Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

International Association of Machinists and Aerospace Workers, Lodge No. 99,

complainant,

and

BHP Billiton Canada Inc. *and* Finning (Canada), A Division of Finning International Inc.,

respondents.

Board File: 29186-C
Neutral Citation: 2012 CIRB **634**
March 9, 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.

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

Representatives of Record

Mr. Patrick Nugent, for the International Association of Machinists and Aerospace Workers, Lodge No. 99;
Mr. Kim G. Thorne, for BHP Billiton Canada Inc.;
Mr. Hugh J. D. McPhail, Q.C., for Finning (Canada), A Division of Finning International Inc.

I–Nature of the Complaint

[1] 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 decide this complaint without an oral hearing.

[2] On December 21, 2011, the International Association of Machinists and Aerospace Workers, Lodge No. 99 (IAMAW) filed an unfair labour practice (ULP) complaint alleging that BHP Billiton Canada Inc. (BHP) and Finning (Canada), A Division of Finning International Inc. (Finning) had violated section 94(1)(*a*) of the *Code*:

> 94. (1) No employer or person acting on behalf of an employer shall
>
> > (*a*) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union.

[3] The IAMAW and Finning have a collective agreement. Finning is a contractor at BHP's Ekati Diamond Mine in the Northwest Territories.

[4] The IAMAW's complaint arises out of a classification grievance which has been heard, in part, by arbitrator Allen Ponak. At the end of formal evidence, the IAMAW asked Arbitrator Ponak to "take a view" of the Ekati mine in order to appreciate fully the classification grievance. The grievance concerned the classification of certain individuals who worked underground at the mine.

[5] Arbitrator Ponak ruled the Code did not give him the authority to order the taking of a view. Moreover, Arbitrator Ponak noted that BHP, the owner of the Ekati mine property, was not a party to the collective agreement or to the arbitration.

[6] Arbitrator Ponak did express the opinion that, if the *Code* had granted him the authority, he would have ordered the taking of a view. In his opinion, the taking of a view would have been justified, and helpful, in determining the merits of the grievance before him.

[7] The IAMAW alleged that Finning, as well as BHP, contravened the *Code* by not consenting to the request for the taking of a view. The IAMAW argued the refusal to consent constituted, *inter alia*, interference with the representation of the employees in its bargaining unit.

[8] By way of remedy, the IAMAW included a request that the Board order BHP to allow Arbitrator Ponak and the parties before him, including Finning, access to its Ekati mine in order to conduct a site visit:

> **9. SPECIFIC REMEDIES REQUESTED**
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> (a) A declaration that the BHP and Finning have violated s. 94(1)(a) of the Code;
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> (b) An order directing BHP and Finning to cease and desist in violating the Code;
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> (c) An order directing BHP to allow the parties and the arbitration board such access to the Ekati site as is necessary to complete the site visit contemplated by the board's decision of November 21, 2011;
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> (d) An order requiring BHP and Finning to pay the Union's legal costs of making this complaint and these applications;
>
> (e) Such further and other remedies as are just and reasonable in the circumstances.
>
> [sic]

[9] The Board has considered the parties' legal submissions and has decided to dismiss the IAMAW's complaint for the reasons which follow.

II–Facts

[10] The parties did not dispute the essential facts in this case.

[11] BHP has no collective bargaining relationship with the IAMAW. Finning provides certain services under a contract with BHP, including the servicing of the mechanical equipment used at the Ekati mine.

[12] Finning has a collective agreement with the IAMAW.

[13] The Ekati mine is not a public site. Tourists and visitors are not welcome or permitted. BHP alleged that even in its collective agreement relationship with the Public Service Alliance of Canada, it has not allowed a view to be taken as part of any arbitration proceeding.

[14] Certain extracts from Arbitrator Ponak's November 20, 2011 decision provide helpful context for the IAMAW's complaint.

[15] Arbitrator Ponak described the grievance before him (page 2):

> ...The Union grievance alleges that underground and above ground work are sufficiently different to constitute two distinct classifications and that the failure of the Employer to recognize that underground and above ground work should be classified differently violates the collective agreement. The Employer disagreed with the Union that there should be a different classification for underground work.

[16] Arbitrator Ponak then described the IAMAW's application for him to take a view of the Ekati mine (page 2):

> At the arbitration hearing, after both parties had presented their evidence on the merits of the grievance, but before closing arguments, the Union made an application for the arbitrator to take a view of the mine. This application was opposed by the Employer. Both parties then provided oral arguments and case law in support of their respective positions on the application to take a view. This award deals exclusively with the application to take a view...

