Canada Industrial Relations Board Conseil canadien des relations industrielles

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

Reasons for decision

Teamsters Local Union No. 419,

complainant,

and

Swissport Canada Handling Inc.,

respondent,

Board File: 32141-C

Teamsters Local Union No. 419,

complainant,

and

Swissport Canada Handling Inc.,

respondent,

Board File: 32232-C

Neutral Citation: 2017 CIRB **863**
November 15, 2017

The Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, Messrs. Richard Brabander and Paul Moist, Members. Hearings were held on August 22, September 26-27, October 16 and October 19, 2017.

Appearances

Mr. Mike Biliski, for Teamsters Local Union No. 419;

Mr. Donald Jarvis, for Swissport Canada Handling Inc.

I. Nature of the Complaints

[1] The Board is seized with two complaints by the Teamsters Local Union No. 419 (Teamsters or the union). The first complaint was filed on May 19, 2017 alleging that Swissport Canada Handling Inc. (Swissport or the employer) breached its duty to bargain in good faith, violated the statutory freeze provision, and interfered with the union's representation of its members when it hired more than one hundred agency workers and offered pay incentives to employees after notice to bargain was served. The second complaint was filed on July 31, 2017, under section 94(2.1) of the *Canada Labour Code (Part I– Industrial Relations)* (the *Code*), in which it alleges that the employer was using replacement workers for the purpose of undermining the union's representational capacity.

[2] During the course of the hearings into the first complaint, the parties concluded a new collective agreement, which was ratified by the majority of the employees in the bargaining unit on October 15, 2017. At the continuation of the hearing on October 16, 2017, the Board, on its own motion, asked the parties whether a labour relations purpose would be served by proceeding with the complaint. The parties presented oral arguments on this issue on October 19, 2017.

[3] For the reasons set out below, the Board has decided that no labour relations purpose would be served by proceeding with these complaints.

II. Background and Facts

[4] The union represents a bargaining unit of "below-the-wing" employees working for Swissport at Lester B. Pearson International Airport in Toronto (the airport). The union and the employer were parties to a collective agreement that expired on July 23, 2017. The union served notice to bargain on December 16, 2016.

[5] On or around May 12, 2017, a number of agency workers began working at Swissport. On May 16, 2017, the union filed a grievance in which it alleges that the employer's use of agency workers constituted improper "contracting-in" to the bargaining unit. The grievance is scheduled to be heard on September 20, 2018.

[6] The union also filed its first unfair labour practice complaint with the Board on May 19, 2017 with additional particulars dated May 23, 2017 and July 26, 2017. In the complaint, the union alleges that the employer violated sections 50(a), 94(1) and 50(b) of the *Code* (Board file

no. 32141-C—the “first unfair labour practice complaint”). In the first unfair labour practice complaint, the union alleges that the employer refused to negotiate rates of pay for ramp employees at the bargaining table and contracted out bargaining unit work to agency workers who were paid a higher rate of pay than bargaining unit employees. The union also alleges that the employer made offers directly to employees of double overtime for certain shifts on the weekend during the course of collective bargaining without consulting with the union. As a remedy, the union requests, among other things, “an Order of the Board pursuant to section 99(1)(b.1) of the *Code* that the Employer concede that the Collective Agreement between the parties shall contain a provision prohibiting the Employer from contracting out bargaining unit work”.

[7] On July 27, 2017, bargaining unit members commenced a lawful strike. In the weeks leading up to the strike action, the employer filed two separate applications for a declaration of unlawful strike pursuant to section 91 of the *Code*. The Board dismissed the first application because the conduct in question did not meet the definition of a “strike” (see *Swissport Canada Handling Inc.*, 2017 CIRB LD 3826). In the context of the second application, the Board found that there was an appearance of an unlawful strike but decided that no labour relations purpose would be served by ordering a remedy where the parties faced the real threat of a lawful work stoppage in less than 36 hours (*Swissport Canada Handling Inc.*, 2017 CIRB LD 3830).

[8] On July 31, 2017, the union filed a new unfair labour practice complaint, under section 94(2.1) of the *Code*, in which it alleges that the employer was using replacement workers for the purpose of undermining the union’s representational capacity. The union contends that the employer used an increasing number of agency workers to perform bargaining unit work in the days leading up to and during a lawful strike (Board file no. 32232-C—the “second unfair labour practice complaint”). In the second unfair labour practice complaint, the union seeks a declaration that the employer used replacement workers for the purpose of undermining the representational capacity of the union and a cease and desist order for the duration of the labour dispute.

[9] On August 10, 2017, the union filed a related application for an interim order under section 19.1 of the *Code*, requesting an order directing the employer to cease employing agency workers until the Board makes a determination with respect to the merits of the second unfair labour practice complaint. The Board dismissed the union’s application for an interim order on August 18, 2017 (see *Swissport Canada Handling Inc.,* 2017 CIRB LD 3858).

[10] The employer raised a number of preliminary objections in response to the union's two complaints. It argued that the union's unfair labour practice complaints did not make out a *prima facie* case, that they were an abuse of process, and that the Board should exercise its discretion pursuant to sections 98(3) or 16(l.1) to dismiss or defer hearing the complaints because there is an existing grievance dealing with the issue of contracting out, which has been referred to arbitration.

