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

Bell ExpressVu LP,

respondent.

Board File: 29534-C
Neutral Citation: 2012 CIRB **649**
July 13, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code* (*Part I–Industrial Relations*) (*Code*).

Counsel of Record

Ms. Melissa Kronick, counsel for the Communications, Energy and Paperworkers Union of Canada; Mr. Michael Smyth and Ms. Margaret Gavins, counsel for Bell ExpressVu LP.

[1] Section 16.1 of 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 parties' written representations, filed pursuant to section 92 of the *Code*, are sufficient to allow it to issue a decision without an oral hearing.

I–Nature of the Application

[2] On July 11, 2012, the Communications, Energy and Paperworkers Union of Canada (CEP) filed an application under section 92 of the *Code* asking the Board for a declaration of unlawful lockout against Bell ExpressVu LP (Bell).

[3] The CEP alleged that Bell engaged in an unlawful lockout when it prevented members of the bargaining unit ("CEP members") from continuing to work on its premises, or remotely, once it had provided a lockout notice under section 87.2(2) of the *Code*. Bell submitted that it remained at all times entitled to direct its workforce and that this included maintaining their pay and benefits, but relieving them of their corresponding obligation to provide services.

[4] While the CEP's application included references or allegations related to the *Code*'s unfair labour practice (ULP) provisions, the Board advised the parties that it would limit its focus to the unlawful lockout request in this expedited matter. The other allegations, including those already contained in file no. 29491-C, will be adjudicated under the Board's normal process.

[5] In the CEP's July 12, 2012 reply, it added significant particulars about alleged comments Bell managers made. This was partially in response to Bell's response. The Board understands why the CEP would add this material, though the Board is faced with only a short window before a lockout or strike is scheduled to start. One of the CEP's remedial requests was to oblige Bell to allow the CEP's members to return to work.

[6] The Board grappled with how to deal with the CEP's reply about alleged comments by Bell managers. One option was to deal with all issues related to the alleged unlawful lockout and the pending ULP complaints under the Board's normal process. However, after consideration, the Board decided the uncontested facts in the parties' representations were sufficient to convince it that an unlawful lockout had occurred. It was accordingly not necessary to consider the CEP's other, and no doubt contested, allegations, which may be examined at some time in the future.

[7] The CEP has satisfied the Board that Bell engaged in an unlawful lockout. As mentioned, the Board has relied only on the uncontested facts in the materials before it. In the special circumstances of this case, the Board's only immediate remedy will be the issuing of a declaration of unlawful lockout.

II–Facts

[8] On March 1, 2011, the Board certified the CEP (order no. 10009-U) to represent the following bargaining unit:

> all employees of Bell ExpressVu LP in its Bell TV Broadcasting Centre, **excluding** supervisors and those above the rank of supervisor, security, office, sales and clerical personnel.

[9] On April 4, 2011, the CEP sent Bell its Notice to Bargain.

[10] The CEP has already filed an unfair labour practice complaint (file no. 29491-C) in relation to the bargaining between the parties. The Board will deal with that complaint under its regular procedure.

[11] On July 10, 2012, the CEP held a vote of its membership on Bell's tentative collective agreement. The employees rejected Bell's offer.

[12] On July 10, 2012, the CEP sent Bell a 72-hour strike notice pursuant to section 87.2(1) of the *Code*. The strike was scheduled to start on "Saturday July 14, 2012 at 12:00 pm (noon)".

[13] Shortly thereafter, but still on July 10, 2012, Bell served the CEP with its lockout notice which indicated that a lockout would commence on "July 14, 2012 at 00:01 AM".

[14] It is noteworthy for the purposes of this decision that these parties have seemingly decided, as the *Code* entitles them to do, to escalate their current bargaining impasse to the next step of economic warfare. This is not a case where a bargaining agent alleges an employer started a lockout during the term of the collective agreement or during the statutory freeze.

[15] The dispute in this case involves events which are transpiring during the 72-hour notice leading to the start of a strike or lockout. Technically, while Bell served its notice after that of the CEP, Bell's lockout would start before the time in the CEP's strike notice, due to the difference in the amount of notice given. The *Code* only requires that "at least" 72 hours be provided.

