Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Syndicat des travailleuses et travailleurs de Coach Canada - CSN,

applicant,

and

Trentway-Wagar Inc. *and* 3329003 Canada Inc.,

employers,

and

Amalgamated Transit Union, Local 1624,

interested party.

Board File: 27814-C
Neutral Citation: 2010 CIRB 550
November 16, 2010

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and Daniel Charbonneau, Members. A hearing was held in Montréal on June 8-10, 2010 and September 16, 2010.

Appearances

Mr. Daniel Charest and Ms. Isabelle Lanson, for the Syndicat des travailleuses et travailleurs de Coach Canada - CSN;
Ms. Louise Baillargeon and Mr. Philippe-André Tessier, for Trentway-Wagar Inc. and 3229003 Canada Inc.;
Ms. Beverley Burns and Ms. Cynthia Watson, for Amalgamated Transit Union, Local 1624.

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

I–Introduction

[1] This decision concerns the date a sale of business occurred under the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*). A quick chronological review of matters involving the parties will provide the necessary context.

[2] On June 22, 2009, the Syndicat des travailleuses et travailleurs de Coach Canada - CSN (CSN) applied for certification for a bargaining unit at 3329003 Canada Inc. (332).

[3] The Board certified the CSN on October 14, 2009 (file no. 27582-C, order 9727-U).

[4] On June 10, 2010, the Federal Court of Appeal dismissed a judicial review application brought by the Amalgamated Transit Union, Local 1624 (ATU) which had contested the Board's certification order: *Amalgamated Transit Union, Local 1624* v. *Syndicat des travailleuses et travailleurs de Coach Canada - CSN*, 2010 FCA 154.

[5] While considering the CSN's certification application, the Board also received on July 8, 2009 an application for a declaration of single employer (file no. 27623-C) from Trentway-Wagar Inc. (TWI) and 332.

[6] On November 9, 2009, the CSN filed an application for a declaration of a sale of business involving 332 and TWI (file no. 27814-C).

[7] For ease of reference only, these reasons will describe the employer as TWI. The parties agreed the transaction between TWI and 332 constituted a sale of business, but differed on when the sale occurred for the purposes of the *Code*. TWI, supported by the ATU, argued that the sale of business between TWI and 332 took place before the CSN's June 22, 2009 certification application. They alleged that the date of the sale of business prevented the Board from certifying the CSN.

[8] The CSN argued that the sale of business between TWI and 332 took place after its June 22, 2009 certification application and suggested the July 8, 2009 Agreement of Purchase and Sale (Agreement) established the proper date for any sale of business declaration.

[9] The Board held four days of hearings in Montréal for the sale of business application. It also dealt with the single employer declaration file and an unfair labour practice complaint. The parties resolved the latter two files during the course of the hearing.

[10] For the reasons which follow, the Board has found that a sale of business took place after the filing of the CSN's certification application.

II–Facts

[11] Coach Canada is a widely known brand name used over time by various related corporate entities to carry out an interprovincial bus transportation undertaking.

[12] One of the corporate entities, TWI, has existed for decades. Mr. Jim Devlin (Mr. Devlin) was its one-time owner and has been its President for several decades.

[13] In 1996, Mr. Devlin and his fellow owners sold TWI to Coach USA. However, Mr. Devlin continued to operate the company as its hands-on President. TWI has its head office in Peterborough, Ontario.

[14] In 1997, Coach USA also bought Autocar Connaisseur (Autocar) which was a Montréal-based bus transportation company operating charter, airport and sightseeing services.

[15] The evidence demonstrated that Mr. Devlin has been a key problem-solver when different crises arose with the Montréal operations of what was originally Autocar.

A–First crisis, 1997-1998

[16] Coach USA, which relied heavily upon Mr. Devlin's Canadian expertise, first asked him to intervene personally in the operations of Autocar in the 1997-1998 time period. Mr. Devlin removed the long-term owner of Autocar, who Coach USA had initially kept in place following its purchase of the business. There was a fear that the deteriorating situation at Autocar might cause the provincial authorities to suspend its operating licenses.

[17] Mr. Devlin testified about the various undertakings they had to give to the provincial authorities so that Autocar could continue to operate.

[18] Mr. Devlin appointed Ms. Patricia Diamente (Ms. Diamente) to run the Autocar operation, which she did successfully from 1998 until her departure in 2002.

[19] In 1999, Stagecoach Group, located in Scotland, purchased Coach USA and its assets, but nothing from that purchase is material to the instant decision.

