Canada Industrial Relations Board Conseil canadien des relations industrielles

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# Reasons for decision

British Columbia Maritime Employers Association,

*applicant,*

and

International Longshore and Warehouse Union, Local 500,

*respondent.*

Board File: 28669-C
Neutral Citation: **2011 CIRB 578**
April 7, 2011

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–Industrial Relations)* (the *Code*). A hearing was held by way of videoconference on March 29, 2011.

**Representatives of Record**

Mr. Israel Chafetz, Q.C., Counsel for the British Columbia Maritime Employers Association;
Mr. Craig Bavis, Counsel for the International Longshore and Warehouse Union, Local 500.

## I–Nature of the Application

[1] On March 25, 2011, the Board received an application from the British Columbia Maritime Employers Association (BCMEA) and its member stevedoring companies for a declaration of illegal strike under section 91 of the *Code*.

[2] The BCMEA alleged that the International Longshore and Warehouse Union, Local 500 (ILWU) had declared or authorized an illegal strike against BCMEA members effective March 26, 2011.

[3] The ILWU responded to the application on March 28, 2011 and argued, *inter alia*, that the Board should exercise its discretion to defer the matter to arbitration. In its view, the parties differed about their rights and obligations under their collective agreement, including whether article 21.05 dealing with "Uninterrupted Operations" applied to the loading of grain by way of feeder hole.

[4] The BCMEA filed its reply on the morning of March 29, 2011. The Board, after reviewing the pleadings, conducted a videohearing on the afternoon of March 29, 2011. Shortly before the hearing began, the Board advised the parties that it would first hear submissions on the ILWU's preliminary argument that the matter should be deferred to arbitration.

[5] After hearing the parties on the preliminary matter, the Board advised the parties orally that it had been persuaded to defer the matter to arbitration. This decision sets out the Board's reasoning.

## II–Facts and Parties' Positions

[6] The BCMEA and the ILWU are parties to a collective agreement which expired on March 31, 2010. The continuation article in that agreement has kept its provisions in effect.

[7] The parties' dispute arises from differing interpretations of their collective agreement concerning feeder hole loading, as well as the scope of a 2003 Memorandum of Agreement (MOA).

[8] Grain is usually loaded directly into the holds of vessels through fully open hatches. However, during inclement weather, this method results in the grain getting wet and spoiling. As a result, when it rains, ships are loaded using "feeder holes" located on the top of vessel hatches.

[9] The BCMEA argued that feeder hole loading is safe and has been the subject of two different engineering studies. Moreover, it referred to comments from Transport Canada about the feeder hole loading practice.

[10] The ILWU argued the practice could be dangerous, due to the possibility of grain dust igniting and exploding.

[11] On March 15, 2011, Mr. Jack Vogt, Manager, Labour Relations at the BCMEA, wrote to the ILWU Vice-President, Mr. Mike Rondpré, about a conversation they had had. Mr. Vogt's letter began:

> As we discussed this morning, employees do not have the right to turn down feeder hole jobs as this is a violation of the collective agreement and Canada labour [*sic*] Code. You indicated that employees "*have the right to turn down feeder hole work if they feel it is unsafe*". As you know HRSD has ruled on this issue already and have cleared employers to continue to pour through feeder holes.

[12] Mr. Vogt's letter put the ILWU on notice that if any of its members started to "opt out" of feeder hole work, that would be viewed as a concerted work refusal and damages might be claimed.

[13] On March 17, 2011, Mr. Rondpré responded to Mr. Vogt and advised that ILWU members had the right to turn down such work on safety grounds and, moreover, that the ILWU did not accept that feeder hole loading was subject to the collective agreement's "Uninterrupted Operations" provision at article 21.05:

> Wheat-rated workers have had the option of refusing such work and clearly there are some workers that do not feel that this job is safe - they have refused the work and taken other jobs. If, by your direction, Despatch changes this rule and does not allow these workers the right to turn down this work that they feel endangers their health or safety, without penalty, then these same workers will likely refuse under Article 7.03 (the right to refuse work that they believe to be unsafe, etc.).