[11] After hearing oral arguments on August 22, 2017, the Board dismissed the employer's preliminary objections pertaining to the first complaint. However, in light of the pending grievance and the Board's general reluctance to interpret the language in the parties' collective agreement, the panel described the essential character of the first complaint in *Swissport Canada Handling Inc.*, 2017 CIRB LD 3849 (LD 3849) as follows:

> ... whether the conduct of the employer during collective bargaining and whether the use of the contracting out provision—whether permissible or not pursuant to the collective agreement—amounted to an unfair labour practice. More specifically, the Board will determine whether the manner, the timing and the effect of resorting to the contracting out provision by the employer is a violation of the duty to bargain in good faith (section 50(a)) and/or interfered with the union's ability to represent its members in collective bargaining (section 94(1)(a)). The Board was satisfied that a *prima facie* case on these allegations has been made out and refused to exercise its discretion pursuant to sections 98(3) or 16(l.1) to dismiss or defer hearing the complaint.
>
> With respect to the complaint made pursuant to section 50(b), the Board indicated that this complaint was essentially rooted in a determination of whether the agency workers are employees of Swissport Canada Handling Inc., requiring an interpretation of the contracts in place and the contracting out provision as well as other provisions of the collective agreement. Accordingly, the Board concluded that this issue was better left for the grievance process and the interpretation and application of the collective agreement by an arbitrator. Therefore, the Board exercised its discretion pursuant to section 98(3) and will refuse to hear this aspect of the complaint as an alleged breach of the freeze provision (section 50(b)).
>
> (page 2)

[12] On August 23, 2017, the Board held a case management teleconference with the parties in the union's two unfair labour practice complaints. In the course of the teleconference, the union maintained its allegations of a violation of a freeze provision as it applies to the direct offering of incentives by the employer to bargaining unit members after notice to bargain was served. As a result, the Board clarified the above ruling and allowed the union to present evidence on this specific aspect of the complaint under section 50(b) of the *Code*.

[13] The Board invited the parties to make any additional submissions on the employer's preliminary objections with respect to the second unfair labour practice complaint. After

reviewing the parties' additional written submissions, the Board dismissed the employer's preliminary objections pertaining to the second unfair labour practice complaint in *Swissport Canada Handling Inc.*, 2017 CIRB LD 3861 and indicated that it would hear the merits of the second complaint consecutively to the first complaint. In dismissing the preliminary objections, the Board described the essence of the union's second unfair labour practice complaint as follows:

> The circumstances that form the basis of the complaint filed under section 94(2.1) of the *Code* emanate from the conduct of the employer during collective bargaining and the timing, manner and effect of the employer's decision to resort to agency workers. Although the factual basis for this complaint is similar to or the same as the set of facts supporting the related complaint of unfair labour practice in file no. 32141-C, the union, in the instant complaint, is alleging that the continued use of agency workers by the employer once the strike began was for the purpose of undermining the union's representational capacity in bargaining. The union relies on the conduct of the employer during collective bargaining as it relates to the decision to use agency workers and the continued use of the same workers after the strike began, and invites the Board to infer that the employer's purpose is not the pursuit of legitimate bargaining objectives, but rather to undermine the union's representational capacity. The Board is of the view that these issues are better left for determination through inquiry and examination of evidence. As pointed out by both parties, this type of complaint has rarely been examined by the Board, and its jurisprudence is still evolving in this particular area. The Board appreciates that the parties have a different interpretation of the applicable test and threshold to be met for a complaint to be successful under section 94(2.1) of the *Code*. As such, it is prudent for the Board to proceed to examine the merits of the complaint and make a determination as to whether there was a breach of the *Code* in this instance.
>
> Further, the Board is unable to conclude that the filing of the complaint pursuant to section 94(2.1) shortly after the strike began is an abuse of process in these circumstances. The union filed its complaint at the earliest convenience and as the circumstances evolved with respect to the use of replacement workers/agency workers. The fact that the complaint may be based on the same factual set of circumstances does not result in it becoming abusive. The rights in the *Code* are meant to be enforced as necessary, and the Board will be very reluctant to dismiss a complaint on the basis that it is abusive for raising similar facts as a previous complaint without examining its merits.
>
> Additionally, the Board has determined that the pith and substance of the complaint filed by the union is whether the use of replacement workers by the employer is for a purpose other than the legitimate pursuit of collective bargaining objectives. This is a matter that falls squarely within the Board's jurisdiction and its authority and power to enforce the rights and policy objectives embedded in the *Code*. This is not a matter that can be determined or resolved through grievance arbitration. Therefore, the Board will not dismiss or defer hearing the complaint pursuant to sections 98(3) or 16(l.1) of the *Code*.
>
> Accordingly, the Board will proceed to hear the merits of the complaint consecutively to the first complaint filed by the union in file no. 32141-C.
>
> (pages 2–3)

[14] Hearings on the substance of the union's first unfair labour practice complaint began on September 26, 2017. The bargaining unit members ratified a new collective agreement on October 15, 2017 for a three-year term. At the hearing on October 16, 2017, the Board asked whether a labour relations purpose would be served by proceeding with the complaint. The parties presented oral arguments on this issue on October 19, 2017.

III. Positions of the Parties

[15] Both parties submitted thorough arguments on the issue of mootness and referred the Board to a broad range of decisions from both the federal and provincial jurisdictions. The Board has carefully reviewed the parties' submissions and the case-law provided in support. What follows is a summary of the key elements of the parties' positions.

A. The Employer

[16] The employer submits that, in light of the settlement of the collective agreement and subsequent ratification of that agreement on October 15, 2017, the Board should not proceed with the union's unfair labour practice complaint.

[17] The employer argues that the matter is now moot since there is no longer a "live controversy" between the parties. It further argues that there is no sound labour relations purpose to be served by proceeding with the complaint, regardless of the Board's determination on mootness. Referring to the Board's decision in *Westcan Bulk Transport Ltd.* (1994), 95 di 169 (CLRB no. 1090), the employer states that the Board possesses the inherent discretion not to proceed in this matter.

