Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

WestJet Pilots Association,

applicant,

and

WestJet Airlines Ltd. and WestJet Pilots Association,

respondent,

and

WestJet Proactive Communication Team,

intervenor.

Board File: 30341-C

WestJet Professional Pilots Association,

complainant,

and

WestJet Airlines Ltd. and WestJet Pilots Association,

respondent,

and

WestJet Proactive Communication Team,

intervenor.

Board File: 30342-C
Neutral Citation: 2014 CIRB **734**
July 21, 2014

Canada

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members. A Case Management Conference (CMC) was held on July 16, 2014.

Counsel of Record

Mr. Jesse Kugler, for the WestJet Professional Pilots Association;
Ms. Joyce A. Mitchell, for WestJet Airlines Ltd.;
Mr. Michael D. A. Ford, Q. C., and Ms. Laura Safran, Q. C., for the WestJet Pilots Association;
Mr. William J. Johnson, Q. C., for the WestJet Proactive Communication Team.

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

I. Nature of the Procedural Issues

[1] On February 26, 2014, the Board received an unfair labour practice (ULP) complaint (Board File no. 30342-C) from the WestJet Professional Pilots Association (WPPA). The WPPA contested certain allegedly unlawful actions which occurred during its ongoing organizing campaign to represent pilots working at WestJet Airlines Ltd. (WestJet).

[2] The WPPA also filed a companion application requesting interim relief (Board File no. 30341-C).

[3] The WPPA named WestJet and the WestJet Pilots Association (WJPA) as respondents. The Board later granted intervenor status to the WestJet Proactive Communication Team (PACT), in part on the basis that some of the remedies the WPPA requested were directed at it.

[4] The Board scheduled an oral hearing which led to two procedural issues.

[5] The first issue concerned the venue where the Board's hearing should take place.

[6] The second issue concerned the setting of hearing dates.

[7] The Board has been satisfied that the appropriate venue for this matter is in Calgary. The Board has accepted some of the parties' proposed dates, but has also been obliged to impose some dates in order to avoid undue delay.

[8] This decision explains the Board's reasoning.

II. Facts

WestJet is based in Calgary. The WJPA and PACT are similarly located in Calgary. Legal counsel for these three parties also work out of Calgary offices.

[9] The WPPA is conducting an organizing campaign for Westjet pilots. It has chosen to retain an expert labour law firm based in Toronto.

[10] The parties filed a significant number of affidavits in support of, or contesting, a request that the Board grant interim relief. The Board advised in its May 27, 2014 hearing notice that it was not prepared at that time to make any interim orders, but the application remains pending.

[11] The Board initially set hearing dates of August 19–21 and November 25–27, 2014 in Toronto for this ULP complaint.

[12] The Board's standard hearing notice makes reference to its adjournment policy:

> The Board reminds the parties that its practice regarding any adjournment requests is set out in the Board's Information Circular No. 4, as well as in *Frayling*, 2010 CIRB 506, both of which are available on the CIRB Website.

[13] The Board's Information Circular No. 4 explains the adjournment process:

> The logistical difficulties caused by the Board's heavy caseload and its geographically widespread and bilingual community render it very difficult to reschedule dates in an orderly and timely fashion. The Board is therefore very reluctant to accede to requests for postponement of its proceedings. In *Frayling*, 2010 CIRB 506, the Board discusses its policy regarding requests for postponement.
>
> The Board will not consider a request for postponement unless the party making the request **has communicated beforehand with the other parties** and attempted to obtain their consent to the postponement. All requests for postponement must be made in writing to the Board, with copies to the other parties at the same time, and must include the reasons for the request for postponement, the positions of the other parties to the request, and a list of alternative dates to which all parties agree and from which the Board may choose, to the extent that this may be possible. Parties should realize, however, that in those instances where a postponement is granted, they may have to wait several months before the Board can reschedule a hearing.
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> Upon receipt of the request for postponement, the Board will take the parties' positions under consideration. Consideration of a request for postponement does not mean that postponement will automatically be granted, even where all parties give their consent. The decision to grant a postponement rests with the panel that has been scheduled to hear the case after considering the merits of such request. Parties who do not consent to the postponement should make their views known to the Board, as soon as the party seeking the postponement has contacted them.