[16] Bell has decided not to allow the CEP's members to work during the 72-hour notice period. In addition, as described in its response and the attachments thereto, Bell took away from the impacted employees various Bell owned items such as access cards; desk keys; companion phone (if any); company-provided mobile phones or Blackberry(s) (if any); and Bell credit cards (if any). It also deactivated employees' Internal network ID, VPN, and company email.

[17] The CEP contested Bell's decision not to allow its members to work during the countdown to the effective time of the lockout notice. Bell advised some CEP members on July 11, 2012 to leave work, or met others upon their arrival to send them home.

[18] Bell advised the Board that it could not risk compromising its system, including its Control Centre, during the 72-hour notice period. Bell's contingency plan, allegedly made in response to receipt of the CEP's strike notice, was not to allow the CEP's members to work during the 72-hour period, but to continue their remuneration.

[19] Bell argued it had the right to direct its employees when and where to work. In this case, Bell directed them not to work and accepted the obligation to continue to pay them.

III–Issue

[20] The above facts raise a single issue for the Board: Did Bell engage in an unlawful lockout when it prevented the CEP's members from working during the 72-hour lockout notice period?

IV–Relevant *Code* Provisions

[21] The *Code*'s definition for a lockout contains both an objective and subjective element:

> 3. (1) In this Part,
>
> ...
>
> "lockout" **includes** the closing of a place of employment, **a suspension of work** by an employer or a refusal by an employer to continue to employ a number of their employees, **done to compel** their employees, or to aid another employer to compel that other employer's employees, to agree to terms or conditions of employment;
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> (emphasis added)

[22] The description of actions which constitute a lockout is not exhaustive as confirmed by the word "includes". Unlike in the situation of a strike, the employer's action must also have the intent "to compel" employees to accept certain terms or conditions of employment.

[23] Section 87.2 of the *Code* sets out the requirements for strike and lockout notices, including when a party will be required to issue a new notice:

> 87.2 (1) Unless a lockout not prohibited by this Part has occurred, a trade union must give notice to the employer, at least seventy-two hours in advance, indicating the date on which a strike will occur, and must provide a copy of the notice to the Minister.
>
> (2) Unless a strike not prohibited by this Part has occurred, an employer must give notice to the trade union, at least seventy-two hours in advance, indicating the date on which a lockout will occur, and must provide a copy of the notice to the Minister.
>
> (3) Unless the parties agree otherwise in writing, where no strike or lockout occurs on the date indicated in a notice given pursuant to subsection (1) or (2), a new notice of at least seventy-two hours must be given by the trade union or the employer if they wish to initiate a strike or lockout.

[24] Section 92 of the *Code* sets out the Board's remedial powers when it receives an application for a declaration of unlawful lockout:

> 92. Where a trade union alleges that an employer has declared or caused or is about to declare or cause a lockout of employees in contravention of this Part, the trade union may apply to the Board for a declaration that the lockout was, is or would be unlawful and the Board may, **after affording the employer an opportunity to make representations on the application**, make such a declaration and, if the trade union so requests, may make an order

(*a*) enjoining the employer or any person acting on behalf of the employer from declaring or causing the lockout;

(*b*) requiring the employer or any person acting on behalf of the employer to discontinue the lockout and to permit any employee of the employer who was affected by the lockout to return to the duties of their employment; and

(*c*) requiring the employer forthwith to give notice of any order made against the employer under paragraph (*a*) or (*b*) to any employee who was affected, or would likely have been affected, by the lockout.

(emphasis added)

[25] As section 92 requires, the Board is obliged to provide the employer with "an opportunity to make representations". Unlike the situation which existed prior to the 1999 amendments to *Part I* of the *Code*, this does not oblige the Board to hold an oral hearing. Any decision whether to hold an oral hearing is made on a case-by-case basis.

[26] Unlawful strike or lockout applications fall under the Board's expedited process pursuant to section 14(*e*) of the *Canada Industrial Relations Board Regulations, 2001*:

14. An expedited process applies to the following matters:

...

