Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Innotech Aviation Limited,

applicant,

and

Unifor; Innotech Aviation Limited Employees' Association,

respondents.

Board File: 32177-C
Neutral Citation: 2017 CIRB **862**
October 27, 2017

The Board was composed of Ms. Annie G. Berthiaume, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*).

Counsel of Record

Ms. Marie-Hélène Jetté, for Innotech Aviation Limited;
Ms. Catherine Saint-Germain, for Unifor and for the Innotech Aviation Limited Employees' Association.

I. Nature of the Application

[1] On June 20, 2017, Innotech Aviation Limited (the employer or Innotech) filed an application for an interim order pursuant to section 19.1 of the *Code*. The employer asked the Board to suspend the raid period to begin on July 1, 2017, until the Board determined the merits of the complaint it had filed on January 19, 2016, pursuant to section 97(1) of the *Code*, alleging violation of sections 95(a), 95(b) and 96 of the *Code* (file no. 31503-C). At the time the present application was filed, the Board had heard the parties in file no. 31503-C at a hearing held on May 17 and 18, 2017. The hearing later continued on September 6 and 13, 2017.

[2] In file no. 31503-C, Innotech alleges mainly that Unifor substituted its authority for that of the Innotech Aviation Limited Employees' Association (the Association)—the certified bargaining agent in this file—by usurping the latter's prerogatives through an initial service agreement between the two unions in 2014 and a second agreement in 2016. According to the employer, the service agreements in question delegate all of the Association's powers to Unifor. Innotech argues that such delegation of powers constitutes an unfair labour practice because Unifor becomes the certified bargaining agent without having to follow the process set out in the *Code*, thus circumventing sections 24(2) and 43 of the *Code*.

[3] In the present file, as the raid period was about to begin, the employer argued that it was necessary to suspend the "open" period set out in section 24 of the *Code* allowing for the filing of certification applications which would start on July 1, 2017. Without this suspension, Unifor would benefit from the unfair practices alleged in file no. 31503-C to obtain its certification, and the complaint in file no. 31503-C would become moot.

[4] A case management teleconference (CMT) was held on June 22, 2017, to discuss the handling of file no. 32177-C. After hearing the parties, the Board confirmed that it would determine the present application based on the written submissions in file no. 32177-C and that, because the application for an interim order stems from the facts contained in file no. 31503-C, it would also rely on the submissions made in file no. 31503-C, including—with the parties' consent—the testimonial evidence filed at the May 17 and 18, 2017 hearing. On June 27, 2017, Unifor and the Association (hereinafter collectively known as the respondents) filed a detailed response to the application for an interim order. The employer filed its reply on June 28, 2017.

[5] Given the priority nature of interim order applications, and given the employer's request to suspend the raid period set to start on July 1, 2017, the Board promptly notified the parties of its decision in the present interim order application. A bottom-line decision with reasons to follow was issued on June 30, 2017, in *Innotech Aviation Limited*, 2017 CIRB LD 3823.

[6] Following a comprehensive review of the parties' submissions, the Board was not satisfied that granting the remedy sought by the employer was justified at this stage, and it dismissed the employer's request to suspend the raid period.

[7] These are the reasons for that decision.

II. Background

[8] By order no. 6250-U, dated June 29, 1993, the Board certified the Association to represent a bargaining unit comprising:

> all employees of Innotech Aviation Limited in Dorval working in engineering, production and sales, **excluding** foremen, supervisors and those above, office personnel, handymen, stress and avionics engineers.

[9] The Association and Innotech were bound by a collective agreement for the period of October 1, 2009, to September 30, 2014. In order to obtain assistance while bargaining for the renewal of the collective agreement, among other things, the Association signed a first service agreement with Unifor on November 7, 2014. In addition to providing assistance while bargaining for the renewal of the collective agreement, Unifor undertook to provide a number of other services through this agreement.