B–Second crisis, 2007

[20] Following Ms. Diamente leaving Autocar, Mr. Giacomo de Franscesco (Mr. de Franscesco) took over as general manager. He ran Autocar with almost total autonomy.

[21] In 2007, serious balance sheet difficulties at Autocar forced Mr. Devlin to intervene for a second time.

[22] A partial corporate reorganization resulted from this second intervention. Autocar had significant balance sheet losses combined with some serious safety issues associated with its operating licenses. TWI merged with Autocar in order to take advantage of the balance sheet losses.

[23] However, prior to that merger, Autocar had transferred its employees, assets and operating licenses to 332. This transaction protected TWI from having its safety record tarnished by that of Autocar.

C–Third crisis: May 28, 2009

[24] Rumours of alleged mismanagement in Montréal arose in the winter of 2009. Those allegations included:

i) favouritism involving assignments being handed out based on personal relationships;
ii) family members of the general manager being on the payroll even though they did no work; and
iii) the misappropriation of large amounts of money belonging to 332.

[25] These matters are currently before the courts. The Board does not need to describe them in any greater detail.

[26] This situation in May 2009 required Mr. Devlin and his TWI management team to intervene to deal with yet another crisis.

[27] Several members of the TWI management team, situated in Peterborough, came to Montréal and took over the operations. They hired Garda Security not only to escort the general manager off the premises, but also to interview employees. The Board heard a significant amount of evidence about the alleged irregularities in the Montréal operation.

[28] The Board also heard that the Montréal operations had always been treated quite differently from those in other geographic locations. Whereas Peterborough controlled almost all aspects of its

divisions, such as those in Kingston and Toronto, the Montréal general manager generally had free rein to operate. 332 ’s services involved sightseeing services and airport shuttles.

[29] Mr. Devlin described how the Peterborough managers started to run the Montréal operation and searched for a new Montréal-based general manager.

[30] TWI, supported by the ATU, argued that a sale of business took place as of May 28, 2009 when Mr. Devlin and his team took control of the Montréal operation.

[31] On July 8, 2009, TWI and 332 entered into their Agreement. TWI agreed to purchase all of the assets of 332. According to article 4 of the Agreement, the “effective date” of the transaction was July 8, 2009 and was subject to the eventual transfer of the “transportation system” (operating authorities and plates).

[32] The Board heard that 332 as a corporate entity no longer has any employees, but continues to exist since it is pursuing the former general manager for the allegedly misappropriated funds.

[33] The Board also heard evidence that the employees on 332’ s payroll were moved over to TWI at different times.

[34] While the clerical staff was moved to TWI’s payroll in or about June, 2009, the drivers were not moved over until after the bus operating licenses were effectively transferred.

[35] TWI started using 332’s licenses as of October 1, 2009, though the provincial authorities had authorized the transfer a few days earlier.

III–Issue

[36] TWI, supported by the ATU, argued that a sale of business took place on May 28, 2009. Mr. Devlin was categoric that he fully intended on that specific date for Montréal’s operations to be fully controlled by TWI, as was the case with other operating divisions. TWI argued that this factual

situation nullified the CSN's certification application for 332.

[37] The CSN argued that, while a sale of business can take place prior to all of the conditions in the corporate transaction closing, there was no evidence that any sale had taken place involving TWI and 332 prior to the CSN's June 22, 2009 certification application.

[38] Therefore, the issue for the Board to decide in this case can be stated succinctly as:

> Did a sale of business between TWI and 332 take place before or after the CSN's June 22, 2009 certification application?

IV–Analysis and Decision

[39] The parties agreed that the Board is not bound to accept the actual date of the corporate transaction as the effective date of a sale of business for purposes of the *Code*. The Board examines substance over form.

[40] Where the parties differed, however, was in applying the Board's jurisprudence to the current situation.

[41] The Board has the authority to determine the effective date of the sale:

> [4] The power to determine the effective date of a sale is the necessary and inevitable concomitant of the power to determine that such a sale has taken place. In this connection the Court notes that the "sale" defined in s. 44 of the *Code* is not that of the Quebec *Civil Code* any more than that of the *Sale of Goods Act* in the common law provinces: on the contrary, the statutory definition is very broad and takes in any transfer or other form of disposition of a business. The effective date of such a disposition may well be very different as a matter of fact from that on which the legally binding agreements enforcing it were concluded. The formal date of a contract is clearly not the decisive factor for the purposes of the *Code* and the Board properly considered substance rather than form.
>
> (*Inter-Canadien1991 Inc.* v. *Conseil canadien des relations du travail et al.,* (1994) 178 N.R. 356 (F.C.A.))

