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Reasons for decision

Stephen Frayling,

complainant,

and

Algoma Central Railway Inc.,

respondent.

Board File: 27583-C

Neutral Citation: 2010 CIRB **506**

March 25, 2010

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*). The Board heard oral argument for an adjournment request at a Case Management Conference (CMC) held via teleconference on March 24, 2010.

Appearances

Mr. Stephen Frayling, complainant, along with Mr. Drew Ratajewski, representative from the CAW; Ms. Johanne Cavé, counsel for Algoma Central Railway Inc.

I - Nature of the Request

[1] The employer, Algoma Central Railway Inc. (Algoma), requested an adjournment close to the start of an oral hearing that had been scheduled more than three months previously. Algoma advised that its main witness and advisor for the hearing would be out of the country on vacation.

[2] The complainant, Mr. Stephen Frayling (Mr. Frayling), contested the adjournment request.

[3] The Board has decided to grant the adjournment, with conditions. These reasons explain that decision and the Board's practice on adjournments.

II - Facts

[4] On June 23, 2009, the Board received from Mr. Frayling a safety complaint under Part II of the *Code*. In that complaint, Mr. Frayling alleged that Algoma had disciplined him for exercising his right to refuse unsafe work.

[5] Algoma alleged in response, *inter alia*, that Mr. Frayling had failed to follow the procedure set out at section 128 of the *Code*, a fact which Algoma argued rendered the complaint inadmissible.

[6] On July 27, 2009, the Board's Industrial Relations Officer, Ms. Natalie Zawadowsky, sent her Investigating Officer's Report to the parties for comment.

[7] After the matter had been assigned to a panel for adjudication, a CMC was held on October 7, 2009. Both parties asked for Ms. Zawadowsky to continue with her mediation efforts.

[8] On November 3, 2009, while mediation continued, the Board set down hearing dates in Sault Ste. Marie, Ontario, for May 11 - 12, 2010. On December 14, 2009, the Board moved the hearing dates up from May 2010 to March 31 - April 1, 2010.

[9] On March 15, 2010, the Board held another CMC to ensure, *inter alia*, there were no issues which could derail the hearing. Ms. Johanne Cavé, counsel for Algoma, indicated during the CMC that one of her witnesses had medical issues and might not be available.

[10] The parties agreed that Ms. Cavé, who would present evidence first at the hearing, would proceed with her main witness and then Mr. Frayling would present his evidence. Ms. Cavé's second

witness, if she could not testify due to medical issues, would testify at a later date.

[11] While this method of proceeding was not conventional, the parties agreed that it was essential to use the March 31-April 1 hearing days in the most efficient way possible. The Board confirmed the parties' agreement on process, and other matters, in its March 17, 2010 post-CMC letter.

[12] On March 17, 2010, Algoma wrote directly to the Board, with a copy to Mr. Frayling, requesting an adjournment of the hearing on the basis that it had just learned that its main witness, and hearing advisor, would be out of the country.

[13] The Board responded on March 17 reminding Algoma that any adjournment request must first be discussed with the opposing party. If a dispute remains, then the Board can determine the matter. Mr. Frayling objected to the adjournment request.

[14] The Board convened another CMC on March 24, 2010 to hear argument on Algoma's adjournment request.

[15] Algoma candidly acknowledged to the Board that an error had occurred. Its main witness had not been advised back in December 2009 that the Board's hearing had been moved forward from May to late March. Algoma only learned of its advisor's unavailability following the March 15 CMC. Algoma submitted that it would suffer greater prejudice than Mr. Frayling if it was forced to proceed with the hearing without its main witness and advisor.

[16] Algoma undertook to make itself available in the short term for a rescheduled hearing and offered to attend mediation in Sault Ste. Marie on the originally scheduled hearing dates of March 31 - April 1, 2010.

[17] Mr. Frayling argued that Algoma has often obliged employees to cancel planned vacation, where circumstances warrant. He and his union representative, Mr. Drew Ratajewski, both changed their schedules in order to be available for the Board's March 31-April 1 hearing.

[18] Mr. Frayling had concerns that the discipline from the safety matter in issue remained on his record. This fact could arguably cause him prejudice under the progressive discipline principle.

[19] Algoma replied that forcing its main witness and advisor to attend, when the mixup was not his fault, would cause significant financial hardship, given that he had already made plans and commitments to take his family on vacation outside Canada.

III - Analysis and Decision

[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.

[24] The Board understands Mr. Frayling's frustration in having to wait longer for a resolution of his complaint. The Board attempted to provide an earlier hearing date than originally scheduled in the hope of resolving the matter efficiently. A late adjournment request also impacts the Board's ability to deal with its other cases. Had this request been raised on a timely basis, the Board could have used the dates to hear other pending cases.

[25] Nonetheless, the Board has decided to grant Algoma's adjournment request for several reasons.

[26] First of all, while the adjournment request came virtually on the eve of the hearing, it was a first request. There is no suggestion in this case that Algoma is attempting to drag its feet on this matter. Indeed, Ms. Cavé has suggested that the hearing dates still be used to explore settlement.

[27] Secondly, errors can occur. Algoma was frank with the Board that notice of the earlier March hearing, despite being received in December, did not get forwarded to its advisor and main witness. In the interim, this person had made arrangements for a family vacation outside Canada. Algoma only realized the problem after the Board conducted its March 15 CMC.

[28] Thirdly, the prejudice to Algoma, which will present its evidence first, would be greater than that to Mr. Frayling. Mr. Frayling is working. This is not a case of a terminated employee waiting to have a reinstatement case heard. While Mr. Frayling is prejudiced somewhat from a delay, it does not amount to the same level of prejudice that Algoma would suffer if it were obliged to proceed on March 31-April 1, 2010.

[29] The Board's decision might have been otherwise if this had not been a first adjournment request. The Board trusts the error in scheduling Algoma's witness is an isolated event.

[30] Algoma undertook to make itself available in the short term to have this complaint heard. As a result, Algoma will provide to Mr. Frayling forthwith its available dates over the next four (4) months to have this complaint heard. This step must be completed by **April 1, 2010**. Mr. Frayling will choose all the dates proposed that are convenient for him and advise the Board by **April 8, 2010**.

[31] The Board will then attempt to accommodate one of the differing date options.

[32] In the interim, Ms. Zawadowsky will continue her mediation efforts. Those discussions remain privileged and will not be disclosed to the panel, other than advising whether or not a formal hearing will still be required.

[33] For the reasons set out above, the Board grants Algoma's adjournment request, with the conditions as described.

Graham J. Clarke
Vice-Chairperson