[10] In file no. 31503-C, the employer complained that Unifor widely overstepped the boundaries of a mere service agreement. Among other things, Innotech argues that Unifor violated the certification provisions of the *Code* by using the Unifor logo and adding “Unifor Local 2410” (translation) to the Association’s name in various communications with its members. The employer views these actions as a tactic used by Unifor to force the employer to bargain collectively and to generate confusion among the bargaining unit members concerning the true identity of their bargaining agent. Although Innotech asked the Association to cease this practice, the Association did not follow up on the employer’s requests and continued to use the Unifor name and logo in its communications. However, at the May 18, 2017 hearing, the respondents agreed to stop this practice until the Board issued its decision in file no. 31503-C. According to Innotech, compliance with the certification provisions of the *Code* is intended not only to protect employees, but also to acknowledge some of the employer’s rights, such as the right to industrial peace. In this regard, Innotech points out that these provisions are a matter of public policy.

[11] In any event, a new collective agreement was reached between the Association and Innotech, for the period of October 1, 2014, to September 30, 2020.

[12] After the service agreement expired in 2014, the Association recommended that its members approve a merger agreement with Unifor, but it was unsuccessful. Subsequently, the Association reached a new service agreement with Unifor on April 26, 2016.

[13] According to Innotech, Unifor's contractual commitment to the Association constitutes a complete delegation of the Association's powers to Unifor. Unifor is trying to become the bargaining agent for the unit represented by the Association without having to go through the certification process set out in the *Code*. This is the issue that was considered at the hearings before the Board.

[14] It is in this context that the employer filed an application for an interim order on June 20, 2017, asking to suspend the raid period which was set to begin on July 1, 2017.

III. Positions of the Parties

A. The Employer

[15] The employer argued in its application for an interim order that the raid period, impending at the time, should be suspended to prevent Unifor from benefitting from both the unfair labour practices as alleged in the complaint file no. 31503-C and the resulting confusion aimed at signing up the Association's members and being certified. According to the employer, Unifor's unfair practices have always sought to replace the Association undemocratically and by circumventing the *Code*. Thus, in the circumstances of the present matter, failing to suspend the raid period would go against the objectives of the *Code*, because the complaint in file no. 31503-C could become moot if Unifor were to be certified before a decision was issued on the merits.

[16] In a detailed analysis, the employer argued that the criteria applicable to an interlocutory injunction, which can serve to guide the Board in an application for interim order, had been met, even though the Board is not required to consider them.

[17] Innotech first argued that the Board was seized of a serious matter, as shown by the complex issues raised in its complaint file no. 31503-C.

[18] The employer was of the view that it would suffer irreparable harm if Unifor were to be certified and replace the Association. Essentially, the employer argued that it would be impossible to backtrack if the Board decided later, in file no. 31503-C, that Unifor had engaged in unfair labour practices, because the respondents would then have benefitted from their unlawful actions. Thus, the members of the bargaining unit would be unable to make an informed choice concerning their bargaining agent until a decision on the merits of the complaint was rendered. Similarly, the employer submitted that it was entitled to have as a counterpart a

union that had fulfilled its statutory obligations; in its view, it was a matter of labour relations peace.

[19] Lastly, the employer asserted that the balance of convenience favours its application, because it was asking only to postpone the raid period. It pointed out that the Board was able to see that the respondents had not been reluctant, in March 2016, to request an urgent merger during a weekend, while file no. 31503-C was before the Board. The employer added that, despite this failed attempt, the respondents had then changed the rules concerning the quorum needed at the Association to facilitate a future merger vote. For the employer, it was clear that Unifor would try to be certified during the raid period. Consequently, if the Board were to dismiss the present suspension request, a decision granting Innotech's complaint (file no. 31503-C) would be moot, because if Unifor were to be certified, it would have benefitted from the *Code* violations to achieve its goals.

[20] The employer indicated that, at any rate, Unifor could always take action to replace the Association, even if the period for doing so were postponed.

[21] Ultimately, the employer asked the Board to suspend the raid period set to begin on July 1, 2017, until the Board rendered its decision in the complaint file no. 31503-C.

B. Unifor and the Association

[22] Unifor and the Association were of the view that the application was ill-founded in law, given the absence of a serious issue or irreparable harm.

