Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW–Canada),

applicant,

and

Air Canada; Sky Regional Airlines Inc.,

employers,

and

Canadian Union of Public Employees; International Association of Machinists and Aerospace Workers; Air Canada Pilots Association,

intervenors.

Board File: 28841-C
Neutral Citation: 2012 CIRB **624**
January 25, 2012

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

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations*) (*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 make this interim decision without an oral hearing.

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

Parties' Representatives of Record

Mr. Lewis Gottheil, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW–Canada);
Mr. Douglas Gilbert, for Air Canada;
Mr. John-Paul Alexandrowicz, for Sky Regional Airlines Inc.;
Mr. Dave Steele, for the Canadian Union of Public Employees;
Ms. Amanda Pask, for the International Association of Machinists and Aerospace Workers;
Mr. Steven H. Waller, for the Air Canada Pilots Association.

I–Nature of the Application

[1] The Board has received three separate, but similar, applications concerning the relationship between Air Canada and Sky Regional Airlines Inc. (Sky), the latter an entity operating out of the Billy Bishop Toronto City Airport (YTZ).

[2] Three bargaining agents at Air Canada, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW–Canada) (CAW), the Canadian Union of Public Employees (CUPE) and the Air Canada Pilots Association (ACPA), have all filed applications asking the Board for single employer and sale of business declarations.

[3] The CAW, CUPE, ACPA, as well as a fourth Air Canada bargaining agent, the International Association of Machinists and Aerospace Workers (IAMAW), have also filed related grievances under provisions in their respective collective agreements. Arbitrations for the CAW and ACPA grievances have already commenced.

[4] In *Air Canada*, 2011 CIRB LD 2654, the Board decided to deal with the three applications separately and chronologically by filing date, starting first with that of the CAW. The Board granted intervenor status to CUPE, ACPA and the IAMAW for the CAW's application.
[5] Air Canada and Sky requested, under section 16(*l*.1) of the *Code*, that the Board defer hearing the CAW's application while the parties engaged in arbitration.

[6] The Board established a timetable to allow the parties and Intervenors to provide legal submissions on the deferral request. Pleadings for this issue closed on November 8, 2011.

[7] For the reasons which follow, the Board has decided to defer hearing the CAW's application given the ongoing arbitration. The Board will monitor its decision to defer as events unfold in other fora.

II–Facts

[8] On December 9, 2010, the CAW filed a grievance under its collective agreement with Air Canada alleging that Air Canada's relationship with Sky resulted in an improper contracting out of bargaining unit work.

[9] The Intervenors have similarly filed grievances:

> i) ACPA has filed two grievances, the first on April 30, 2010 and the second on May 2, 2011;
> ii) the IAMAW grieved on May 24, 2011, though that grievance is currently on hold during collective bargaining negotiations; and
> iii) CUPE filed two grievances on July 20 and 21, 2011 respectively. Neither grievance has been scheduled for arbitration.

[10] The various grievances are not identical, but rather focus on the specific obligations found in each separate collective agreement.

[11] On July 8, 2011, the Board received from the CAW its application requesting declarations under *Code* sections 35 (single employer) and 44 (sale of business).

[12] The CAW asked the Board to examine the business relationship between Air Canada and Sky and to declare that Air Canada and Sky constituted a single employer under the *Code*.

[13] If the Board were to issue that single employer declaration, then the CAW asked that its certification order no. 8011-U be amended to include any Sky employees performing the functions that fell within the scope of its bargaining unit.

[14] In the alternative, the CAW argued that a sale of business had taken place and therefore Sky was bound by the relevant provisions of its collective agreement with Air Canada.

[15] The CAW and Air Canada engaged arbitrator Michel Picher for the contracting out grievance. Arbitrator Picher has held two hearing days on October 7 and December 20, 2011. The Board understands that the Picher arbitration will continue on the following dates: February 6–7, 2012 and April 5, 2012.

[16] Air Canada and ACPA retained arbitrator Kevin Burkett to hear the April 30, 2010 grievance. That grievance alleged that only Air Canada pilots can fly Q400 aircraft (the type used by Sky), on behalf of Air Canada. The arbitration between Air Canada and ACPA completed formal evidence on December 16, 2011, with written final argument scheduled to be completed by late January, 2012.

[17] The Board understands the CUPE and IAMAW grievances have no arbitration dates scheduled.

[18] This is the context in which the Board examined the request to defer its proceedings.

III–Analysis and Decision

A–Parties' and Intervenors' Positions

[19] Section 16(*l*.1), added to the *Code* in 1999, gave the Board the authority to defer deciding a matter in certain circumstances:

> 16. The Board has, in relation to any proceeding before it, power
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> ...

