for collective bargaining", as the expression is used in section 16(p)(v) of the *Code*.

[34] The Board in *BCT.TELUS et al.*, 2000 CIRB 73, described generally the analysis it employs in considering the composition of bargaining units. The analysis is different for initial certification applications, as opposed to bargaining unit reviews under section 18.1 of the *Code*:

[17] The Board has developed well-established principles and criteria that it will consider when determining the appropriateness of a bargaining unit or when reviewing and reconfiguring existing bargaining units. In making such a determination, the Board will weigh and consider a number of factors, including the following: community of interest; viability of the unit; employee wishes; industry practice or pattern; the history of collective bargaining with the employer; the organizational structure of the employer; and the Board's general preference for broader-based bargaining units, for reasons such as administrative efficiency and convenience in bargaining, lateral mobility of employees, common framework of employment conditions and industrial stability (see *AirBC Limited* (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797), and *Canada Post Corporation* (1988), 73 di 66; and 1 CLRBR (NS) 129 (CLRB no. 675)). A good description of the Board's approach is outlined in *Quebec North Shore & Labrador Railway Co.* (1992), 90 di 110; and 93 CLLC 16,020 (CLRB no. 978), where it stated the following:

The tests for determining whether a unit is appropriate for collective bargaining take into account the interests of both the employees and their employer. Without claiming to make an exhaustive list of these factors, we would note, *inter alia*, the community of interest among the employees, the method of organization and administration of the business, the history of collective bargaining with the employer and in the industry in question, whether the employees are interchangeable and the interests of industrial peace. The tests may have different weight, depending on the individual case, particularly in terms of whether it is an application for certification or an application for review. In the first situation, the Board

must allow the employees to have access to collective bargaining. In the second, it must examine the existing bargaining structure in order to make the bargaining process and the application of the collective agreements more effective. However, it must always try to balance what are often divergent interests in determining viable bargaining units and in order to ensure effective bargaining and the most harmonious labour relations possible.

(pages 123-124; and 14,147-14,148)

[35] The Board, in *United Parcel Service Canada Ltd.*, 2008 CIRB 433, described some of the factors it considers when determining if a bargaining unit smaller than an “all employee” unit is appropriate:

[21] It is important to note that although the Board generally favours all-employee bargaining units or creating larger bargaining units, it will nevertheless create less than all-encompassing units or fragment an existing unit when there are compelling reasons to do so. The factors that favour smaller units include a lack of community of interest, geographical factors, specific statutory provisions, the likelihood that a larger unit would not be viable, and an interest in enabling employees to obtain representation.

[36] The Board is not bound to accept the trade union’s proposed unit, or a unit proposed on consent by the parties: see, in particular, *Quick Coach Lines* (2000), 96 A.C.W.S. (3d) 397 (FCA).

[37] Once the Board has decided on an appropriate bargaining unit, it must then consider which employees fall into the unit.

iii) Inclusions and Exclusions

[38] The *Code* grants the Board the discretion to include or exclude employees from the bargaining unit. This question is different from determining whether someone “performs management functions”, or is employed in a “confidential capacity”, and is therefore excluded from “employee” status under the *Code*.

[39] Section 27(2) allows the Board to decide which “employees”, as defined in section 3 of the *Code*, should be included in an appropriate bargaining unit:

27. (2) In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.

(emphasis added)

[40] Unlike in some provinces, the *Code* at sections 27(3)–(6) extends collective bargaining rights to professionals and supervisors, as long as they meet the definition of “employee” in section 3 of the *Code*. The Board may include supervisors in a proposed bargaining unit. It could also accept a unit composed solely of supervisors:

27. (3) Where a trade union applies under section 24 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsections (2) and (4), shall

determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining.

(4) In determining that a unit is appropriate for collective bargaining under subsection (3), the Board may include in the unit

(a) professional employees of more than one profession; and

(b) employees performing the functions, but lacking the qualifications, of a professional employee.

(5) Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining.