[42] The Board has decided that a preliminary written agreement, essentially evidence of a valid offer and subsequent acceptance, can constitute the date of the sale, even if the agreement is later modified on several occasions:

> On March 1, 1991, Regional made a joint proposal to Corporation Intair Inc. and Lignes aériennes Inter-Québec. This proposal, contained in a document of some twenty pages, began with the following paragraph:
>
> "This letter, **upon acceptance**, constitutes an agreement between Canadian Regional Airlines Ltd. ('Regional'), Corporation Intair Inc. ('Intair') and Lignes Aériennes Inter-Quebec Inc. ('Inter-Quebec') with respect to the sale and purchase of certain assets or, alternatively the shares, of Inter-Quebec, **upon the following terms and subject to the following conditions**: ...
>
> (document no. 40A); emphasis added)"
>
> Although this agreement was amended some fifteen times between March and June 1991, the above-quoted paragraph never was. Nor was the acceptance of the offer on March 4, 1991 by Intair and Inter-Québec.
>
> Some argue that a contract of sale was established immediately upon the acceptance of March 4, 1991 by Intair Group. Others, however, view this transaction as a conditional or term promise of sale within the meaning of the Civil Code. One thing is clear: it is a contract, the substance of which provides for the acquisition, in one form or another, of the so-called "scheduled" services of an airline known as Lignes Aériennes Intair. If the final form of the acquisition continued to be a matter of discussion between the parties and subject to a number of conditions, there was agreement on the acquisition per se.
>
> [*sic*]
>
> (*Intair Inc. et al.* (1993), 93 di 83 (CLRB no. 1042))

[43] In *Intair Inc. et al.*, *supra*, evidence existed of a binding corporate agreement, even though many details remained. In the current case, there was no evidence presented of any agreement between the corporate entities before the July 8, 2009 Agreement.

[44] The Board must balance rights given the purpose behind sale of business provisions:

> ... An employer's right to independently rearrange its business or eliminate itself as an employer must be balanced with the need to protect employees from sudden changes in their bargaining rights. If employees are assured of a continuity in their collective bargaining rights upon a sale, industrial strife may be avoided. The successor provisions have a two-fold purpose: to protect the trade union's right to bargain and to protect any subsisting collective agreement from termination upon the sale.
>
> (George Adams, *Canadian Labour Law*, 2nd ed. (Aurora: Canada Law Book Inc., 1993), page 8-1))

[45] The Board has decided that the facts do not demonstrate that a sale between TWI and 332 took place prior to June 22, 2009. There are several reasons for the Board arriving at this conclusion.

A–The relevance of past interventions

[46] In their arguments, all parties indicated that the Board can look at the history of the parties' actions when analyzing when a sale under the *Code* actually took place.

[47] On three separate occasions Mr. Devlin intervened in order to avoid the potential shut down of Montréal's operations.

[48] However, the history of these three interventions demonstrates that Mr. Devlin's salvaging of a crisis situation did not result in an immediate sale of business.

[49] When Mr. Devlin intervened in 1997-1998, no corporate change took place. Rather, an important management change improved the situation and convinced the provincial authorities not to suspend Autocar's operating licenses.

[50] In 2007, when Mr. Devlin intervened a second time, only a partial corporate reorganization took place. However, that corporate reorganization did not result in an immediate sale of all of 332's assets to TWI.

[51] Rather, the 2007 corporate reorganization took time and it was ultimately decided, after receiving appropriate professional advice, to amalgamate Autocar with TWI, but only so that TWI could take advantage of Autocar's significant balance sheet losses.

[52] Because TWI did not want to be impacted by Autocar's safety problems, the operating licenses, assets and employees were transferred to 332. The CSN's certification application sought to represent 332's employees.

[53] The Board cannot ignore that the previous crisis situations did not result in an instantaneous sale of business of the Montréal operations to TWI. The first situation resulted only in a management change. The second situation resulted in a corporate reorganization, but shielded TWI from being the actual corporate entity running the Montréal operations. That responsibility fell to 332, which continued to operate with a large amount of autonomy until May, 2009.