(*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;

[20] Air Canada argued that the ongoing arbitrations could resolve the pending matters before the Board. For example, in the CAW's case, Arbitrator Picher will examine whether certain contested work being done by Sky falls within the Air Canada and CAW collective agreement. That decision could eliminate any need to hold a potentially long and costly hearing.

[21] Air Canada urged the Board to take a "wait and see" approach and apply the principle of "judicial economy". Sky took a similar position in its written submission.

[22] The CAW disagreed and emphasized that the issues before Arbitrator Picher and the Board were separate and distinct. While an arbitrator interprets the parties' collective agreement, the Board examines whether the *Code* impacts a corporate relationship. The CAW emphasized the issues are different and should be dealt with without delay.

[23] The CAW further argued any remedy issued by Arbitrator Picher would not address the legal issues raised by its application to the Board.

[24] The CAW reminded the Board that, in the past, it had decided to refuse to issue a stay of proceedings merely due to a concurrent arbitration: *Reuters Information Services (Canada) Limited and Starfish Systems Inc.* (1995), 99 di 64 (CLRB no. 1138).

[25] The IAMAW also argued that arbitration will not determine the specific matters covered by sections 35 and 44 of the *Code*. However, it took no position on Air Canada's request for a purely temporal deferral of the Board's proceeding in the CAW's application. The IAMAW similarly referred to the principle of judicial economy.

[26] ACPA took no position on whether the Board should apply section 16(*l*.1) to defer hearing the CAW's application. Counsel for ACPA reminded the Board that it has the discretion to defer if the

matter "could" be resolved by arbitration. There was accordingly no need now for the Board to determine if the arbitration "will" resolve the matter.

[27] CUPE requested that the Board not defer to arbitration since Arbitrator Picher would have no jurisdiction to consider or decide the merits of the CAW's single employer arguments or those related to a sale of business. Given this fact, CUPE suggested, *inter alia*, that the Board's current proceeding could not become moot, regardless of the merits of any arbitration decisions.

B–Section 16(*l*.1)

[28] The Board is satisfied that the Legislator did not add section 16(*l*.1) to the *Code* solely for situations where an arbitrator and the Board exercise an identical jurisdiction over a particular matter. Indeed, given the Supreme Court of Canada's recent decision in *British Columbia (Workers' Compensation)* v. *Figliola*, 2011 SCC 52, the Board's authority to determine the exact same question already decided in another forum might be problematic.

[29] The wording of section 16(*l*.1) suggests that the Board, in considering how best to allocate its finite resources, could defer hearing and deciding a matter, when arbitration or another process might resolve the parties' dispute.

[30] The Board agrees with counsel for ACPA that it does not need to determine whether arbitration will finally resolve the dispute. Rather, if there is a potential that it will, then the Board may consider a deferral.

[31] In *Rees*, 2010 CIRB 499 (*Rees*), the Board had before it a duty of fair representation (DFR) complaint alleging that a bargaining agent had violated the *Code* by failing to file a grievance within the time limits set out in the collective agreement. The Board noted that the *Code* granted the arbitrator to whom the grievance had been referred the discretion to extend grievance and arbitration time limits.

[32] In the Board's view, that situation made it appropriate to defer deciding the DFR complaint, given that arbitration might resolve the matter, even though the questions in the proceeding were not the same:

> [16] Section 60(1.1) of the *Code* allows an arbitrator to extend the time limits in the parties' grievance and arbitration procedure:
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> > 60 (1.1) 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.
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> [17] On the same date that section 60(l.1) was added to the *Code*, the Legislator also added section 16(*l*.1):
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> > 16. The Board has, in relation to any proceeding before it, power
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> > ...
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> > (*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.
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> [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.
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> [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.
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> [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*.

[33] In *Rees*, the issue before the arbitrator was different from that before the Board. The arbitrator would examine whether to exercise the statutory discretion at section 60(1.1) of the *Code* to extend

the disputed time limits. The Board, in examining a DFR complaint, would decide a different question entirely. While a Board remedy could include sending an out of time grievance to arbitration, the issue in the DFR complaint would be whether the trade union, in missing a time limit, had acted arbitrarily.

[34] Since the Board's jurisprudence is clear that it does not hold trade unions to a standard of perfection, the Board's hearing would have examined whether the evidence demonstrated that the trade union had been grossly negligent in its handling of Mr. Rees' grievance.

[35] It was accordingly more practical, and efficient, to defer and allow the arbitrator to determine whether to hear the grievance, despite the missed time limit.

