Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Communications, Energy and Paperworkers Union of Canada,

applicant,

and

Shaw Communications Inc.,

respondent.

Board Files: 28493-C, 28510-C
Neutral Citation: **2011 CIRB 577**
April 6, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and David P. Olsen, Members.

Counsel of Record

Ms. Debra Burton and Mr. Daniel J. Rogers, for the Communications, Energy and Paperworkers Union of Canada;
Mr. Howard A. Levitt, for Shaw Communications Inc.

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

I–Background

[1] Section 16.1 of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine these complaints without an oral hearing.

[2] The Board has received two separate complaints, both of which will be dealt with in this decision.

[3] Each file contains a complaint from the Communications, Energy and Paperworkers Union of Canada (CEP) that Shaw Communications Inc. (Shaw) violated its duty to bargain in good faith as found in section 50(a) of the *Code*. The CEP also sought in one of the files a declaratory opinion from the Board under section 15.1(2) of the *Code*.

[4] The files were assigned to the current panel on February 25 and March 2, 2011, respectively.

[5] The Board has considered the parties' extensive submissions. The Board has not been convinced that it needs to issue a declaratory opinion. The Board further finds that Shaw has not violated section 50(a) of the *Code* with regard to negotiations for the Eastern Canada bargaining unit (Board file no. 28493-C).

[6] However, the Board finds that Shaw's position with regard to the two Alberta and British Columbia bargaining units (Board file no. 28510-C) is not consistent with its obligation to bargain in good faith. The Board accordingly finds a *Code* violation and directs Shaw to commence collective bargaining immediately.

[7] This decision sets out the Board's reasoning for the above conclusions and its remedy.

II–Facts

[8] As described in *Global Television Network Inc.*, 2008 CIRB 407 (RD 407), the Board recently reviewed the bargaining unit structure at Global Television (Global). It determined that a consolidation of those units should take place and that the following three geographic bargaining units would be appropriate: i) Eastern Canada; ii) Alberta; and iii) British Columbia.

[9] In file 28493-C, the CEP asked the Board to declare that there had been a sale of business between Global and Shaw, such that Shaw became the successor employer. Shaw has not contested this request. The sale of business request (file 28492-C) is not before the instant panel.

[10] The issues in these two files arise from the bargaining for renewed collective agreements.

a) File 28493-C (Eastern Canada Bargaining Unit)

[11] On December 9, 2010, the Board received the CEP's application, *inter alia*, for a declaratory opinion under section 15.1(2) of the *Code* with regard to the form of a collective agreement being proposed by Shaw and, in the alternative, a complaint under section 50(a) of the *Code*.

[12] Shaw served the CEP with notice to bargain for the Eastern Canada bargaining unit on November 5, 2010. There had been issues between the CEP and Global with regard to earlier bargaining, but those issues are not material to this decision.

[13] The difference in point of view between the CEP and Shaw can be summarized as follows. Shaw sought to negotiate a collective agreement that would have seven or eight new articles. That agreement would then have attached the pre-existing collective agreements from the separate bargaining units that the Board had merged to form the new Eastern Canada bargaining unit.

[14] The CEP objected to this structure. In its view, Shaw's proposal would not constitute a single collective agreement for the entire Eastern Canada bargaining unit. The CEP asked the Board to issue a declaratory opinion on the issue or, in the alternative, find Shaw in breach of section 50(a)

of the *Code*.

[15] Shaw argued that it had presented proposals which would amend the pre-existing collective agreements and create a single collective agreement. It wanted to append the earlier collective agreements to maintain the workplace status quo for those subjects not covered by the eight new proposed articles. The eight new articles covered: Intent, Bargaining Unit, Management Rights, Leave for Union Activities, No Work Stoppage - No Lockout, Grievance Procedure, Seniority and Jurisdiction.

[16] Shaw and the CEP exchanged their respective bargaining proposals.

[17] The parties attempted to negotiate in person on November 23, 2010 but then stopped due to their differences as set out above. During that meeting, Shaw amended its position to add a wage proposal and an article entitled "Article 9–All other Provisions" which dealt with the previous collective agreements.

[18] In late March, 2011, the parties advised the Board that the Minister of Labour has appointed a mediator to assist them under section 105 of the *Code*.

b) File 28510-C (Alberta and British Columbia Bargaining Units)

[19] The Board is also seized with a section 50(a) complaint from the CEP about collective bargaining for these two separate bargaining units that the Board created in RD 407.

[20] In its December 21, 2010 complaint, the CEP referenced the bargaining steps that had been taken for the Eastern Canada bargaining unit as set out above. It also described the November 8, 2010 notice to bargain that it had served on Shaw for the British Columbia and Alberta bargaining units.