> There may be situations of last minute urgency where it is impossible for the parties to consult one another. In such cases, the Board will only grant the request for postponement in very exceptional cases. Also, in some instances, because of circumstances beyond its control or for reasons totally unrelated to the parties, the Board may unilaterally determine that a postponement is necessary.
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> (emphasis in original)

[14] On July 4, 2014, legal counsel for WestJet requested an adjournment of the initial hearing dates and a change from the Toronto venue:

> The hearing for this matter has been scheduled to take place in Toronto on August 19–21 and November 25–27. These dates pose a problem for two parties' counsel, one of whom, is double booked on August 21st and the other of whom is double booked for the entire November 25–27 timeframe. As a result, we have canvassed the parties for alternate dates. All parties are currently available on September 8–9 and November 11–13. Subject to the Board's availability and agreement, the parties respectfully request that these dates be substituted for the currently scheduled dates.
>
> In addition, the parties have been discussing the venue for the hearing. The hearing is currently scheduled to be heard in Toronto. All of the parties are located in Calgary. As far as we are aware, all of the witnesses are located in Calgary. With the exception of the WPPA's counsel, all counsel are also located in Calgary.

[15] As noted, for the hearing dates, one legal counsel was already double-booked for the August 21, 2014 date. Another legal counsel was double-booked for the entire November 25–27 hearing. Following efforts to find other suitable dates, legal counsel for all parties did submit two dates when all would be available: September 8–9 and November 11–13, 2014.

[16] Unfortunately, the Board could not accommodate the September dates. The Board is also closed on Remembrance Day, November 11.

[17] The Board held a CMC on July 16, 2014 in order to hear the parties' submissions on the issue of venue and dates. In advance of the CMC, the Board asked the parties to consult with each other in order to provide a broader list of potential dates. The Board also requested written submissions on the subject of venue:

> The CMC will examine the issues of venue and hearing dates.
>
> Please note the Board is closed for Remembrance Day on Tuesday November 11, which was one of the dates in Ms. Mitchell's letter.
>
> In order to consider the adjournment request, the parties are to consult with each other and provide, prior to the CMC, a broader list of available consecutive hearing dates for the remainder of 2014, and in early 2015.

For the issue of venue, the parties may provide written submissions on the issue, in advance of the CMC.

At the CMC, the parties may make further oral submissions in conformity with the following schedule:

i. Applicant/complainant (up to 15 minutes)
ii. Respondents (collectively up to 20 minutes)
iii. Applicant/complainant (up to 5 minutes for reply)

[18] The respondents filed a spreadsheet with several jointly available hearing dates between September and April, 2015. The WPPA expressed concern that its ULP complaint would be prejudiced if not heard on the original dates.

[19] WPPA counsel also advised he was not free for many of the respondents' proposed dates.

[20] The Board has usually found that legal counsel are able to agree on a significant list of hearing dates from which the Board can then choose. A list also allows the Board to reconfigure a panel, at least prior to the hearing starting.

[21] This is one of the rare cases where, despite the parties' efforts, the Board has been obliged to fix some of its hearing dates.

III. Board Practice on Hearing Dates and Venue

A. Hearing Dates

[22] In labour arbitrations, the arbitrator chosen by the parties generally provides available dates from which they may choose. This allows for greater flexibility for lawyers' schedules, but can also lead to significant delays before starting, and ultimately finishing, a hearing.

[23] A labour board, on the other hand, has a statutory duty to conduct its cases efficiently. Delay in hearing certain matters can make any later determination moot.