[54] TWI and the ATU argued that the third intervention was different and that the sale of business took place immediately on May 28, 2009 when Mr. Devlin and his team took over the Montréal operations. However, other than Mr. Devlin stating what his intention was, there was no other evidence, and certainly no offer and acceptance as had existed in *Intair Inc.*, *supra*, that on May 28, 2009 a sale of business from 332 to TWI occurred.

[55] As with the earlier intervention situations, the Board is of the view that the corporate consequences arising from the third intervention took shape only over a period of time.

B–TWI's pleadings

[56] Support for the Board's conclusion that the ultimate result of the May 28, 2009 intervention only developed over time is demonstrated by TWI's own pleadings in this case. For example, TWI never filed a sale of business application with the Board. Rather, the CSN filed the current sale of business application on November 9, 2009, in response to bargaining difficulties following its certification.

[57] Instead, on July 8, 2009, the same date as the Agreement, TWI filed a single employer declaration and argued that TWI and 332 constituted a single employer for the purposes of the *Code*.

[58] While common control is an element for the request for a single employer declaration, it does not by itself demonstrate that a sale of business has already taken place.

[59] Indeed, a single employer declaration requires, under the Board's case law, the existence of at least two federal employers with employees: *Viterra Inc*., 2009 CIRB 442. If a sale of business had taken place on May 28, 2009, as TWI and the ATU argued, there would have been but one employer thereafter.

C–Corporate transactions

[60] While the Board agrees that the Agreement does not necessarily determine the exact date of the sale for purposes of the *Code*, it remains relevant that TWI and 332 clearly established between themselves an "effective date" of July 8, 2009. That effective date was, however, "subject to eventual transfer of the transportation system which is comprised of the operating authorities and replating of the equipment": article 4.

[61] Moreover, it would appear to the Board that calculating the value of the transaction, as expressed in the Agreement, would not have been something that was instantaneously achieved on May 28, 2009. Rather, it would have been evaluated and finalized over time with the assistance of expert advisors.

[62] TWI and its parent, Coach USA, decided to structure the bussing operation using different corporate vehicles, notably Autocar and 332. The Board does not suggest that the use of these corporate vehicles is in any way inappropriate. Indeed, a corporate transaction designed to allow one corporation to take advantage of another's operating losses, but not necessarily taking on all of its liabilities, is a part of strategic planning.

[63] However, in a sale of business situation, where corporations have decided to structure themselves in certain ways, then a change of that corporate structure will not be effected, for the purposes of the *Code*, simply by one person expressing the opinion that the change of control took place on May 28, 2009. Rather, in such situations involving the use of interrelated corporations, the Board will give greater weight to the later corporate restructuring.

[64] TWI accepted for years that the Montréal operations would be run very independently. TWI can change this situation, but the Board needs evidence, beyond the simple expression of one person's opinion, when determining the effective date of the sale of business.

D–The need to balance different parties' rights

[65] The case law put before the Board described the need to balance the rights of the parties. Sale of business provisions were added to the *Code* to protect collective bargaining rights.

[66] The Board will not nullify the CSN's certification based solely on an employer's opinion that a July 2009 corporate transaction only confirmed what had already occurred on May 28, 2009.

[67] The Board will weigh that position, but will balance the rights of all parties, including the rights of employees to decide whether to apply for certification at 332.

[68] Other than nullifying the CSN's certification, the Board heard no other reason put forward why the sale of business must have occurred on May 28, 2009, some seven weeks prior to the date of the Agreement.

V–Conclusion

[69] The Board confirms that a sale of business took place in this case, but it did not crystallize prior to June 22, 2009. The CSN was at all times entitled to seek certification.

[70] The Board is satisfied that the sale of business in this case took place on July 8, 2009, even though some conditions were only later satisfied. TWI became responsible for 332's *Code* obligations.

[71]The parties asked the Board, if it decided this case in favour of a sale of business occurring after June 22, 2009, to review the existing bargaining units at TWI pursuant to sections 18.1 and 45 of the *Code*.

[72] The Board grants the parties 90 days from the date of this decision to discuss the two bargaining units in question, one belonging to the ATU and the other to the CSN. Section 18.1(2) requires the Board to provide the parties with an opportunity to agree on appropriate bargaining units following a sale of business.

[73] If the parties are unable to come to an agreement, or if the Board is not satisfied with the agreement the parties submit to it (section 18.1(3)), then the Board will hear further argument with regard to the structure of the existing bargaining units.

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

Graham J. Clarke
Vice-Chairperson

André Lecavalier
Member

Daniel Charbonneau
Member