[36] Similarly, in *Mitchell*, 2010 CIRB 559, the Board deferred hearing a DFR complaint that involved the issue of alleged age discrimination and a concurrent complaint to the Canadian Human Rights Commission. The Board decided to defer its process, in part to avoid a multiplicity of proceedings occurring concurrently on the same or similar facts:

> [12] The Board has exercised its power to defer in a case where a decision on the timeliness of a complainant's grievance was pending before an arbitrator: *Trevor William Emile Rees*, 2010 CIRB 499. That DFR complaint had requested, as a remedy, that the time limits in the collective agreement be waived and the grievance be taken to arbitration.
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> [13] One of the purposes of adding section 16(*l*.1) to the *Code* was to limit a multiplicity of proceedings occurring concurrently on the same or similar facts.
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> [14] In this case, the Board is satisfied that it should defer deciding Mr. Mitchell's DFR complaint. The concurrent human rights route he has decided to pursue constitutes an appropriate "alternate method of resolution". This expression in section 16(*l*.1) is intended to be broad as confirmed by the French version of section 16(*l*.1):
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> > ...ou par tout autre mode de règlement.
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> [15] There are several reasons motivating the Board's decision to defer this complaint.
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> [16] The Board sees the possibility of significant overlap between Mr. Mitchell's DFR complaint and his human rights complaint. While it is true that the Board's focus on the CAW's process could be different from the exact legal question Mr. Mitchell has raised in his human rights complaint, an analysis of the term "discriminatory" in section 37 would still be essential.
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> [17] In addition, the issue of mandatory retirement in the federal jurisdiction is currently before other administrative tribunals and courts.
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> [18] Even if the Board were to decide Mr. Mitchell's complaint, there is a virtual certainty that the Board's conclusion would be added to the other pending matters before the courts.

> [19] Thus, while the Board might be able to hold a hearing and make a determination on the DFR complaint before the completion of Mr. Mitchell's human rights complaint, the final resolution of the matter would most likely not result from the Board's decision. Rather, any resolution would have to wait for decisions from the courts or legislative changes from Parliament.
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> [20] The Board is also of the view that Mr. Mitchell's DFR complaint might become moot once other cases contesting mandatory retirement have been determined.
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> [21] As a result, the Board believes it is appropriate to defer deciding this complaint. The matter will be re-listed depending on the developments in Mr. Mitchell's human rights complaint, decisions from the courts and for future legislative changes.

[37] Thus, the Board in considering the application of section 16(*l*.1) does not focus on whether the same question is before the arbitrator. Rather, it examines whether that other proceeding could resolve the parties' dispute.

C–Application of Section 16(*l*.1)

[38] The Board's exercise of the discretion under section 16(*l*.1) requires it to evaluate the labour relations context in which the parties find themselves. The CAW and all the Intervenors, except CUPE, originally filed grievances before bringing any application to the Board. The CAW's December 9, 2010 grievance significantly predated its July 8, 2011 application to the Board. ACPA had filed its first grievance on April 30, 2010, well over a year before the CAW filed the first application to the Board.

[39] This does suggest the parties and most Intervenors made the strategic decision to deal initially with the Air Canada and Sky issue under their collective agreements.

[40] If the Board were to continue to proceed, there could be significant duplication between hearing this matter while the arbitration continues before Arbitrator Picher. Since the CAW is asking Arbitrator Picher to find that Air Canada contracted out work to Sky in violation of the collective agreement, that decision could resolve the matter. Even in the absence of a complete resolution, the preexisting arbitral process could reduce the need for oral evidence before the Board.

[41] Parties rarely spend their finite resources on merely academic questions. It is clear that the Board may be required to make a decision under sections 35 and 44 of the *Code*. But if the CAW received satisfactory remedies at arbitration, then the odds of it pursuing the application before the Board decline.

[42] The Board understands the concern that deferring a case will only result in increased delay for the parties. However, any issue of undue delay can be monitored depending on developments at arbitration.

[43] The Board notes, as described earlier, that these experienced parties are cooperating to ensure an efficient arbitration process. For example, the ACPA arbitration before Arbitrator Burkett completed its evidence in three days (December 1, 2 and 16, 2011). Written final argument will be completed by late January, 2012.

[44] Similarly, the CAW and Air Canada have an aggressive hearing schedule before Arbitrator Picher, despite no doubt challenges in finding mutual dates for the arbitrator, legal counsel and their clients.

[45] The Board is also satisfied that a deferral will give the parties more availability to plead their cases at arbitration. Evidently, the more work the Board requires the parties to do leading up to its hearing, including appearing at a Board hearing, the less time the parties have available to focus on their arbitrations.

[46] For all of these reasons, the Board has been persuaded to defer hearing the CAW's application while arbitration continues. Since the Board previously decided to hear the three applications in chronological order, this potentially delays the hearing of all the applications. Nonetheless, the potential benefit arising from the ongoing arbitration processes satisfies the Board that the matter may be resolved and that deferral is the appropriate course to take at this stage of the process.

[47] For all of the above reasons, the Board defers hearing the CAW's application while a related matter is being dealt with at arbitration.

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David P. Olsen
Member