[24] In this case, the ULP concerned alleged unlawful conduct impacting an organizing campaign. While not a matter to which the Board's expedited process applies (see section 14 of the *Canada Industrial Relations Board Regulations*, *2012*), it is nonetheless a case where the Board realizes that the allegations require it to act on a priority basis.

[25] This scenario may force the Board to impose certain hearing dates on the parties, a situation which would rarely, if ever, occur in a standard labour arbitration with a private arbitrator.

[26] The Board examined its policy in this area in *Andree*, 2011 CIRB 589:

> [27] Adjournments are not automatic. The Board is under a statutory duty to decide cases which come before it. In order to fulfill its role under the *Code*, it must consider various competing interests, including those of the parties, the Board and the public.
>
> [28] Unlike a private rights arbitrator, who is retained by the parties, the Board is a creature of statute and has a role *proprio motu* to ensure that matters which come before it are conducted with appropriate diligence. For this reason, much like the civil courts, the Board now case manages its proceedings. This case management process may include imposing hearing dates.
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> [29] The Ontario Labour Relations Board (OLRB) in *Industrial Hardwood Products (1996) Ltd.*, [1999] O.L.R.D. No. 2842, follows a similar adjournment process for many of the same reasons:
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> > 9. The Board's policy on adjournments exists for a number of reasons. The Board schedules thousands of cases for hearing every year. In the past few years, the Board's budget, and hence personnel, has been significantly cut. It is simply beyond the Board's resources to either consult with counsel as to their availability in each and every instance or reschedule hearing dates a number of times. In addition, labour relations matters, involving ongoing relationships between the parties and affecting the daily working lives of employees, require expeditious treatment. If the Board were to delay the scheduling of cases until such time as it was convenient for all concerned, expedition would be impossible.
> >
> > 10. The policy is, however, only a general one and consideration is given to individual requests for adjournments.
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> [30] In *Stephen Frayling*, 2010 CIRB 506, the Board described its adjournment practice which seeks to balance the interests of parties with the need to deal with cases efficiently:
>
> > [20] The Board's practice on adjournments is comparable to that followed by other Canadian labour relations boards. A party's first step is **not** to write directly to the Board requesting an adjournment.
> >
> > [21] The Board's Information Circular No. 4-01, available publicly on the Board's website, clearly explains the Board's policy.
> >
> > [22] If a party requires an adjournment, then its first step is to communicate with the other parties. Other than in exceptional circumstances, the Board will often adjourn a matter at the joint written request of the parties.
> >
> > [23] However, if the matter is contested, then the Board will decide whether to adjourn, based on the parties' written submissions or after a CMC, depending

on the situation. The Board also has a public interest role to exercise when considering such a request: *Société Radio-Canada*, 2002 CIRB 193.

(emphasis in original)

[31] In *Société Radio-Canada*, 2002 CIRB 193, the Board commented, in the context of a request for a stay of proceedings, about the public interest for matters which come before it:

> [30] The Board wishes to emphasize that an application filed under the *Code* is a procedure that follows from public legislation, in contrast to the arbitration of grievances, which is a private process and controlled by the parties. According to its statutory mandate, the Board must consider all the objectives of the legislation that governs it and not only the interests of one of the parties. The *Code* sets out the following objectives in its Preamble:
>
> > Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
> >
> > And whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;
> >
> > And whereas the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;
> >
> > **And whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all; ...**
>
> (emphasis added)
>
> ...
>
> [33] The Board's role is at the very heart of this public interest policy, and therefore plays its role with respect to all the parties to a dispute and not only with respect to the interests of the person who institutes an application involving his or her rights. Thus an application before the Board does not belong to the party who files it, but affects the interests of all the other parties involved. For this reason, the withdrawal of a proceeding cannot be done unilaterally by the party requesting it, but must be formally granted by the Board after considering the consequences of the withdrawal on the labour relations of those concerned in view of the *Code*'s objectives.