[18] The employer contends that the union's allegations have been rendered moot by the mere fact of the negotiated settlement and by the actual terms of the settlement. In this regard, it explains that the return to work protocol deals with the issue of agency workers, which shows there is no *lis* between the parties. The employer explains that the factual event which gave rise to the complaint is the decision to contract out and bring in agency workers. The parties themselves have agreed in the terms of the ratified settlement that the employer will make best efforts to remove agency workers.

[19] The employer invites the Board to examine the essential character of the allegations brought forth by the union under sections 50(a), 94(1)(a) and 50(b). In the employer's view, all

three aspects of the union's complaint relate to allegations that obstacles were put in place which were preventing parties from achieving a collective agreement.

[20] The employer argues that the purpose of proceeding and obtaining a remedy would be to enable the parties to reach a freely negotiated collective agreement, which the parties have already done in this case. The employer submits that there is no possible remedy left in this case and in any event, if there is still an issue remaining about improper contracting out, this matter will be determined at arbitration.

[21] In summary, because the parties have already reached a freely negotiated collective agreement, the employer contends that the entire proceeding is moot.

[22] In addition, the employer submits that no labour relations purpose would be served by pursuing the complaint.

[23] First, the employer argues that apart from a declaration of breach, the Board is without jurisdiction to issue the remedy requested by the union, namely to direct the parties to include a provision in their collective agreement prohibiting contracting out. It refers to the plain language in section 99(1)(b.1) of the *Code* in support of its contention that the employer cannot include a specific term on contracting out or withdraw from a bargaining position because the parties are no longer engaged in collective bargaining. The employer submits that a remedy under section 99(1)(b.1) of the *Code* is only available while the parties are in collective bargaining and where there is a finding of a breach of section 50(a) of the *Code*.

[24] Second, the employer submits that the Board has a policy not to issue retroactive or academic declarations. In this regard, the employer refers to the Board's decision in the first unlawful strike application between the parties, in which a cease and desist order was declined because the unlawful strike was not ongoing. The employer argues that the policy considerations in the context of an unlawful strike application are still applicable in this case.

[25] Third, leaving aside section 99(1)(b.1) of the *Code*, the employer acknowledges that the Board still has general remedial jurisdiction under section 99(2) of the *Code*. It submits that the union did not seek a remedy under section 99(2) and in any event, any subsequent remedy constraining the settlement reached between the parties would be an improper intrusion into the sanctity of free collective bargaining. The employer contends that the Board will only impose terms to the collective agreement in exceptional cases, such as in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, which was nothing like the

circumstances in this complaint. The employer submits that the union is asking the Board to provide an outcome that it was unable to secure at the bargaining table.

[26] Fourth, the employer submits that it would be a waste of resources to proceed with this matter. There would likely be five additional hearings days in this case not including the second unfair labour practice complaint, which is substantial. The employer presented nine will-say statements in preparation for the hearing and by the time the parties reached a collective agreement, the union was halfway into the cross-examination of the first will-say statement.

[27] Regarding the union's claim that the issue will come up again in future rounds of bargaining, the employer states that this is entirely speculative. It explains that the circumstances which led to this case were the employer's inability to attract employees because of wages. The employer is hopeful that with higher wages in the collective agreement, the shortage of staff, which led to its decision to contract out, will not come up again. In addition, the employer states that the collective agreement has a mid-term contract provision to address future issues which arise during the term of the collective agreement.

B. The Union

[28] The union submits that the complaint is not moot because the remedy it is seeking is still available. It asks the Board to amend the term of the collective agreement to prohibit the employer from contracting out. The union refers to its request on July 26, 2017 for "an Order of the Board pursuant to section 99(1)(b.1) of the *Code* that the Employer concede that the Collective Agreement between the parties shall contain a provision prohibiting the Employer from contracting out bargaining unit work". It further submits that the Board should exercise its discretion to decide the complaint even if it is found to be moot.

[29] The union argues that the Board must consider whether a remedy is still available and meaningful in this case even though a collective agreement is in place. It submits that the members of the bargaining unit understood the complaint would continue before the Board at the time they ratified the collective agreement.

[30] The union contends that if the Board were to dismiss the complaint as moot, after approximately six months of litigation, it would send a clear message to union members that their statutory rights are unenforceable. In the union's view, such a decision would promote labour unrest and would suggest that the only way to preserve statutory rights is to maintain labour disruption, which is contrary to the objectives of the *Code*. In other words, the union

states that if the Board were to dismiss the complaint as moot, it would mean that the only way the complaint could be heard is if the employees remained on strike.

[31] The union distinguishes the facts in this case from those in *Canadian National Railway Company*, 2011 CIRB 572 (RD 572), where there was no remedy sought. It notes that in RD 572, the complaint continued for one and a half years after the parties reached an agreement and the mootness issue, which was raised on the Board's own motion, arose out of the parties' inaction during the six previous months.

[32] On the issue of remedy, the union submits that both sections 99(1)(b.1) and 99(2) of the *Code* are available in this case. It requested that the employer concede that a collective agreement shall contain a provision prohibiting contracting out. In the union's view, the Board has the clear authority to amend the collective agreement where circumstances warrant even if the conditions in section 99(1)(b.1) have not been met. The union refers to the decisions in *Cairns,* 2003 CIRB 230 and the principles therein when assessing remedial orders, namely:

- There must be a relation between the breach, its consequences and the remedy;
- The Board is justified in using its experience and special skill in crafting a remedy;
- The Board takes into account the objectives of the legislation;
- The Board has broad remedial powers under section 99(2) of the *Code*; and
- The complainant should be put in the position it would have been had the wrong not occurred.