[17] Arbitrator Ponak found that the *Code* did not provide him with the power to order the taking of a view (page 17):

> Section 60(1)(a) confers certain powers on arbitrators that have also been granted to the Canada Industrial Relations Board (CIRB) in section 16 of the *Code*. Sections 16(a) to 16(p) enumerate a host of powers necessary for a labour board to carry out its statutory responsibilities. These powers range from administering oaths and solemn affirmations, to compelling the attendance of witnesses, to holding presentation votes. Section 16(h) empowers the CIRB to take a view - that is, "enter any premises of an employer where work is being done.... and view any work, machinery, appliances or articles.... respecting any matter that is before the Board".

> Section 60(1)(a) specifies four of the powers of the CIRB that are applicable to arbitrators - 16(a), (b), (c), and (f.1). These powers enable arbitrators to compel witnesses (a), administer oaths and solemn affirmations (b), receive evidence (c), and produce information and documents (f.1). Absent from the list of CIRB powers that also apply to arbitrators is the power to take a view set; 16(h) is not included in section 60(1)(a).
>
> This is a surprising omission given that the authority of arbitrators to require that a view be taken in appropriate circumstances has long been a customary part of the modern arbitration hearing process...
>
> [sic]

[18] While Arbitrator Ponak decided the *Code* did not grant him the power to order a view, he nonetheless analyzed whether, if he had that power, this might have been an appropriate case for the taking of a view (pages 18–19):

> I conclude that the ability to order a view is not within my power as an arbitrator under the *Canada Labour Code*. It is not in my discretion to re-write the *Canada Labour Code*, even I believed that it contained an inadvertent omission. Therefore, I have no choice but to deny the Union's application that I order a view to be taken of the Ekati mine. My hands are tied.
>
> Normally, a decision denying an application for lack of authority to grant it would end the matter and that is precisely what the Employer has strongly encouraged me to do in this case. In the Employer's view, there is no need to speculate as to what might have occurred if it was within my power to grant the application. The Union, in contrast, urged me to decide the merits of it application regardless of my conclusions on my power to order a view. It based its position on its belief that the absence of the statutory power of an arbitrator to order a view under the Canada Labour Code was inadvertent. The Union proposed, assuming its application succeeded on the merits, to take the matter before either the CIRB or an appropriate court.
>
> I am persuaded by the Union's argument in this case. I share the Union's view that the omission of the power of an arbitrator to order a view could well have been inadvertent, not deliberate. To not rule on the merits would foreclose the Union's opportunity to attempt to have a successful application for a view enforced through the CIRB or a court. I therefore turn to the merits of taking a view in the current case.
>
> [sic]

[19] Arbitrator Ponak also commented on the challenge of ordering a view for a non-party's (BHP) private property (page 22):

> For the above reasons, if I had the statutory power to do so, I would grant the Union's application to take a view.

> There is one final point to consider. Even if the Union is successful in convincing the CIRB or a court that I have the power to order a view, there still remains the question of whether such an order would be enforceable on a third party. BHP, not Finning, owns and operates the Ekati mine site. The Employer provided multiple authorities outlining the difficulties that can arise when an employer the party to a collective agreement is a contractor on a worksite owned by a third party. None of the Employer's authorities addressed this question directly. It is an issue that would need to be clarified if the Union succeeds in convincing the CIRB or a court that an arbitrator has the power under the *Canada Labour Board* to order the taking of a view and BHP declines to allow a visit.
>
> [sic]

[20] The IAMAW's January 20, 2012 Reply, which the Board only received on March 7, 2012, provides a useful summary of its position:

> It is the Union's position that by continuing to object to a view being taken at the Ekati mine, both Finning and BHP are interfering with the administration of a trade union and interfering with the representation of employees by a trade union. As we point out in our complaint, BHP regularly has visitors to the Ekati site. BHP acknowledges that it has visitors to the site, but states that those are only visitors whose presence at the site is "deemed by BHP to be in its interests are permitted at the site." However, neither BHP, nor Finning, have presented any reasonable argument why this arbitration Board, in carrying out its function of adjudicating disputes under the collective agreement, could not attend at the site or why such a visit would somehow be incompatible with the operation of BHP's business.
>
> Given the absence of any such justification, it is the Union's position that BHP and Finning are taking the position they are taking in order to thwart the fact-finding of the arbitrator and undermine the Union's ability to represent its members. This, in the Union's submission, is a violation of section 94(1)(a) of the Canada Code and should be of serious concern to the Board. BHP's position amounts to stating that even with the consent of the parties to an arbitration and the direction of the arbitrator, taking a view is not available in unionized work places on third party controlled sites where the third party does not also consent. Arbitrators do not make the decision to take a view lightly - it is only undertaken after the parties have satisfied the legal test for doing so. To completely deprive unions, employees and even employers of the possibility of an arbitrator taking a view at a third party site seriously undermines the quality of justice that can be administered under the Canada Code.
>
> [sic]

III–Analysis and Decision

[21] For ease of reference, we will reproduce section 94(1)(*a*) :

> 94. (1) No employer or person acting on behalf of an employer shall
>
> > (*a*) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union.