> In respect to your comments about the Membership passing motions, please be advised that this is the administration of a Trade Union that you are speaking about and it is you that is attempting to change the rule regarding the feeder hole jobs. Workers with wheat ratings have been turning down these jobs on safety grounds since these jobs have been despatched, which correlates with Article 7.03. It was your memo of yesterday that changes the way that Despatchers deal with this issue, which, as you have pointed out, is contrary to our Collective Agreement.
>
> Furthermore, please be advised that as per 21.05 of the Collective Agreement, there is no agreement in place regarding running these new feeder hole jobs as uninterrupted operations. Such would be necessary for work to continue through coffee breaks and meal periods. As such, I am informing you that the Union will not continue working this job as uninterrupted after March 25, 2011, unless we come to some agreement as prescribed by 21.05.
>
> [sic]

[14] On March 21, 2011, Mr. Vogt replied to Mr. Rondpré with his interpretation of when employees could refuse feeder hole loading and argued that feeder hole loading had long been subject to article 21.05:

> It is the Association's position that employees do not have the right to turn down feeder hole jobs and that such refusals would be deemed a concerted work stoppage and a violation of both the Collective Agreement and Canada Labour Code. My memo to the BCMEA Dispatchers did not change anything but rather reinforced the current dispatch practice. Our Dispatch Department has reaffirmed that the current dispatch practice does not allow employees to turn down feeder hole jobs. The expectation is that employees who plug in for work accept available jobs, report to work and refrain from any illegal job action.
>
> I would also like to address your comment about employees who feel that this work "*endangers their health and safety will likely refuse under Article 7.03*". This comment is troubling given the fact that Transport Canada has ruled on this issue and determined that it is safe to pour through feeder holes and that you recently signed an agreement that says, "*the BCMEA and ILWU agree that the practice of loading grain through feeder holes as detailed in the current work procedures, as attached, has been ruled to be a safe work practice.. ...*". [*sic*]
>
> Employees can only refuse work when they believe that to perform the work under particular circumstances would endanger their health and safety. It is then the obligation of the employee to identify the specific safety concerns that they believe constitutes a danger. In this case, pouring through feeder holes has already been ruled on, therefore employees must comply. To do so otherwise would constitute a bad faith refusal and a violation of article 7.01, this is supported by industry jurisprudence.
>
> The union has an obligation to head off any likely disruption so we would expect that your members have been advised that loading grain through feeder holes has been ruled to be a safe work practice. In addition, I would again like to remind you that ILWU Local 500 Executives (you) signed off on a grain agreement. In this grain agreement the union has committed to communicate with their membership that loading grain through feeder holes as detailed in the current work procedures has been agreed to.

[15] The ILWU argued that the Board should defer the illegal strike application to arbitration given the differences that existed between the parties. In its view, the last paragraph in Mr. Rondpré's March 17, 2011 letter was not an indication of a concerted refusal to work. Rather, Mr. Rondpré suggested that article 21.05 did not apply to feeder hole loading and thus the collective agreement required the parties to negotiate that issue:

> 21.05 UNINTERRUPTED OPERATIONS:
>
> The Association has the right to establish and maintain uninterrupted operations on behalf of any Employer in areas where they are not presently in existence, i.e., no stopping of any operation for any reason including coffee breaks and/or meal periods, etc. The Association will advise the Union forty-five (45) days in advance of the implementation of any such uninterrupted operation(s) and discussion, if required, will take place at the Joint Industry Labour Relations Committee level. Where such operation(s) is established, the Association will ensure that each employee will receive a meal period and coffee breaks. Any dispute relative to the implementation of any uninterrupted operation(s) may be referred to the Industry Arbitrator for resolution.
>
> Once the matter has been referred to the Industry Arbitrator, the Union may elect to have the matter heard on the next available date, regardless of whether another matter has been scheduled for that date. If such occurs, all other cases before the Industry Arbitrator shall be moved back accordingly. The Party whose case was to have been next before the Industry Arbitrator may, at their option, elect to have their case submitted to the Alternate Industry Arbitrator. Cost for hearing any matter referred to the Industry Arbitrator under this section will be borne equally between the Parties.

[16] The ILWU also argued that the 2003 MOA was never intended to apply to feeder hole loading.

[17] The parties' comments in their correspondence about whether an ILWU member could turn down a feeder hole dispatch of safety grounds involved these articles of the collective agreement:

> 7.01 The Union agrees that during the term of this Agreement there will be no slowdown nor strike, stoppage of work, cessation of work, or refusal to work or to continue to work.
>
> ...
>
> 7.03 Unless an employee in good faith believes that to perform work under particular circumstances would endanger health or safety, the employee may not refuse to work. A question of health or safety arising on the job shall be investigated immediately and if not settled shall forthwith be dealt with by a representative of the Union and a representative of the Association who shall endeavour to settle the question. If no settlement is reached, either Party may refer the question to the Arbitrator for a Summary Disposition or decision as provided under Article 6 of this Agreement. The Union pledges in good faith that the provisions of this Section 7.03 will not be used as a means to circumvent the provisions of Section 7.01 of this Article.

[18] The ILWU advised the Board that its collective agreement with the BCMEA provided for both Job Arbitrators and Industry Arbitrators. These arbitrators were generally available on short notice, and can issue decisions in short time frames.

[19] The ILWU had concerns that a Board order could limit employees' rights to raise safety concerns under article 7.03. It argued the parties had already agreed that a Job Arbitrator would have jurisdiction under article 7.03 to deal quickly with any refusal.