[33] First, the union contends that the remedy sought is narrowly tailored, and rationally connected, to the illegal conduct of the employer in this case. In the union's submission, it is the employer's overt reliance on its legal right to contract out which has led to the breach of the *Code*. Therefore, the union states that the Board should order a remedy, which restricts that right. The union relies on Justice Dickson's dissenting reasons in *Canadian Union of Public Employees* v. *Labour Relations Board (N.S.) et al.*, [1983] 2 S.C.R. 311 (the Digby School Board case) in support of its contention that the Board has the authority to make such an order prohibiting contracting out for the duration of the collective agreement. The dissenting reasons of Justice Dickson were relied upon by the majority in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, *supra*.

[34] Second, the union urges the Board to use its expertise to consider the likelihood that a collective agreement would be ratified if the union thought the Board, on its own motion, would

dismiss the complaint. The union argues that the employer's conduct has irreparably harmed its ability to properly represent its members and to negotiate on a fair playing field. In the union's view, it would be unfair to dismiss the complaint because it agreed to a contract and ceased labour disruption. In assessing the remedy, the union invites the Board to question why the employer did not bring forward the mootness argument. In this regard, the union suggests that the employer understood the union would be maintaining its complaint despite the conclusion of the collective agreement.

[35] Third, with respect to the objectives of the legislation, the union argues that free collective bargaining is not the only objective in the *Code*. It argues that dismissing the complaint on the basis of mootness would run contrary to sound labour relations and sends a message to the members of the bargaining unit that they should have stayed on strike.

[36] Fourth, the union argues that both sections 99(1)(b.1) and 99(2) of the *Code* grant the Board power to order an amendment to the collective agreement.

[37] Fifth, with respect to returning the union to the position it would have been had there not been a breach, the union submits that it would be impossible to do so in this case. In the union's view, the remedy requested only partially addresses the harm it has suffered. The union refers to its last offer to the employer on July 21, 2017 in which it amended its proposal and offered binding arbitration on the issue of no contracting out. The union states that it is only fair to ask for this remedy here, which is different from imposing a term in the collective agreement. The union submits that there is no reasonable dispute that the Board has the authority to order the remedy requested.

[38] The union further argues that even if the complaint is moot, the Board should exercise its discretion to continue the hearing because the matter at issue is "capable of repetition and evasive of review". In other words, the union submits that the issue will come up again between the parties in the future, but it is unlikely that the complaint will be adjudicated to completion in a timely manner, given the nature and complexity of such a complaint. The union alleges that in order to obtain a decision in this matter, it would have to wait a year and would therefore have had to remain on strike for seven or eight months.

[39] As a result, the union urges the Board to exercise its discretion to continue to hear the complaint; otherwise the issue will never be determined. In this regard, the union refers to the decision in *Trillium Lakelands District School Board* and *Upper Canada District School*

Board, [2013] OLRB Rep. March/April 427, in which the OLRB noted that to characterize the dispute as academic would insure that the dispute will always disappear before it can be heard. In this case, the Board has already had five days of hearing. In the union's submission, the expenditure of resources cannot be thrown away. The union feels that it will have no access to justice without a decision on the merits of the complaint.

IV. Analysis and Decision

[40] The Board in this case raised the issue of mootness on its own initiative. After the new collective agreement was reached, the Board asked the parties to provide oral arguments on whether a labour relations purpose would be served by proceeding with the first complaint.

[41] In *Westcan Bulk Transport Ltd., supra*, the Board confirmed its authority to refuse to hear and determine a complaint where there is no longer a live controversy between the parties and the determination would have no practical effects on the rights of the parties. It stated the following regarding the Board's authority to dismiss a complaint as moot:

> ... the Board's obligation to "hear and determine" a complaint pursuant to section 98 cannot be interpreted to require the Board to hear the merits of complaints that are moot and for which a determination would have no practical effect on the parties' rights. The Board has repeatedly alluded, without elaboration, in past decisions to its power to dismiss complaints which are moot; see: *Québec Ports Terminals Inc.* (1991), 85 di 71 (CLRB no. 870); *Halifax Grain Elevator Limited* (1991), 85 di 42; 15 CLRBR (2d) 191; and 91 CLLC 16,033 (CLRB no. 867); and *Purolator Courier Ltd.* (1981), 45 di 300 (CLRB no. 344).
>
> (pages 173–174)

[42] The Board, as master of its own proceedings, has the authority to raise with the parties the question of whether there is a labour relations purpose in proceeding with a complaint in light of a change in circumstances. The Board exercised this authority more recently in *Fredericton International Airport Authority Inc.*, 2012 CIRB 647.

[43] Both parties referred the Board to the two-step analysis set out by the Supreme Court of Canada in *Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342 on the issue of mootness:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is

> commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. ...
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. ...
>
> (page 353)

[44] While the approach in *Borowski* v. *Canada (Attorney General)*, *supra*, can serve as a useful tool, the focus of the Board when it decides whether to refuse to hear and determine a complaint is generally on the issue of whether a labour relations purpose would be served by proceeding with the complaint.

[45] With these principles in mind, first, the Board will determine whether there is a live controversy between the parties and, second, the Board will assess whether a labour relations purpose would be served by hearing and determining the complaint.