[22] The Board's predecessor, the Canada Labour Relations Board, aptly described the scope of section 94(1)(*a*) of the *Code* in *ATV New Brunswick Limited (CKCW-TV*), (1978), 29 di 23; and [1979] 3 Can LRBR 342 (CLRB no. 149):

> Section 184(1)(a) [now section 94(1)(a)] deals with the formation of a trade union, the administration of a trade union and the representation of employees by a trade union. In our view, this enumeration corresponds generally to the three basic functions embraced by this *Code* and are directed to the protection of these functions which are:
>
> "1. The formation of a union. This is the initial stage, and can be viewed as the first step towards collective bargaining. The trade union must have a recognized status.
>
> 2. The administration of the union. This is directed at the protection of the legal entity, and involves such matters as elections of officers, collecting of money, expenditure of this money, general meetings of the members, etc. in a word all internal matters of a trade union considered as a business. This is to assure that the employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arms length."
>
> ...
>
> "3. The representation of employees by a trade union. We are of opinion that 'representation' as used here deals mainly with collective bargaining. The main objective of 184(1)(a) is to protect the bargaining rights of the bargaining agent to negotiate collectively. It is because of this subsection that the employer cannot negotiate working conditions directly with his employees, either collectively or individually, without the permission of the union. It is a necessary corollary to protect the rights of the union given to it by section 136(1) of the *Code*."
>
> (pages 28-29; and 346-347)

[23] The IAMAW argued that Finning has violated section 94(1)(*a*) of the *Code* by contesting its request before Arbitrator Ponak to take a view of the Ekati mine. Similarly, the IAMAW alleged that BHP violated section 94(1)(*a*) by not consenting to its separate, independent request to permit the IAMAW, Finning and Arbitrator Ponak to take a view of the above-ground and underground portions of the Ekati mine.

[24] The Board has decided to dismiss the IAMAW complaint for three main reasons.

[25] Firstly, if the IAMAW believed that Arbitrator Ponak was wrong in his interpretation of his arbitral powers under the *Code*, then the proper recourse was judicial review. Secondly, the Board has no express jurisdiction to review arbitrators' decisions under the *Code*. Finally, the IAMAW has not convinced the Board that this dispute falls within the scope of section 94(1)(*a*) of the *Code*.

i) Avoiding a Multiplicity of Proceedings

[26] The Board in *Bell Mobility Inc.,* 2012 CIRB 626, analyzed recent decisions from the Supreme Court of Canada (SCC), in *British Columbia (Workers' Compensation Board)* v. *Figliola*, 2011 SCC 52 (*Figliola*), and the Federal Court of Appeal (FCA), in *Human Rights Commission* v. *Air Canada*, 2011 FCA 332. Those cases cautioned administrative tribunals against relitigating issues already decided by another tribunal:

> [11] The Supreme Court of Canada in *Figliola*, *supra*, held that, even if two tribunals had concurrent jurisdiction to decide the same human rights question, that question could be litigated only once. Fairness required the application of the principles of finality, the avoidance of multiplicity of proceedings and the protection for the integrity of the administration of justice to prevent a second hearing before a different tribunal on the same legal question:
>
> > [34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:
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> > > • It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
> > >
> > > • Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
> > >
> > > • The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
> > >
> > > • Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
> > >
> > > • Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).
> >
> > [35] These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.

> [36] Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.
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> (emphasis added)

[12] The Federal Court of Appeal in *Canadian Human Rights Commission* v. *Air Canada*, 2011 FCA 332 (*Air Canada*) recently applied the *Figliola* principle when it decided that one administrative tribunal should have stayed its proceeding after another administrative tribunal, with concurrent jurisdiction, had already decided the same human rights question:

> [28] Turning to the application of these principles to the Tribunal's decision, as in *Figliola* it may be said that the Tribunal was "complicit" in an attempt to collaterally appeal the merits of the Agency's decision and decision-making process. The Tribunal dismissed Air Canada's motion for a stay on technical grounds, without considering the unfairness inherent in serial forum shopping. The Tribunal failed to consider whether Mr. Morten should be allowed to ignore the review mechanisms provided in the Act and to instead use the Tribunal to relitigate essentially the same legal issue in an effort to obtain a more favourable result. It did not engage in the required analysis. Specifically, the Tribunal failed to consider that, before the Agency, Mr. Morten knew the case to be met and was afforded the opportunity to meet that case. Any concern on the part of Mr. Morten about the Agency's application of human rights principles ought to have been addressed through the redress provided under the Act for decisions of the Agency - particularly when Air Canada had offered to support an application for leave to appeal the Agency's decision.
>
> (emphasis added)

[13] The Federal Court of Appeal emphasized that the proper recourse against an unfavourable tribunal decision was by way of judicial review. The legal determination could not be litigated a second time before another administrative tribunal with concurrent jurisdiction.