[23] First, the respondents pointed out that at the May 18, 2017 hearing, the Board took note of the Association's undertaking through which it agreed to stop identifying itself as a Unifor local in its communications, until a decision was issued on the merits of file no. 31503-C. In exchange, the employer agreed not to file an application for an interim order.

[24] The respondents maintained that the application did not raise any serious issue because, in their view, there was no evidence to show that the members of the Association had been misled concerning the true identity of the bargaining agent. Also, nothing indicated that the Association had abdicated its sovereignty and autonomy by contracting out Unifor to provide labour relations guidance and advice during a difficult period of mass layoffs. According to the respondents, it was interesting to see the employer objecting to Unifor following the certification process set out in the *Code*, when it was accusing Unifor of not following it in file no. 31503-C.

[25] The respondents urged the Board to be very cautious before restricting or changing the time limits set out in the *Code* for filing a certification application. According to them, suspending the raid period would violate the rights of association and to collective bargaining—both of public policy and protected by the *Canadian Charter of Rights and Freedoms* (the *Charter*)—and would cause harm to Unifor and third-party associations wishing to file an application for certification and to employees wishing to file an application for revocation.

[26] Moreover, they maintained that suspending the raid period would interfere with the "scheme of the *Code*" (translation) on issues as important as bargaining for the renewal of the collective agreement and acquiring the right to strike and to lockout, which are related to the bargaining agent's certification.

[27] The respondents reiterated that the Board's powers to make orders in relation to unfair labour practices are set out in section 99 of the *Code* and that when the Board determines that section 95(a) or 95(b) of the *Code* has been violated, it can only order the parties to cease contravening the provisions, to comply with them, or to remedy the damage caused by the violations. With the exception of the power set out in section 99.1 of the *Code*, nothing in the *Code* allows the Board to amend a provision to counter the harm caused by such violations.

[28] The respondents also submitted that the employer would not suffer irreparable harm if the Board were to grant the complaint in file no. 31503-C. According to them, the members would be able to make an informed choice regarding their bargaining agent, and none of them have been misled about the bargaining agent's identity. The respondents reminded the Board that it can dismiss a certification application if it found that a fraud had occurred in order to taint the employees' membership in a union. They added that if Unifor were to file a certification application, and the Board later granted the unfair labour practice complaint, concluding that Unifor and the Association had engaged in an unfair labour practice that misled the unionized employees of Innotech, section 40 of the *Code* empowers the Board to revoke this certification at any time. Moreover, the respondents maintained that the filing of a certification application was hypothetical at the time of filing the application.

[29] The respondents did not make any submissions concerning the balance of convenience.

C. Employer's Reply

[30] In its reply, the employer argued that there was no evidence to show that third-party associations were preparing to replace the Association nor that the employees were about to

make an application for revocation. However, Unifor's omnipresence, with the Association's support since November 2014, made this scenario "practically moot" (translation). The employer added that postponing the raid period would not have caused irreparable harm, because the rights of the respondents, third-party associations and employees would only be deferred, not cancelled. In addition, while the parties cannot alter the duration of the raid periods, the Board could do so in this case. Moreover, as the Board orders are public, the members of the bargaining unit and the third-party associations would be informed that the period was suspended, ensuring that no rights were violated. The employer reiterated that the only limit to the Board's power to issue interim orders is that those orders must further the *Code*'s objectives. It further stated that sections 95 and 96 of the *Code* are aimed at preventing unfair labour practices.

[31] The employer suggested that issuing the requested interim order would simply restore the balance of power between the parties, since the union would have a legitimate interest in having file no. 31503-C heard quickly if its right to file a certification application had been suspended. Furthermore, the union, third-party associations and employees would then have the benefit of the Board's opinion before the raid period had begun and a possible change in union allegiance had occurred.

[32] The employer also maintained that, on May 18, 2017, it did not undertake to not file **any** application for an order. Although Unifor had stopped representing the Association as one of its locals in May, the employer was not reassured about the possibility that its unfair labour practice complaint would be deprived of any effect, since the union could have benefitted from these practices. Further, the employer claimed that initiating revocation proceedings for fraud, as the respondents had suggested, would lead to needless multiple recourses and costs, which would cause a major inconvenience for the parties.