A. Is There a Live Controversy?

[46] As a general rule, the Board will not automatically dismiss as moot a complaint alleging a breach of the duty to bargain in good faith solely for the reason that a collective agreement has been concluded. In fact, in *Atomic Energy of Canada Limited*, 2001 CIRB 110, the Board determined the merits of a bad faith bargaining complaint despite the fact that a collective agreement had already been reached. In that case, the union alleged that the employer breached its duty to bargain in good faith by failing to disclose information regarding salary increases and promotions. In finding that the complaint was not moot, the Board noted:

> [47] Unless the necessary information is disclosed, the negotiation of such a remedy or even the process of administration of the collective agreement itself may be a mere sham. The failure to disclose such clearly relevant information following notice to commence collective bargaining is a clear violation of section 50(a)(i) and (ii) as alleged. The continuation of that failure is a continuing violation. This is so even after the conclusion of a new agreement, particularly so in circumstances such as the present where it was made express at the time the agreement was concluded that the information was still being sought and still viewed as of importance by the bargaining agent and where the information in question continues to be of importance.

[47] The decision in *Atomic Energy of Canada Limited*, *supra*, is important in that it demonstrates that the conclusion of a collective agreement does not automatically render a bad

faith bargaining complaint moot. The Board also focused on the relation between the remedy being sought and its importance to the bargaining relationship as a whole, including the administration of the collective agreement. Indeed, the information withheld by the employer was essential to the representational capacity of the bargaining agent.

[48] That said, the Board has also found that certain complaints related to a party's conduct during collective bargaining have been rendered moot as a result of the conclusion of a collective agreement in light of the particular circumstances of each case.

[49] In *Can-Ar Transit Services, Division of Tokmakjian Limited*, October 17, 1997 (LD 1750), the union requested that a complaint alleging breaches by the employer of sections 50, 94 and 96 it had previously filed, years earlier, be consolidated and heard with a more recent application for termination of the union's bargaining rights before the Board. The union asserted that the employer's position during bargaining and the subsequent filing of the termination application were evidence that the employer was not acting in good faith at the time of its complaint. The Board had not determined the merits of the section 50 complaint, but had issued a declaration regarding their obligations in a collective bargaining relationship. Following this declaration, the parties negotiated and concluded a collective agreement. However, in the declaration, the Board indicated that it remained seized of the matter should any other issues arise, and the union relied on this declaration to attempt to resurrect its complaint. In dismissing the complaint as moot, the Board stated the following:

> Admittedly, the successful conclusion of a collective agreement does not prevent the Board from considering the merits of the complaint relating to the employer's refusal to meet and bargain with the Union, as alleged in its complaint. Such facts—if proven—would allow for a declaration that the employer had violated the *Code* by having committed an unfair labour practice. The question, however, remains as to whether it is appropriate for the Board to examine and decide these issues now.
>
> The Board considers that a hearing regarding collective bargaining issues, which are now without object, would not be conducive to furthering good labour relations. This is particularly so when no appropriate remedy can be provided. ...
>
> ...
>
> Given the conclusion of a collective agreement subsequent to the filing of the complaint, issuing an order would have no practical effect on the parties with respect to the employer's conduct, which allegedly took place in 1995 and early in 1996. The issues in question with respect to those negotiations are now moot (see Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342).
>
> In these circumstances, and in the absence of any factors which warrant us to exercise our discretion to consider the complaint on its merits notwithstanding that it is moot, the Board

> has decided that it will not hear the complaint. Consequently, the complaint is dismissed as being academic and the request to consolidate file 745-5316 with the application for termination of the ATU's bargaining rights is rejected.
>
> (pages 3–4)

[50] Similarly, in *Canadian Broadcasting Corporation* (1997), 104 di 34 (CLRB no. 1201), the employer filed a bad faith bargaining complaint alleging that it was being improperly forced to bargain jointly with three bargaining agents who had entered into a Joint Bargaining Agreement and that this agreement was unlawful. The Board dismissed the matter as being moot because collective agreements had been concluded with respect to each of the three bargaining units in question and no labour relations purpose would be served by pursuing the complaint. The Board stated the following:

> Given that collective agreements have been concluded in respect of each of the three units in question, we do not consider it appropriate to hear what could be lengthy and contentious evidence concerning the agreement and its application. The matter is moot, and after hearing arguments from the parties on this point, we conclude that no valid labour relations purpose would be served by determining these complaints on their merits at this time.
>
> (page 37)

[51] More recently, in *Canadian National Railway Company*, *supra*, the TCRC filed a complaint alleging that CN had breached its duty to bargain in good faith by pre-emptively training replacement workers on the job and having them perform bargaining unit work as a training tool. The union also alleged that these actions interfered with the trade union and undermined its representational capacity. After filing the complaint and after the union initiated a strike action, the parties reached an agreement to submit unresolved issues related to wages and benefits to binding arbitration. The Board had initially decided to continue to hear and determine the matter despite the parties' agreement. In deciding to do so, the Board took particular note of the parties' parallel collective bargaining negotiations that were ongoing for a separate bargaining unit and for which an identical issue with respect to the training of replacement workers had been raised. However, when that second collective bargaining dispute settled and after the parties failed to provide a status report, the Board, on its own initiative, asked the parties to show cause why the complaint should not be deemed to be withdrawn pursuant to section 29(2) of the *Canada Industrial Relations Board Regulations, 2001*. After considering the parties' submissions, the Board was of the view that there was no longer a live issue in this case:

> [16] In the present case, it is evident that the circumstance that gave rise to the complaint, namely the training of managers to allegedly act as replacement workers in the event of a

> strike by the LE and/or CTY bargaining unit, no longer pertains, and thus the issue is academic. Therefore, the question for the Board is whether it should exercise its discretion to decide the merits of the complaint, despite the absence of a current controversy.

[52] The Board ultimately declined to exercise its discretion to hear and determine the complaint because no labour relations purpose would be served in doing so.