[27] The principles reviewed in *Figliola* are clear. One tribunal should not allow a party to relitigate the merits of a decision already made by another tribunal having appropriate jurisdiction. While clothed as a ULP complaint, the IAMAW has essentially requested this Board to make the remedial decision that Arbitrator Ponak ruled he had no authority to make.

[28] The IAMAW's request to the Board is a collateral attack on Arbitrator Ponak's decision. This seems to be precisely the type of collateral attack on another tribunal's decision that the courts have suggested administrative tribunals avoid. The proper recourse for the IAMAW is judicial review of Arbitrator Ponak's decision.

ii) The CIRB's Jurisdiction over Labour Arbitrators

[29] In order to avoid any confusion about the extent of this Board's jurisdiction, it is clear the *Code* gives it no authority to review the merits of arbitrators' decisions.

[30] By contrast, in British Columbia, section 99 of the provincial *Labour Relations Code* (RSBC 1996) provides for that type of appeal to the British Columbia Labour Relations Board:

> 99 (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
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> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
>
> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.
>
> (2) An application to the board under subsection (1) must be made in accordance with the regulations.

[31] The *Code* gives the CIRB jurisdiction to decide various Part I–Industrial Relations *Code* matters, while arbitrators generally have an almost exclusive jurisdiction over issues involving parties' collective agreements.

[32] There are only a few *Code* areas where there may be some slight overlap in the jurisdictions of the Board and an arbitrator.

[33] For example, section 65 of the *Code* contemplates that certain determinations regarding the existence of a collective agreement, or the identity of the parties to a collective agreement, may be referred from an arbitration proceeding to the Board:

> 65.(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for determination.

> (2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

[34] Similarly, the *Code* gives the Board the discretion to refuse to hear certain ULP complaints, if it believes the matter could be determined by an arbitrator under the collective agreement:

> 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.

[35] The exercise of this power may require the Board to consider the provisions of a collective agreement.

[36] The existence of sections 65 and 98(3), which refer to the rare and peripheral involvement of the Board in arbitration matters, confirms that the CIRB has no appeal jurisdiction over an arbitrator's interpretations of the *Code* or collective agreements.

[37] Judicial review is the proper forum in which to question arbitrators' decisions.

iii) Scope of Section 94(1)(*a*)

[38] Even if the Board considered the merits of the IAMAW's ULP complaint, there is a difference between interference with the right to represent employees, which is protected by section 94(1)(*a*), and losing a legal argument before an arbitrator.

[39] An arbitrator's decision which is adverse to a party's legal argument does not mean that the winning party's position amounts to "interference in the representation of employees by a trade union".

[40] The fact an arbitrator listened to the parties' competing legal arguments and made an interim arbitral decision demonstrates their collective bargaining system is working. The IAMAW has also not shown that BHP's refusal to accept its independent request for the taking of a view amounts to interference. If Finning had no right to grant a view, then the Board fails to see how BHP, who was a stranger to the collective agreement and the arbitration, would have any obligation, unless the Legislator required it, to grant access to its private property.

[41] The IAMAW raised concerns about the limits on an arbitrator's power to order the taking of a view. That is a question for the Legislator, rather than for this Board.

IV–Conclusion

[42] In considering the principles set out, *inter alia*, in *Figliola*, *supra*, the Board is not the proper forum to contest an arbitrator's procedural decision.

[43] The Board does not sit in appeal of decisions made by labour arbitrators under the *Code*. Judicial review is the proper route to contest an arbitrator's legal decision.

[44] Even if the IAMAW could overcome the above two issues, the Board is satisfied that neither Finning nor BHP interfered with the IAMAW's representation rights under section 94(1)(*a*) of the *Code*. The question of taking a view was properly taken to an arbitrator who interpreted his powers. The rejection of a legal argument at arbitration does not morph into interference under section 94(1)(*a*) of the *Code* for the unsuccessful party.

[45] The Board dismisses the IAMAW's ULP.

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David P. Olsen
Member