[20] Instead, the ILWU suggested the Board could defer deciding the matter and establish tight time limits within which the parties would arbitrate their differences.

[21] The BCMEA argued that it required redress for a clear and unequivocal notice from the ILWU that it no longer intended to apply the "uninterrupted work" provision to feeder hole loading after March 25, 2011. Given this clear notice from the ILWU, the BCMEA asked the Board to issue a prospective order. It argued the Board did not have to wait until damages started occurring before issuing an order.

[22] The BCMEA argued that any safety issues with feeder hole loading had been dealt with by two different engineering reports and by Transport Canada. The real reason for the dispute arose when it advised the ILWU that any members who refused feeder hole loading dispatches would be disciplined.

[23] The BCMEA referred the Board to the well-known arbitral principle of "obey now, grieve later". When the ILWU did not follow that principle, but instead made a unilateral change to a longstanding practice, the BCMEA argued it had no choice but to seek an illegal strike declaration.

[24] The BCMEA also advised the Board that the parties negotiated article 21.05 before the 2003 MOA, with the implication that feeder hole loading had therefore always been subject to the "Uninterrupted Operations" provision.

[25] In reply, the ILWU noted that the parties' positions confirmed there were clear differences of opinion about how to interpret the collective agreement. Those differences required an arbitrator to resolve them rather than the Board.

[26] At the conclusion of argument, and after a short deliberation, the Board advised the parties orally of its decision:

> The Board has been persuaded to defer hearing this matter pursuant to section 16(*l*.1) of the *Code*.
>
> Certain issues in dispute between the parties clearly involve the interpretation of the collective agreement. The Board will defer so that that process can occur.
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> However, this file is only deferred; it is not dismissed. If circumstances require, the Board will not hesitate to deal with this application and, after hearing relevant evidence and the parties' arguments, will intervene, if appropriate.

## III–Analysis and Decision

[27] Section 91 of the *Code* states:

> 91.(1) Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful.
>
> (2) Where an employer applies to the Board under subsection (1) for a declaration that a strike was, is or would be unlawful, the Board may, after affording the trade union or employees referred to in subsection (1) an opportunity to make representations on the application, make such a declaration and, if the employer so requests, may make an order
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> > (a) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;
> >
> > (b) enjoining any employee from participating in the strike;
> >
> > (c) requiring any employee who is participating in the strike to perform the duties of their employment; and
>
> (d) requiring any trade union, of which any employee with respect to whom an order is made under paragraph (b) or (c) is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraphs (b) or (c) to any employee to whom it applies.

[28] The Board agrees with the BCMEA that an illegal strike declaration can be prospective. In

*British Columbia Maritime Employers Association*, 2007 CIRB 397, the Board issued an illegal strike declaration even though damage had not yet occurred:

> [93] We conclude that the BCMEA's members will have no identified employees with security clearances by the Implementation Date. The Board does not need to hear extensive evidence and cross-examination in order to find that that situation will restrict or limit the BCMEA members' output.
>
> [94] While the application of the Board's previous decision in *Maritime Employers' Association*, *supra*, to the facts of the instant case is sufficient for disposition, we also found the decision issued by the Ontario Labour Relations Board (OLRB) in *Toronto District School Board*, [2003] OLRB Rep. January/February 138, helpful since it dealt with a case where the effects of a concerted refusal would only be experienced at a future time.
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> [95] In *Toronto District School Board*, *supra*, the employer had altered a policy it had regarding Positions of Responsibility (POR). Part of this change would do away with the job title "Department Head."
>
> [96] The Ontario Secondary School Teachers Federation (OSSTF) objected to the employer's new model and instructed its members in writing to boycott the process.
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> [97] The result was that teachers did not apply for the PORs. The employer argued that its programs and its schools would be disrupted as a result.
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> [98] The OLRB concluded an unlawful strike had occurred:
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> > 25. ...The Federation points out that classes will still be taught and programs will continue uninterrupted even if the board is unable to commence its new POR system. That may be so, but the classes will not be taught and the programs will not continue in exactly the manner envisaged by the board. A failure by the board to put in place its new POR system will have some, albeit limited, impact on the manner in which school programs are delivered, and on the manner in which schools are organized. Leaving aside any question of the board's entitlement to introduce the new POR system in the manner it has, for the purposes of disposing of the limited question I am asked to determine whether, any interference, however partial, with the operation of the school programs is contemplated in the definition of "strike" in the Education Act. By requiring its members not to apply for the new POR positions which have been posted, I find that the Federation intends to limit or interfere with the functioning of the board's school programs and schools.
> > (*Toronto District School Board*, *supra*, page 144)
>
> [99] The OLRB rejected the argument that the employer's concerns were at best speculative:
>
> > 26. ...The impact of the Federation's boycott is affecting the board's organizational arrangements now and any relief to which the board may be entitled is warranted forthwith.
> > (*Toronto District School Board*, *supra*, page 145)
>
> [100] It is our view that the ILWU's advice to members not to complete the application for the security clearance is an identical situation, leaving aside the Validity Questions, to the refusal to log in, in *Maritime Employers' Association*, *supra*, and to the refusal to apply for POR positions in *Toronto District School Board*, *supra*.