[53] In the present matter, the parties have presented differing views on whether the complaint itself is moot as a result of the conclusion of the collective agreement. On the one hand, the employer maintains there is no longer a live controversy because collective bargaining was central to each of the allegations in the complaint and the collective agreement resolved the underlying collective bargaining obstacles. On the other hand, the union argues that the matter is not moot because there is an available remedy beyond mere declarations. In its submission of July 26, 2017, the union requested "an Order of the Board pursuant to section 99(1)(b.1) of the *Code* that the employer concede that the collective agreement between the parties shall contain a provision prohibiting the employer from contracting out bargaining unit work".

[54] In order to determine whether there is still a live controversy between the parties, it is necessary to carefully examine the nature of each of the union's allegations. In the complaint, the union alleges the following:

1. The employer violated its duty to bargain in good faith under section 50(a) of the *Code* when it refused to negotiate rates of pay for ramp employees at the bargaining table and decided to hire agency workers who were paid more than ramp employees.

2. The employer interfered with the union's ability to represent its members during collective bargaining in violation of section 94(1)(a) of the *Code*.

3. The employer offered double time incentive pay after notice to bargain was given and thus violated the freeze provision in section 50(b) of the *Code*.

[55] In LD 3849 the Board described the essential character of the union's complaint under sections 50(a) and 94(1)(a) of the *Code* as follows:

> ... whether the conduct of the employer during collective bargaining and whether the use of the contracting out provision—whether permissible or not pursuant to the collective agreement—amounted to an unfair labour practice. More specifically, the Board will determine whether the manner, the timing and the effect of resorting to the contracting out provision by the employer is a violation of the duty to bargain in good faith (section 50(a))

> and/or interfered with the union's ability to represent its members in collective bargaining (section 94(1)(a)). ...
>
> (page 2)

[56] In that same decision, the Board specifically declined to make a determination which would require an interpretation of the contracts in place and the contracting out provision in the collective agreement. In the Board's view, these issues were better left for the grievance process and the interpretation and application of the collective agreement by the grievance arbitrator.

[57] The circumstances that gave rise to the union's complaint under sections 50(a) of the *Code* and 94(1)(a) of the *Code* are the employer's refusal to negotiate rates of pay for ramp employees at the bargaining table and the employer's decision to hire more than a hundred agency workers after notice to bargain was given. The employer noted, and the union did not dispute, that the newly negotiated collective agreement provides higher rates of pay for ramp employees and allows the parties to conclude mid-term contracts. In addition, in the parties' return to work protocol, it is specifically stipulated that the employer will "make every best effort to eliminate the services of agency/replacement workers currently engaged by the Employer within sixty (60) days following ratification of the Memorandum of Settlement." In the return to work protocol, the parties also acknowledged that the agency/replacement workers may be hired into the bargaining unit. In the Board's view, these elements combined show that there is no longer a live controversy regarding the circumstances which led to the filing of the complaint under section 50(a) and 94(1)(a) of the *Code*. The collective agreement reached by the parties addresses the key issues that were central to the complaint.

[58] Similarly, the Board is of the view that there is no longer a live controversy regarding the breach of the statutory freeze provision. In *United Food and Commercial Workers, Local 503* v. *Wal-Mart Canada Corp.,* 2014 SCC 45, the majority of the Supreme Court of Canada recently reaffirmed the purpose of the statutory freeze provision as follows:

> [34] In my opinion, the purpose of s. 59 in circumscribing the employer's powers is not merely to strike a balance or maintain the status quo, but is more precisely to facilitate certification and ensure that in negotiating the collective agreement the parties bargain in good faith (Bergeron, at pp. 142 and 147; F. Morin, Le Code du travail: sa nature, sa portée, ses effets (1971), at pp. 16-17; Club coopératif de consommation d'Amos v. Union des employés de commerce, section locale 508, SOQUIJ AZ-85141201 (T.A.), at pp. 11–12; Association des juristes de l'État v. Commission des valeurs mobilières du Québec, [2003] R.J.D.T. 579 (T.A.), at para. 71).

[59] Thus, the statutory freeze provision is a measure designed to not only maintain the status quo but also acts as a safeguard to ensure that the parties bargain in good faith with the objective of concluding a collective agreement. Since the parties were able to achieve a freely negotiated collective agreement, there is no longer a live controversy regarding the employer's alleged attempts to influence collective bargaining by offering incentives to employees during the freeze period. Accordingly, the Board finds that there is no longer a live controversy regarding the circumstances which led to the filing of the complaint under section 50(b) of the *Code*.

[60] The union urged the Board to consider that the complaint is not moot, because it is still requesting a remedy, which includes an order "that the employer concede that the collective agreement between the parties shall contain a provision prohibiting the employer from contracting out bargaining unit work". The employer argues that the Board does not have the authority to grant such a remedy in this case.

[61] The union referred to the decisions in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, *supra*; and *Cairns*, *supra*, in support of its position that the Board has the authority to issue the remedial order requested. However, these decisions were issued in a completely different context. In *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, *supra*, the majority of the Supreme Court, upheld the Board's remedial order which directed the employer to make certain offers subject to binding arbitration. However, in doing so, the Supreme Court highlighted the exceptional circumstances of that case, which included a lengthy and violent labour dispute. In addition, the parties had not yet reached a collective agreement when the Board issued its decision. The *Cairns*, *supra*, matter, on the other hand, arose from a duty of fair representation complaint. This was not a case where a party to a collective agreement was asking the Board to amend a term of the freely negotiated collective agreement it had just ratified.

[62] The union's argument on this point would essentially mean that as long as the Board has the authority to impose a remedy and the union maintains its request for a remedy, these would be sufficient reasons to pursue the complaint even though the parties have already resolved the underlying labour relations dispute. The Board is not persuaded by this argument. The fact that the union is maintaining its request for a remedy cannot, in and of itself, serve to create a live controversy when the complaint has become moot.