> [34] As well as taking into account the public interest policy described above, the Board's role in any application must also be evaluated according to three realities. Firstly, time is often of the essence in the labour-management relationship. Secondly, the parties are in a continuous relationship, which means that they must continue to coexist once their dispute is resolved. Thirdly, the Board must consider the objectives of the legislation, as described above.
>
> (emphasis in original)

> [32] The Board is required to sit across a country the size of Canada. Each Board panel must have a neutral Chair, of which there are only six. Some cases further require the specific panel to be bilingual in order to respect the *Official Languages Act*. The *Code* also presumes matters will be heard with a three-person representative panel, subject to the Chair's discretion at section 14 of the *Code* to appoint a single-person panel.
>
> [33] These operational realities cannot be ignored when faced with an adjournment request and a respondent's very limited availability to appear at a rescheduled Board hearing.

[27] Other labour boards follow similar practices.

[28] The Ontario Divisional Court recently examined the Ontario Labour Relations Board's (OLRB) imposition of hearing dates in *Bur-Met Contracting Ltd. et al.* v. *Carpenters District Council et al.,* 2014 ONSC 1621 (*Bur-Met*):

> [11] The Board issued another decision on August 15, 2012 concluding that the application would proceed as scheduled on August 21, 2012 unless the Applicants either obtained the Union's consent to adjourn or adequately explained to the Board why the proceeding could not proceed in any fashion on that date. **This explanation would have to focus on circumstances beyond their control, apart from the weakness of the application or the inconvenience or expense of attending a hearing in Toronto.** The Board noted that the Notice of Hearing pointed out that if a party does not attend the hearing, the Board may decide the application without further notice to that party and without considering any document filed by that party.
>
> (emphasis added)

[29] The Divisional Court in *Bur-Met*, *supra*, acknowledged the OLRB's need to proceed expeditiously in labour relations matters:

> [6] **On the oral hearing before this Court, counsel for the Applicants did not press the issues of the failure to consult counsel about an initial hearing date and the adequacy of the notice. Nevertheless, we find that the Board's practice to set an initial hearing date on its own, without consultation, is reasonable given the need to proceed expeditiously in labour relations matters.** Further, 69 days' notice in this case was more than sufficient to allow for preparation and arranging counsel's schedule. There was no procedural unfairness arising from these matters.
>
> (emphasis added)

[30] The Board is fully aware of the challenges private labour lawyers face in attempting to juggle important client demands. But there is also a difference between being unable to appear at two obligatory hearings at the same time and preferring dates which fit within an overall schedule.

[31] Ultimately, if a case risks being prejudiced by delay, then the Board, albeit reluctantly, may have to impose dates on the parties.

B. Venue

[32] The issue of venue has not arisen frequently in the Board's case law. Unlike in some civil litigation matters, the parties in labour disputes are generally closely associated with a particular workplace.

[33] This Board's predecessor, the Canada Labour Relations Board (CLRB), considered certain principles when examining the venue of a hearing.

[34] For example, in *Samperi* (1982), 49 di 40; [1982] 2 Can LRBR 207; and 82 CLLC 16,172 (CLRB no. 376), the CLRB noted the importance of an individual party's needs when bringing a case against an institutional party:

> … While the Board may lean to a location least inconvenient to the individual, as opposed to the institutional party, that is not always the deciding factor.
>
> (pages 44 and 45; 210; and 706)

[35] In *H.M. Trimble & Sons Limited* (1976), 14 di 87 (CLRB no. 52), the Board noted its practice to travel to accommodate the parties:

> … With regard to the question of the site of the hearing, while it would have been more convenient for Board members and the Board staff and less expensive for the Board to hold hearings in Ottawa, the Board followed its established practice of travelling to a point which would accommodate to the extent possible the various parties involved. The complaint involved representatives of the employer and the unions, as well as their witnesses from British Columbia, Alberta and Ontario at locations which included Mile 285, Alaska Highway, Edmonton, Calgary, Vancouver and Ottawa. Following the request of Mr. Medley and Senator Lawson, the Board considered alternatives to a Calgary hearing but concluded that, on balance, Calgary was still a logical place for the hearing. …
>
> (pages 88 and 89)