IV. Analysis and Decision

[33] Section 19.1 of the *Code* provides the following:

> **19.1** The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.

[34] The Board recently reiterated the principles it follows in analyzing an application for an interim order in *V INTERACTIONS Inc.*, 2017 CIRB 851:

> [48] In its decision in *Trentway-Wagar Inc.*, *supra*, the Board established the factors that can serve as an analytical guide when it is seized of an application for an interim order, namely, the three-stage test in common law applied by the courts when considering applications for interlocutory injunctions. However, the Board is not required to follow these guidelines. What is important for the Board in conducting its analysis is ensuring that its powers under section 19.1 of the *Code* are interpreted and applied in a manner that guarantees the fulfilment of the objectives of the *Code*.
>
> [49] **The Board has very broad discretion to grant interim orders to ensure that the fundamental objectives of Part I of the *Code* are achieved.** In *Transpro Freight Systems Ltd.*, 2008 CIRB 422, the Board recalled the objectives of the *Code*:
>
> > [42] What are the "objectives" of Part I of the *Code* as that term is used in section 19.1?
> >
> > [43] The Preamble to the *Code* helps identify some of Part I's objectives such as the encouragement of free collective bargaining and the freedom of association:
> >
> > > 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;
>
> (emphasis added)

[35] In short, the Board must pay careful attention to the fundamental objectives of the *Code* when it exercises its discretionary power; it is not required to consider the three-step test set out by the common law courts. The Board will issue an interim order only if the order furthers the objectives of the *Code*, in particular, free collective bargaining, the constructive settlement of disputes and freedom of association.

[36] The employer based its application on two major labour relations objectives. On one hand, it wanted to prevent the "irreparable" harm it would suffer if Unifor were to benefit from the alleged unfair labour practices by becoming the certified bargaining agent. On the other hand, it alleged that labour relations peace depended on suspending the raid period until the Board issued its decision in file no. 31503-C, in order to allow the members of the unit to make an informed decision.

[37] The respondents, for their part, essentially argued that suspending the raid period would violate their right of association and to collective bargaining.

[38] Although the Board can certainly issue an interim order to neutralize the potential harm of an unfair labour practice until a decision is made on the merits, the Board must first consider the effect of the order sought by the employer to determine whether this order would fulfill the *Code*'s objectives. To do so, it is important to analyze the labour relations objectives that underlie the open-period concept.

[39] To ensure labour relations stability, section 24(2) defines the periods in which employees can exercise the right to choose their bargaining agent:

> **24 (2)** Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made
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> > **(a)** where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;
> >
> > **(b)** where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;
> >
> > **(c)** where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and
> >
> > **(d)** where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only
> >
> > > **(i)** during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and
> > >
> > > **(ii)** after the commencement of the last three months of its operation.

[40] Section 8 of the *Code* sets out the right of employees to freely join the trade union of their choice, which is one of the objectives in the preamble to the *Code*:

> **8 (1)** Every employee is free to join the trade union of their choice and to participate in its lawful activities.

[41] In *A.S.P. Incorporated*, 2010 CIRB 538, the Board acknowledged the close nexus between section 24 and section 8 of the *Code* and the role they play in guaranteeing the right of association protected by section 2(d) of the *Charter*:

> [29] Section 8 of the *Code* protects employees' right to choose the bargaining agent of their choice. Although this provision predates the guarantee of freedom of association found in section 2(d) of the *Canadian Charter of Rights and Freedoms*, it gives practical effect to that freedom. Section 24 of the *Code* sets out the time frames within which this right may be exercised, by specifying the periods in which an application for certification may be made. It is only during these defined periods that an individual employee has the opportunity to express his or her wishes regarding the choice of the bargaining agent that is to represent them. ...

[42] The Board recognizes the importance of fixed and foreseeable open periods, because they allow employees to exercise a fundamental right granted under section 8 of the *Code* at specific times.