(6) The Board shall not include a private constable in a unit with other employees.

(emphasis added)

[41] One of the Board’s tasks, among many, is to distinguish between someone who “performs management functions”, or is employed in a “confidential capacity”, as opposed to someone who is a supervisor. For those the Board finds are supervisors, and consequently “employees” under the *Code*, the Board must then consider a further question whether it makes labour relations sense to include these individuals in the bargaining unit.

[42] Just because an individual has employee status under the *Code* does not mean automatically they should be in the bargaining unit. That decision comes only after the Board analyzes whether it makes labour relations sense to include them. That determination will vary based on the circumstances of each case.

c) The Trade Union's Support (section 28(c))

[43] As section 28(c) states, the Board evaluates a trade union's support as of the date of the certification application. Exceptionally, the Board may choose another date to evaluate support.

[44] If the applicant trade union's membership cards demonstrate majority support within the unit the Board has found to be appropriate, then the Board, subject to its discretion to order a vote under section 29(1), must certify it. If the trade union has support between 35% and 50% then section 29(2) of the *Code* makes a representation vote mandatory.

[45] If a trade union applies to represent a unit that the Board considers inappropriate, and the union does not have sufficient support in a unit that the Board determines to be appropriate, then the certification application will be dismissed.

[46] The Board recently commented on this type of situation in *United Parcel Service Canada Ltd.*, 2011 CIRB 591 (*UPS 591*):

[47] While the Board has determined that a unit of clerical employees at distinct UPS geographic sites can be appropriate, the Teamsters have failed to persuade the Board of the appropriateness of its proposed bargaining unit of 12 clerical employees working at the Ground Centre.

[48] The Board is satisfied that an appropriate bargaining unit in this case would include all clerical employees at UPS' Windsor location. If the Board were to accept the Teamsters' proposed bargaining unit, then a second certification application might follow for the clerical employees at the International Centre. A multiplicity of clerical bargaining units at a single geographic location with less than 60 clerical employees overall does not make labour relations sense.

[49] The Teamsters did not persuade the Board that the Ground Centre clerical employees were sufficiently distinct or lacked a community of interest with those at the International Centre to justify a separate bargaining unit. While the Board may certify smaller units, the fracturing of clerical employees at UPS' Windsor facility would lead to labour relations issues that an appropriately structured bargaining unit would avoid.

[50] The Board was also concerned regarding the ongoing interaction between employees in the two different centres. For example, a Ground Centre employee regularly retrieves packages from the International Centre work area and places them on conveyor belts to send to the Ground Centre. In another case, an International Centre employee works in the Ground Centre on a daily basis scanning products for a particular client.

[51] The Board concludes that a bargaining unit seeking to represent a subset of Windsor clerical employees is inappropriate in the circumstances of this case. If the Teamsters want to represent clerical employees at UPS' Windsor location, then the bargaining unit would have to be, at a minimum, comparable to those the Board has previously certified at St. Catharine's, Stoney Creek and Brantford, which covered all clerical employees at those individual locations.

[52] The Board has determined that an appropriate bargaining unit in this case would encompass all clerical employees at UPS' Windsor location. Based on the membership evidence presented, the Teamsters do not have sufficient support for that bargaining unit. The Board is accordingly obliged to dismiss the certification application.

[47] While certification applications, depending on the circumstances, do not always raise the same issues, the Board's analysis frequently focusses on the same questions, including:

1. Is the applicant a trade union? (sections 3 and 28(a));
2. Which individuals are "employees" under the *Code*? (sections 3 and 28(c));
3. Is the trade union's proposed unit appropriate for collective bargaining? (sections 24(1), 27(1) and 28(b));
4. If the proposed unit is not appropriate, what would be an appropriate unit? (sections 16(p)(v), 27(1) and 28(b));
5. Which employees, as defined under the *Code*, should be included in an appropriate bargaining unit? (sections 27(2)–(6)); and
6. Does the trade union have majority support, or sufficient support for a vote, in a bargaining unit the Board has found appropriate for collective bargaining? (sections 28(c), 29(1) and (2)).

ii) Analysis of the GSU's Certification Application

[48] The Board's conclusion as mentioned at the outset does not necessarily mean it disagrees with Viterra's position that its supervisory employees, and those with the title "Assistant Manager", could be employees under section 3 of the *Code* and included in a bargaining unit. Section 27 allows the Board to consider whether to include these types of supervisory employees in a bargaining unit.