(*e*) applications for declaration of unlawful strike or lockout made under sections 91 and 92 of the *Code*;

[27] Most unfair labour practice complaints are not covered by that special expedited process.

V–Analysis and Decision

[28] The parties' pleadings raised similar issues to those the Board considered in *Vidéotron Télécom Ltée*, 2002 CIRB 190 (*Vidéotron*). While the facts are not identical in every respect, the Board has not been persuaded at this time, and in the circumstances of this case, to depart from the reasoning set out therein.

i) Lockout: the objective element

[29] Bell argued that the objective element in the definition of a lockout was missing because there were no economic consequences for CEP members. They continued to be paid during the 72-hour period (which was still running during the drafting of this decision).

[30] In *Vidéotron*, *supra*, the Board was not convinced that an economic consequence for employees was a necessary requirement for the objective element:

> [60] While these two Ontario Labour Relations Board decisions both support the conclusion that an economic sanction on the employees, as a result of the employer's actions, can be a, or even the, compelling reason in establishing the objective element of the definition of lockout, they do not, in the present panel's opinion, support the unequivocal suggestion that the objective element cannot be established unless the employer's action or actions result in an economic sanction on the employees.
>
> [61] As stated above, the conclusion in [*Maritime Employers Association,* [2000] CIRB no. 77; 62 CLRBR (2d) 1; and 2001 CLLC 220-001], that without an economic sanction on the employees there could be no lockout, was obiter in any event. Such a finding was not necessary to the Board's final decision in that case. Having had the opportunity to consider a matter where there was no economic sanction on the employees, this panel finds that economic sanctions are not a prerequisite to establish the objective element of the definition of lockout. Taking into consideration all of the relevant facts submitted by the parties, as well as the wording of the definition of lock-out as it appears in the *Code*, the Board is convinced that the employer's action of paying the employees during the lockout notice period establishes the objective element of the *Code*'s definition of lockout.

[31] The Board is similarly satisfied that Bell's decision to suspend the work CEP members would otherwise have been performing during the 72-hour notice constitutes a suspension of work and is sufficient to meet the *Code*'s objective element.

ii) Lockout: the subjective element

[32] An employer's subjective intention is derived from assessing the circumstances. Just as in the case of unlawful strikes, the Board is almost always confronted with the position that either no concerted activity is taking place (for a strike) or that there is no intent to compel employees (for a lockout).

[33] Bell suggested it retained its right to direct its workforce, including providing time off with pay. The Board's predecessor, the Canada Labour Relations Board, dealt with a similar situation, but in a different context: *Cable TV Limited* (1979), 35 di 28; [1980] 2 Can LRBR 381; and 80 CLLC 16,019 (CLRB no. 188).

[34] Bell argued that its decision not to allow CEP members to work, but to continue to pay them, was devoid of any intent to induce or compel them to accept its proposed terms and conditions of employment. Rather, Bell suggested the evidence confirmed it intended only to ensure its operations continued to run smoothly during the 72-hour notice period.

[35] The Board in *Vidéotron, supra,* was faced with a similar argument:

> [63] In its written submissions and at the hearing, the employer submitted that the reason why it sent employees home with pay was to ensure that the equipment and installations remain functional and that the work atmosphere be maintained. The Board is not convinced that this was the real motive of the employer. In its written submissions and at the hearing, the employer did not provide any justification for its alleged concern that there was a real possibility that the employees, if permitted access to the premises during the notice period, would sabotage equipment. Unlike in [*GCIU Local 34-M* v. *Southam Inc.*, [2000] Alta. L.R.B.R. 325], where the employer submitted conclusive evidence of prior vandalism, in the present matter, nothing in the weeks preceding the lock-out indicated that something similar would happen.

[36] The Board is similarly not persuaded in the instant case. Bell's argument contains the underlying presumption that CEP members would engage in tortuous, or even criminal behaviour, if they continued to work during the *Code*'s mandatory 72-hour notice period. While the Board is not naive enough to think that negative events have never occurred when emotions are tense in the moments leading up to a strike or lockout, it nonetheless has the same difficulty it expressed in *Vidéotron, supra,* in making this type of presumption.