[43] The Board's predecessor, the Canada Labour Relations Board (CLRB), stressed the importance of predictable open periods in *Dolphin Delivery Ltd.* (1993), 93 di 103; 23 CLRBR (2d) 270; and 94 CLLC 16,025 (CLRB no. 1043); this question was addressed more recently in *Transport Jean-Marie Bernier Inc.*, 2010 CIRB 508, in an analysis of section 67(2) of the *Code*, which expressly prohibits the parties to a collective agreement from changing the term of the agreement.

[44] More specifically, in *Dolphin Delivery Ltd.*, *supra*, the CLRB explained that the prohibition under section 67(2) of the *Code* was specifically intended to prevent the open period from being transformed into an ever-moving target:

> The reason for the section 67(2) prohibition to tamper with the term of a collective agreement is two-pronged. First, it has to do with employees' individual rights. Second, it has to do with the proper operation of the *Code* from a broader labour relations perspective.
>
> From the perspective of individual rights, employees' rights turn on their basic freedom to belong to the union of their choice (section 8(1)). **Conversely, there is the right to change unions or to do away with union representation. These rights are directly linked in the North American system of free bargaining to what is commonly referred to as the "open period.**" In our *Code* this is governed by sections 24 (certification) and 38 (revocation). In both cases, the open period varies depending upon the existence or the term of a collective agreement. At regular intervals, employees take advantage of the possibility of changing or revoking unions as bargaining agents. If employers and unions were recognized the unqualified right to reopen collective agreements with regard to their term, they could in fact deprive individual employees, and consequently rival unions, of the possibility of ever displacing the incumbent union. Parliament through the clear prohibition of section 67(2) prevents the open period from being transformed into an ever moving target. Once a

> contract is signed, the parties lose the privilege of changing its term, and the open period becomes frozen.
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> (page 115; 281; and 14,204; emphasis added)

[45] In the same vein, the Board reiterated the underlying objective sought in setting fixed open periods in *American Cartage Agencies Ltd.*, 2006 CIRB 354:

> [61] As stated in *Jazz Air Limited Partnership, carrying on business as Air Canada Jazz*, May 11, 2005 (CIRB LD 1241), **the purpose of prescribing a fixed open period, in which a trade union may apply** for a bargaining unit that is already certified to another union, **is to provide both labour relations stability and employee choice. Stability is provided by restricting raid applications to specific and limited periods and choice is provided by permitting employees the opportunity to change their bargaining agent should they desire to do so.**
>
> (emphasis added)

[46] This overview of the jurisprudence shows that the underlying fundamental objectives of maintaining fixed open periods, as set out in section 24 of the *Code*, are the freedom of association and free collective bargaining.

[47] In the context of a section 19.1 application, the Board must determine whether issuing the order sought will further the objectives of the *Code*. In light of the underlying objectives of maintaining fixed and predictable raid periods, the Board finds that an order postponing the open period would defeat the fundamental objectives of the *Code*. Therefore, it dismisses the application for an interim order filed by Innotech in file no. 32177-C.

[48] Moreover, and although it is not required to consider this factor, the Board was not satisfied that the employer would suffer irreparable harm if Unifor were to be certified and if the Board concluded, in file no. 31503-C, that unfair labour practices had occurred. In fact, remedies are available to the employer under the *Code* to rectify a situation like this one. While such recourse would certainly incur costs and delays, such inconvenience would not, in the Board's view, justify opting for the postponement of the raid period, as it is a difficult solution to reconcile with the objectives of the *Code*. For the Board, preserving free collective bargaining and freedom of association—two fundamental rights protected under Part I of the *Code*—prevails over the inconvenience the parties could possibly face if it were to determine that Unifor had engaged in unfair labour practices in file no. 31503-C.

[49] The Board wishes to remind the parties that the present decision does not prejudge the merits of the complaint in file no. 31503-C (see *Bell Mobility Inc.*, 2009 CIRB 457).

[50] Consequently, the Board dismisses the employer's application for an interim order filed pursuant to section 19.1 of the *Code*.

Translation

Annie G. Berthiaume
Vice-Chairperson