[36] In *Canadian National Railway Company*, 2007 CIRB LD 1714, the Board noted the location of potential witnesses and where the events took place influenced the choice of venue for a hearing:

> **Unless the parties agree otherwise, it is generally the Board's practice to hold a hearing in the location where most of the potential witnesses are located.** At the July 13, 2007 case management teleconference and as confirmed in its letter of July 17, 2007 cited above, the Board invited the TCRC to make any request for a change in the hearing location as part of its amended complaint. The TCRC has done so. It submits that a change of venue for the hearing from Winnipeg to Vancouver is warranted in light of the high incidents of examples arising in the Vancouver area. CN does not agree with the change of location but it does not dispute the fact that the majority of the recent incidents, as alleged by the TCRC, occurred in Vancouver.
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> (pages 5 and 6; emphasis added)

IV. Analysis and Decision

A. Venue

[37] The respondents satisfied the Board that the hearing venue should be moved from Toronto to Calgary. The WPPA expressed concern that it would suffer prejudice if the hearing were held in Calgary.

[38] The WPPA did not convince the Board that significant extra costs would occur for a Calgary hearing, beyond those related to counsel travelling to Calgary.

[39] As mentioned earlier, the parties filed significant affidavit evidence in support of, and against, the issuing of interim relief. The WPPA's five (5) affiants all seem to have a close connection with Calgary or, in one case, British Columbia. None of them had a clear connection to Toronto.

[40] The respondents, on the other hand, pointed to significant prejudice if they were forced to bring all of their witnesses to Toronto from their Calgary base. That prejudice included accommodation costs, as well as WestJet's ability to schedule pilots who were needed to testify.

[41] They also noted all their offices were based in Calgary. All the respondents had retained labour law firms located in Calgary.

[42] The respondents demonstrated to the Board's satisfaction that the ULP complaint had a substantial connection with Calgary and virtually none with Toronto. While WestJet flies out of

Toronto, its only operations there are linked with using Toronto-Lester B Pearson International Airport.

[43] In considering its practice of travelling to the venue where the balance of convenience lies, the Board has been satisfied that it must hold its hearing in Calgary rather than Toronto.

B. Dates

[44] The WPPA filed its ULP complaint on February 26, 2014. While the ULP complaint did not fall within the Board's expedited procedure, its subject matter is still one which indicates they must be heard on a priority basis.

[45] The Board has attempted to accommodate the parties' proposed dates, despite significant inconvenience and the impact on other hearings it is holding across the country.

[46] But in order to respect its statutory duty, the Board must also impose some hearing dates. The parties, having all retained experienced labour law firms with significant bench strength, will have to find ways to accommodate those dates despite probable inconvenience.

1. August Dates

[47] The WPPA urged the Board to retain these original dates unless there was mutual consent in favour of other dates. The Board agrees to a certain extent.

[48] The Board will adjourn the August 21, 2014 hearing day on the basis of the representation from counsel that one respondent lawyer is already double-booked due to another obligatory legal hearing.

[49] However, given the change of venue and the fact that Calgary-based counsel will no longer have to travel to Toronto for this hearing, the Board has added the date of August 18 in order to ensure sufficient time exists to make significant progress at the start of the hearing.

2. November Dates

[50] The Board similarly will cancel the November 25–27 hearing dates, again on counsel's representation that one lawyer is double-booked in another obligatory hearing for all three hearing days.

3. December Dates

[51] The parties all had availability during the week of December 15. The Board's hearing will continue on December 15–18, though the panel has to return to Ottawa on December 18 in time for an already scheduled policy meeting on Friday morning, December 19.

4. January 20–22, 2015 Hearing Dates

[52] The respondents had virtually no mutually available dates to propose in 2015 until April. Unless all parties can propose a list of convenient dates to continue holding this hearing in the winter of 2015, then the hearing will reconvene from January 20–22, 2015.

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