[63] For the above reasons, the Board finds that there is no longer a live controversy between the parties with respect to the underlying issues which led to the complaint.

[64] That said, the Board will assess whether a labour relations purpose would be served by proceeding with the complaint despite the fact that it is moot.

B. Labour Relations Purpose

[65] The union argues that it should not be penalized for concluding a collective agreement and the employer's alleged conduct sanctioned because the union agreed to end the work stoppage. The union states that it accepted the collective agreement and agreed to end the strike with the understanding that it would continue with its complaint before the Board. It states that it would otherwise have had to continue a lengthy strike in order to wait for the outcome of these proceedings and a meaningful remedy.

[66] First, the Board is very aware and sympathetic to the fact that these types of complaints can result in lengthy and protracted proceedings. Allegations of bad faith bargaining and interference in union representation are generally difficult to address quickly and on the basis of the written record. Unfair labour practice complaints can present complex questions of fact and law and often require presentation of evidence through oral testimony and evaluation of witnesses' credibility. Although the Board attempts to schedule hearing days in the shortest time possible, scheduling issues involving multiple parties is a challenge, as was the case in the present matter.

[67] Second, the Board understands that the union's membership may have accepted the collective agreement on the basis of representations made during the ratification process that the complaints before the Board would be pursued. The union urges the Board to take into consideration the advice given to the membership and the conditional acceptance of the collective agreement as critical and relevant to the question of whether there is a labour relations purpose to pursue these matters and the remedy sought by the union. In the Board's view, representations made or advice given in the parties' respective caucuses during collective bargaining or during the ratification process are not relevant to the Board's assessment of whether a labour relations purpose would be served by continuing with the complaint. The Board is not about to engage in a review of what was presented to the union's membership during the ratification process. In any event, the representations that a complaint will continue,

whether they influenced the outcome of the vote or not, are not binding on the Board in deciding whether to exercise its discretion to proceed with the complaint.

[68] Third, the union argues that in order to obtain a meaningful remedy, the members would have had to continue their strike action for a number of months in order to wait for the outcome of these proceedings. It contends that the encouragement of free collective bargaining is not the only policy principle advanced in the *Code* but that this must be reconciled with the enforcement of other provisions that prohibit unlawful practices during collective bargaining to ensure sound labour relations. The union urges the Board, to continue with the proceedings and to make a determination on the merits of the complaints in order to give it and its members access to justice.

[69] Although the union cites the old adage of justice delayed is justice denied, in considering whether a labour relations purpose is served by continuing to inquire into these applications, the Board is careful not to engage in an exercise that would seek to punish or allocate blame on any side. As cited by the employer, the Board is reluctant to issue retroactive orders or declarations where the issue that is central to the application or complaint has become moot. The Board's general approach in ordering remedies is to make the party affected by a violation of the *Code* whole and to put the affected party back in the position it would have been had there not been a breach. In deciding whether to issue a retroactive order, the Board will consider its role in promoting the constructive settlement of disputes and the labour relations purpose served by issuing such an order.

[70] The framework of collective bargaining is one that is carefully crafted to support the parties' efforts to achieve a freely negotiated collective agreement. *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995) discusses the reasons why free collective bargaining is so fundamental to a stable labour relations regime:

> ... the parties themselves are the best architects of their situations. Therefore, through statute, we promote voluntarism, encouraging the parties to settle their own collective agreements, giving them full scope to negotiate terms and conditions of employment and allowing them to design their own dispute resolution mechanisms. We give them the opportunity and responsibility to codify their own affairs. We restrict or limit these rights as little as possible.
>
> ...
>
> Further, they recognize that the most efficient and workable collective bargaining system is one which places the greatest degree of responsibility for their actions on the parties

> themselves. Therefore, the purpose of labour legislation and reform must be to establish and protect the general framework for collective bargaining to allow the parties to operate.
>
> (pages 36 and 40)

[71] The provisions of the *Code* as they relate to collective bargaining are designed to promote free collective bargaining and allow the economic "clout" of the respective parties to play out and for the parties to achieve the best result they can with their respective economic leverage. In this dispute, the union and the employer both exercised their economic leverage and ultimately concluded a collective agreement following 11 weeks of strike.

[72] The Board will be prudent not to interfere in the results achieved through this process. Even in the most egregious of cases, the Board and the Courts have been reluctant to impose terms of a collective agreement. For example, in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, *supra*, the majority of the Supreme Court of Canada upheld the Board's remedy, which directed the employer to make certain offers subject to binding arbitration. It did so in the following terms:

> ... such an extraordinary order, while justified in these circumstances, runs against the established grain of federal and provincial labour codes by overriding the cherished principle of "free collective bargaining" which animates our labour laws. ... I find that in the absence of exceptional and compelling circumstances such as those prevailing in this case, it will normally be patently unreasonable for a labour board to impose such an invasive remedial order in light of the core value of free collective bargaining enshrined in the *Code*.
>
> (page 379)

[73] In the circumstances before us, the union is pursuing a remedy that would see the Board impose a new term in the collective agreement, which was just recently concluded between the parties through the process of free collective bargaining. Although the union recognizes that it is seeking a remedy that may be rarely imposed, it submits that the question for the Board is whether a remedy is still available. However, the Board is of the view that the basis for the remedy sought in this case disappeared when the parties reached a new collective agreement and the return to work protocol. The Board must be cautious not to allow a party to achieve through the Board what it was not able to achieve at the bargaining table. The Board is not prepared to grant an order that would constitute a significant intrusion into the parties' freely negotiated collective agreement in the absence of exceptional and compelling circumstances.