[21] The CEP described its attempts to meet with Shaw to negotiate for new collective agreements covering the Alberta and British Columbia bargaining units. In the CEP's view, Shaw refused to meet due to the impasse that existed in their negotiations for the Eastern Canada bargaining unit.

[22] Shaw explained its position for not meeting on the basis that a meeting would serve no purpose until the Board had decided the CEP's bad faith bargaining complaint for the Eastern Canada bargaining unit. Shaw indicated that it would have comparable proposals for the British Columbia and Alberta bargaining units and argued that the CEP had already refused to bargain over the type of structure it had proposed for the Eastern Canada unit.

[23] Neither the CEP nor Shaw has provided the other with its opening set of bargaining proposals.

III–Analysis and Decision

[24] The parties provided the Board with detailed legal submissions. The applicable principles in this area are well known and do not need to be repeated at length.

[25] Section 15.1(2) of the *Code* gives the Board the discretion whether to issue a declaratory opinion:

> 15.1(2) The Board, on application by an employer or a trade union, may give declaratory opinions.

[26] Sections 49 and 50 establish the notice to bargain mechanism and the resulting collective bargaining obligations:

> 49.(1) Either party to a collective agreement may, within the period of four months immediately preceding the date of expiration of the term of the collective agreement, or within the longer period that may be provided for in the collective agreement, by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement.
>
> (2) Where a collective agreement provides that any provision of the collective agreement may be revised during the term of the collective agreement, a party entitled to do so by the collective agreement may, by notice, require the other party to commence collective bargaining for the purpose of revising the provision.

50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
(ii) make every reasonable effort to enter into a collective agreement; and

(b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

(emphasis added)

[27] Unless they agree otherwise, parties are obliged to meet within, at the most, 20 days of the section 49 notice to commence collective bargaining. This obligation does not end after a single meeting. Rather, parties are obliged on a continuous basis to make "every reasonable effort to enter into a collective agreement".

[28] There can be only one collective agreement applicable to a bargaining unit. The definitions of bargaining unit and collective agreement in section 3(1) of the *Code* read:

3. (1) In this Part,
...
"bargaining unit" means a unit
(a) determined by the Board to be appropriate for collective bargaining, or
(b) to which a collective agreement applies;
...
"collective agreement" means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters;

[29] The content of the collective agreement is left up to the parties and their respective ability to convince the other to agree with their proposals. The *Code* provides for various mechanisms to assist the parties' negotiations, ranging from conciliation and mediation up to and including strikes and lockouts.

a) Eastern Canada Unit

[30] Shaw did not violate the *Code* with its initial proposal for a single collective agreement for the Eastern Canada bargaining unit, but with geographic-specific provisions based on where the employees actually worked. Collective agreements often have provisions that are not common to all employees. For example, while bargaining unit seniority would be the norm, some collective agreements have classification-specific seniority.

[31] The Board's conclusion that Shaw did not violate the *Code* with its initial proposal in no way suggests that the CEP must accept it, or even like it. The CEP is free to put forward its own proposals.

[32] The parties must then continue negotiating from those initial positions. The parties can access the *Code*'s various collective bargaining mechanisms up to and including, if all statutory conditions are met, strikes and lockouts. However, doing nothing because of disagreement with a party's opening position is not an option under the *Code*.

[33] Given this conclusion, the CEP's request for a declaratory opinion is academic and will not be addressed.

b) Alberta and British Columbia Units

[34] The Board has decided that Shaw's decision not to meet with the CEP for the Alberta and British Columbia bargaining units constitutes a technical violation of section 50(a) of the *Code*. A party cannot refuse to negotiate other collective agreements on the basis that a similar situation is currently the subject of a Board complaint. Indeed, the Board has often said that the obligation to bargain continues, even during strikes or lockouts and in other situations: *Jean-Claude Harrison et al.* (1983), 53 di 85; and 4 CLRBR (NS) 258 (CLRB no. 417), at pages 99-100.

[35] In this case, there may have been an impasse once Shaw put forward its position. But there would have also been an obligation to continue discussions with the goal of finding some common ground on which the parties could agree. The parties could also have recourse to the *Code*'s mechanisms for resolving collective bargaining challenges.

[36] The Board therefore orders Shaw to provide its initial bargaining proposal to the CEP for the Alberta and British Columbia units. The CEP shall do likewise, given the lack of any exchange of proposals to date. The parties will then make every reasonable effort to negotiate a collective agreement, as required by the *Code*.

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David P. Olsen
Member