[29] The *Code* allows the Board to issue an illegal strike declaration before the damages start to

accrue. The ILWU, however, argued that the Board should defer hearing this application given the availability of arbitration.

[30] Section 16 (*l*.1) of the *Code* states:

> 16. The Board has, in relation to any proceeding before it, power
>
> ...
>
> (*l*.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution;

[31] In *Trevor William Emile Rees*, 2010 CIRB 499 (RD 499), the Board commented on its power to defer deciding a matter. RD 499 involved a duty of fair representation complaint which asked for essentially the same remedy that was concurrently being sought from a labour arbitrator:

> [16] Section 60(*l*.1) of the *Code* allows an arbitrator to extend the time limits in the parties' grievance and arbitration procedure:
>
> > 60.(*l*.1) The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.
>
> [17] On the same date that section 60(*l*.1) was added to the *Code*, the Legislator also added section 16(*l*.1):
>
> > 16. The Board has, in relation to any proceeding before it, power
> >
> > ...
> >
> > (*l*.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution.
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> [18] Section 16 (*l*.1) does not authorize the Board to dismiss Mr. Rees' complaint. In this respect, it differs significantly from section 98(3) of the *Code*:
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> > 98.(3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.
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> [19] Section 16(*l*.1) allows the Board to put its matter on hold while another possibly more appropriate labour relations proceeding takes place.
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> [20] The Legislator added section 16(*l*.1) for just this type of case. Mr. Rees' discharge grievance is proceeding before an arbitrator. The arbitrator has the authority under section 60(*l*.1) of the *Code* to

> consider whether to extend the collective agreement's time limits and hear the merits of Mr. Rees' grievance.
>
> [21] The Board prefers not to preempt the arbitrator. More importantly, while the arbitrator will consider the simple question of whether to extend time limits, the case before the Board is more complex. Stated succinctly, this case involves a determination whether a bargaining agent's failure to observe a collective agreement time limit constitutes a violation of the duty of fair representation.
>
> [22] The Board would likely require oral submissions on that issue since its case law does not hold that every error a trade union makes necessarily constitutes a violation of the duty of fair representation. The Board does not hold trade unions to a standard of perfection.
>
> [23] Rather than start a process that could end up academic or moot, and given that the Board's hearing might not conclude before the anticipated arbitration date, the Board prefers to defer deciding the DFR question and allow the arbitrator to decide whether to extend the time limit for Mr. Rees' grievance under section 60(*l*.1) of the *Code*.

[32] The situation involving the BCMEA and the ILWU is similar, given their differing interpretations of the collective agreement.

[33] The BCMEA clearly believes that the ILWU's recent interpretations of the collective agreement are untenable. In its view, feeder hole loading is governed by article 21.05 and certain decisions have confirmed that this practice is not dangerous for the purposes of article 7.03.

[34] The Board in this instance was persuaded that the matters separating the parties can be resolved quickly under the collective agreement. They have established an expedited arbitration system to serve their particular needs in the Port of Vancouver.

[35] While the Board was tempted to accept the ILWU's offer to set a strict time limit for arbitration on these matters, it prefers not to preempt the arbitrator from being the master of his or her procedure. The Board nonetheless relied on the ILWU's representations about the speed with which decisions can be issued by either Job or Industry Arbitrators on these matters.

[36] At the time of the hearing, there had been no rain since March 25, 2011 and thus no need for feeder hole loading. The BCMEA had concerns about what would happen when it did in fact rain, given that grain loading was almost continuous at the port.

[37] The Board, if necessary, and only if satisfied that an arbitrator cannot deal with it, will consider

any significant factual changes that might occur in this file. The matter is deferred only in favour of arbitration; it is not dismissed.

[38] The Board trusts the parties will work out their differences quickly under their collective agreement and will advise when, and if, these matters have been finally resolved.

**IV–Conclusion**

[39] For the reasons set out herein, the Board has been persuaded that the differences between the BCMEA and the ILWU result mainly from their differing views over the collective agreement and ancillary documents.

[40] This illegal strike application will accordingly be deferred under section 16(l.1) of the *Code*, so that the matter can be resolved under the collective agreement.

Graham J. Clarke
Vice-Chairperson