[37] This is a first collective agreement situation. The employees, on July 10, 2012, rejected a proposed collective agreement. After section 92 notices went out, Bell, without warning or any consultation, sent employees home, albeit with pay. In the Board's view, this occurred to put pressure on them to reconsider Bell's offer. This satisfies the subjective element the *Code* requires for a lockout.

[38] Since 1999, the *Code* requires a 72-hour notice period before a strike or lockout. The notice period maintains the status quo, but also raises the stakes between the parties. That notice period gives them a final deadline before which they may decide to compromise, finalize a collective agreement, and avoid the unpleasantness of a strike or lockout.

[39] Bell's unilateral action deprived CEP members of this 72-hour notice period and countdown.

[40] The Board receives numerous applications for unlawful strike declarations. In some of those cases, employers emphasize the importance of a trade union's 72-hour notice period in order to allow, *inter alia*, for an orderly shutdown or modification of operations. The *Code* requires a similar mutuality when it comes to a lockout.

[41] Had the *Code* wanted to allow for a waiver of the 72-hour notice of a lockout, through continued remuneration, the Legislator could have easily done so.

[42] The importance of work for employees extends beyond remuneration. In *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, the Supreme Court of Canada described the importance of work to individuals:

> [93] This unequal balance of power led the majority of the Court in [*Slaight Communications Inc*. v. *Davidson*, [1989] 1 S.C.R. 1038], to describe employees as a vulnerable group in society: see p. 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C.J. noted in Reference *Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368:
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> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.
>
> [94] Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. In [*"Aggravated Damages and the Employment Contract"* (1991), 55 Sask. L. Rev. 345.], Schai noted at p. 346 that, "[w]hen this change is involuntary, the extent of our 'personal dislocation' is even greater."

[43] Bell's actions, during the 72-hour notice period before a lawful lockout could commence, did not only deprive CEP's members of work. The Exhibits to its response describe how Bell deactivated employees' access cards, Internal network ID, VPN, and email. Bell also repossessed, where

applicable, employees' desk keys, companion phones, mobile phones or Blackberry(s) and Bell credit cards.

[44] Those actions, during a period when the *Code* mandates the maintenance of the status quo, further satisfy the Board that Bell intended to cause employees to rethink their decision to reject its offer.

[45] As in *Vidéotron, supra*, the Board is satisfied that the uncontested facts establish the necessary subjective element for a lockout.

iii) Validity of Bell's lockout notice

[46] As an alternative argument, Bell relied on *Vidéotron, supra*, as authority for the proposition that, even if an unlawful lockout had occurred, its original lockout notice remained valid.

[47] The Board, in *Vidéotron, supra*, did not invalidate the lockout notice, even if an unlawful lockout had also occurred:

> [69] While the Board is not prepared to state that an unlawful lockout caused by an employer in the period between the time that lockout notice is given and the time the notice takes effect would never affect the validity of the lockout notice, in the case presently before it, the reasons supporting the employer's actions were clear, notwithstanding the unlawful lockout, and the notice is, thus, valid. There was no indication by the union that it had reasons to believe that the lockout would not commence in accordance with the employer's notice. Accordingly, the lockout declared by the employer on April 30, 2002 at noon, pursuant to its April 27, 2002 notice, is a lawful lockout.

[48] In the circumstances of this case, since each party has given the other 72 hours notice of a strike or lockout, the Board is not persuaded to depart from this earlier reasoning.

[49] Bell's unlawful lockout during the 72-hour period has not, in the particular circumstances of this case, impacted the validity of its July 10, 2012 lockout notice.

VI–Order

[50] The Board has concluded that Bell engaged in an unlawful lockout when it prevented the CEP's members from attending work during the 72-hour notice period, despite continuing their remuneration.

[51] The Board's declaratory order is attached hereto (Order no. 690-NB).

[52] The Board reserves its jurisdiction to adjudicate the other matters raised in the CEP's application, including any allegations about alleged, but unproven, comments of Bell managers, along with the existing ULP matters raised in the companion file no. 29491-C.

Graham J. Clarke
Vice-Chairperson