[74] The Board understands the complexity of the negotiations and difficult decisions that had to be made by the union on whether to continue with the strike in evaluating its leverage at the

bargaining table. However, the Board is unable to accept that there is a labour relations purpose in determining the merits of the complaints as they relate to the conduct during collective bargaining. In the circumstances of this case, where the labour relations landscape has changed and a collective agreement is ratified after 11 weeks of the union's exercise of their right to strike, the Board's view is that the proceeding would only result in declarations that would be punitive in nature if it were to determine that there was a violation of the *Code*.

[75] This result however, should not be interpreted to mean that the Board does not have broad authority to fashion appropriate remedies to make parties whole where circumstances warrant it. The employer forcefully argued that the Board lacks jurisdiction to grant the remedy requested by the union given the fact that a collective agreement has already been concluded. Although this question does not need to be decided in the context of this motion, section 99(2) of the *Code* affords broad latitude and powers to the Board to create remedies to counteract breaches and fulfill the objectives of the *Code*.

[76] Fourth, the union argues that regardless of the fact that the parties have reached a collective agreement, it is necessary to address the conduct of the employer during collective bargaining in order to ensure that there is no repetition in the next round of bargaining. The circumstances that will surround the next cycle of collective bargaining for this unit are speculative and any future complaint will have to be assessed on its own merits. Nevertheless, the Board is of the view that it is the parties' responsibility to determine how they want to approach bargaining in the future. The union's complaint in this case raised a number of concerns regarding the employer's conduct. The union alleged that the employer attempted to address the ramp employees' wage issues outside the bargaining table while it insisted that these issues be dealt with during collective bargaining. Shortly after notice to bargain was given, the employer began using more than a hundred agency workers who worked alongside these same ramp employees. While this situation may have contributed to the length of the labour dispute, the parties ultimately found a common ground and achieved a freely negotiated collective agreement. In the Board's view, pursuing the complaint at this stage may negatively impact the parties' labour relationship going forward.

[77] Finally, the Board is also cognizant of the resources that would be required from all sides in bringing these matters to conclusion. As noted in the background above, the Board has already issued three decisions in these matters to deal with an interim application and other preliminary matters. These are in addition to two decisions of the Board addressing applications for

declaration of illegal strike filed by the employer at the time when the parties were facing the threat of a full and lawful work stoppage. Suffice it to say that in the course of four months, the Board has dedicated a significant amount of resources to the matters emanating from these parties' collective bargaining relationship. At the time of hearing this motion, nine witnesses were still scheduled to testify, which would require at least five more days of hearing. Although the question of judicial economy is not determinative, it is important for the Board to allocate its limited resources in a way that is consistent with the objectives of the *Code* and best support its mandate.

[78] Having carefully reviewed the arguments and case law presented by the parties, the Board has decided not to inquire further into the union's complaint relating to the conduct of the employer during collective bargaining as it would serve no labour relations purpose at this time.

C. Impact on Second Unfair Labour Practice Complaint

[79] In LD 3861 the Board specifically noted that the circumstances that formed the basis of the second unfair labour practice complaint emanated from the conduct of the employer during collective bargaining and the timing, manner and effect of the employer's decision to resort to agency workers. The Board also recognized that the factual basis for the second complaint was similar to, or the same as, the set of facts supporting the first unfair labour practice complaint. In LD 3849 issued to the parties on August 24, 2017, the Board indicated as follows:

> The complainant asked the Board to consolidate the two complaints, to hear them together but to defer its decision on one of the prongs of the replacement worker complaint until there is clarity on the status of agency workers from the arbitration process. The employer objected to this approach and suggested that the complaints be heard sequentially. It indicates that the evidence and onus applicable to the complaint related to the use of replacement workers is different and its success would necessarily depend on the outcome of the first unfair labour practice complaint.
>
> The Board is prepared to proceed to hear the first unfair labour practice complaint (file no. 32141-C) starting on **September 26, 2017**. In the event that the Board dismisses the preliminary objections and decides to proceed to hear the complaint related to the use of replacement workers (file no. 32232-C), it will hear the two complaints consecutively, pursuant to section 20 of the *Canada Industrial Relations Board Regulations, 2012*.
>
> (page 3)

[80] For the reasons already outlined above, the Board finds that there is no longer a live controversy regarding the conduct of the employer during collective bargaining and the timing, manner and effect of the employer's decision to resort to agency workers. After a case

management meeting with the parties in the two unfair labour practice complaints, the Board decided to hear the second unfair labour practice complaint consecutively to the first one. Given the circumstances of this case, the Board sees no labour relations reason to proceed with the second unfair labour practice complaint, the outcome of which was dependent upon the first unfair labour practice complaint.

D. Production of Documents Motion

[81] During the hearing on October 16, 2017, the union requested redacted versions of four Powerpoint presentations prepared by management for presentation to Swissport's headquarters in Zurich. The employer strongly opposed the production request. The Board reserved its decision in this matter until after it determined whether there was a labour relations purpose to be served by proceeding with the complaint.

[82] Given the Board's decision not to proceed with the first complaint, there is no need to deal with the union's request for production of documents.

V. Conclusion

[83] For the reasons outlined above, the Board finds that no labour relations purpose would be served by rendering a decision in these matters and exercises its discretion not to inquire further into the merits of the two unfair labour practice complaints.

[84] Accordingly, the Board closes its files and cancels the hearing dates scheduled on December 6, 19, and 20, 2017.

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

Ginette Brazeau
Chairperson

Richard Brabander
Member

Paul Moist
Member