[49] Similarly, the Board considered Viterra's suggestion to add office staff to the GSU's proposed production and maintenance bargaining unit. That configuration is certainly one option, among many, from which the Board could choose.

[50] The Board considered Viterra's position as it evaluated the appropriateness of the GSU's proposed production and maintenance unit. The *Code* makes explicit reference to the fact the trade union initially proposes the unit. The Board will often not intervene in the trade union's suggested bargaining unit, unless the Board concludes that it is not appropriate.

[51] While Viterra makes various arguments about what the optimum bargaining unit might be at the Mill, the Board does not find that these arguments demonstrate that the GSU's suggested unit was inappropriate.

[52] In the Board's view, a maintenance and operations employee unit numbering roughly 41 employees can be an appropriate unit under the *Code*. It is large enough to be viable and does not lead to undue fragmentation, contrary to the situation where the Board rejected the trade union's proposed unit in *UPS 591, supra*.

[53] Employees are well-placed to identify a community of interest, in this case for a production and maintenance unit at the Mill. The Board's views in *Maritime-Ontario, Parcel Division*, 2000 CIRB 100, at paragraph 37, on the importance of the trade union's suggested unit, merit repeating:

[37] If the employees themselves identify a community of interest and describe an identifiable bargaining unit around a clearly identified working condition structure or function, the Board should not deny their application for certification solely on the basis that some larger unit, other grouping of working conditions, structures or functions might allow a more appropriate bargaining structure. In short, the Board should, where reasonable and possible, respect employees' wishes if their suggested grouping does comprise an appropriate unit, as stated in *Alberta Wheat Pool* (1991), 86 di 172 (CLRB no. 907):

The Board's policy regarding the appropriateness of bargaining units in applications like we have here is well settled. Where unorganized employees are exercising their right to participate in collective bargaining the Board will provide a meaningful opportunity for them to do so and it will not frustrate these fundamental rights by insisting upon artificial or unnecessary bargaining unit configurations. In these situations the Board will accept bargaining units that are somewhat less than the most appropriate unit regardless of whether this might cause administrative inconvenience for the employer. (For an overview of these policies and an example of their practical application see *Sedpex Inc. et al.* (1985), 63 di 102 (CLRB no. 543), and *Purolator Courier Ltd.* (1989) 77 di 1 (CLRB no. 730).)

(page 176)

[54] In addition, unlike in many provincial jurisdictions, the *Code* grants the Board the power, upon application, to conduct a bargaining unit review which allows it to merge or reorganize existing bargaining units:

18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.

(emphasis added)

[55] Viterra raised certain hypothetical problems which might occur if the Board accepted the GSU's proposed bargaining unit. Section 18.1 would allow the Board to remedy problems arising out of multiple certified bargaining units, if that situation ever occurred.

[56] It is certainly not novel in labour relations to have an office unit separately certified from a production/maintenance unit. This demonstrates why a single production/maintenance unit as proposed by the GSU did not strike the Board as being inappropriate in this case.

[57] In summary, the Board agrees with the GSU that a Production and Maintenance bargaining unit is an appropriate unit under the *Code*. The Board agrees with Viterra that there is no reason to exclude the seasonal operations worker from the unit. The description of the certified unit has been set out in the February 16, 2012 certification Order no. 10143-U. The unit includes the warehouse worker who works in maintenance and production.

[58] The GSU further satisfied the Board that it had majority support in the unit it has found to be appropriate.

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

Graham J. Clarke
Vice-Chairperson

André Lecavalier
Member

Norman Rivard
Member