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Reasons for decision

Amalgamated Transit Union, Local 1229,

complainant,

and

Acadian Coach Lines LP,

respondent.

Board File: 29065-C

Neutral Citation: 2012 CIRB **654**

August 16, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and David Olsen, Members. A hearing was held on February 7–9, 2012, May 23–24, 2012 and June 13–15, 2012, in Moncton, New Brunswick.

Appearances

Ms. Cynthia D. Watson, for the Amalgamated Transit Union, Local 1229;

Ms. Nancy Barteaux and Ms. Amy Bradbury, for Acadian Coach Lines LP.

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

I–Introduction

[1] On November 2, 2011, the Board received from the Amalgamated Transit Union, Local 1229 (ATU) an application for interim relief, as well as a complaint alleging various unfair labour practices (ULP).

[2] The issues arose from ongoing labour relations matters, including collective bargaining, between the ATU and Acadian Coach Lines LP (Acadian). Acadian operates an interprovincial bus service and is headquartered in Moncton, New Brunswick.

[3] The Board did not issue interim relief, in part due to a lengthy lockout at Acadian which took place from approximately December 2, 2011 to May 6, 2012.

[4] The broad scope of the Board’s initial February hearing changed after the lockout ended and the parties concluded a new collective agreement.

[5] While a complaint under section 50(a) of the *Code* alleging a violation of the duty to bargain in good faith had originally been filed, the parties advised the Board that that issue would no longer be pursued.

[6] The ATU also advised that it would not pursue its section 94(1)(a) allegations regarding certain notices given to employees as well as alleged captive audience meetings. The parties would instead focus on the ULP complaint related to Acadian’s termination of Mr. Glen Carr, the President of the ATU’s Local. The ATU did maintain its position that Acadian’s termination of Mr. Carr interfered with the administration of a trade union, contrary to section 94(1)(a) of the *Code*.

[7] This decision is therefore limited to Mr. Carr’s situation.

[8] The Board has concluded that Acadian did not meet its burden of demonstrating that Mr. Carr's union activities played no part in its decision to terminate his employment. The evidence suggested it was precisely Mr. Carr's manner of exercising his union duties which led to his termination. Similarly, the Board has concluded that Acadian's termination of Mr. Carr interfered in the ATU's legitimate activities as a trade union.

[9] These are the reasons for those conclusions.

II—Facts

[10] Mr. Carr is a bus driver. Acadian hired him in January, 2008. Approximately 6 to 7 months later, the ATU appointed Mr. Carr as its Secretary. He also assisted the ATU as a shop steward.

[11] The parties' previous three-year collective agreement had an expiration date of December 31, 2010. Mr. Carr had had some involvement at the tail end of negotiations for that earlier agreement. It was his view, for example, that the last minute involvement of a Ms. Judy Sheehan had allowed the parties to finalize that agreement. The relevance of this point will become clearer after the Board reviews the chronology of events.

[12] Mr. Carr later became the Local's President and, as of the end of the hearing, he had held that position for roughly two and a half years.

[13] From mid-May 2011 to October 24, 2011, Mr. Carr was not actively at work due to a work-related injury. Throughout this period, which included ongoing collective bargaining, he continued to perform his functions as the Local's President.

[14] During the hearing, both parties highlighted various events involving Mr. Carr which took place in the 2010–2011 time period.

a) 2010 Events

[15] In January, 2010, Groupe Orléans, based in Quebec, hired Ms. Nancy Krisko as its Vice-President, Human Resources. Among her responsibilities, she oversaw collective bargaining with approximately eleven (11) different trade union locals, including that of the ATU at Moncton-based Acadian.

[16] In March, 2010, Acadian had applied to New Brunswick's Energy and Utility Board (EUB) for significant changes to its bus routes. The EUB oversees the New Brunswick routes that Acadian must operate.

[17] Ms. Krisko, who was not cross-examined, explained that Acadian hoped to have significant changes approved which would help it address its ongoing operating losses. The EUB only gave a partial approval to the application which, Ms. Krisko indicated, resulted in a negative impact on Acadian's staffing. Acadian remained obliged to keep operating certain unprofitable routes.

[18] The ATU was a party to Acadian's original March, 2010 EUB application. The matter would cause tension later in October 2010, following Acadian's decision to file an amended application to the EUB.

[19] One of the ongoing issues in the parties' relationship arose from Mr. Carr's emails, which were sent to many, if not all, members of management, at both Acadian and its parent company, Groupe Orléans in Quebec. From Mr. Carr's perspective, he felt that issues were not getting resolved locally. He testified he wanted to ensure everyone was aware of these ongoing issues.

[20] Acadian found Mr. Carr's method of communicating disruptive. It preferred that Mr. Carr use the collective agreement's grievance procedure, if discussions with local management in Moncton did not resolve the issue.

[21] The parties met at a June 22, 2010 Labour-Management meeting to discuss the email issue and other matters.

[22] Acadian's minutes of the June 22, 2010 meeting summarized an introduction made by the new V.-P., Ms. Krisko, regarding what she hoped to achieve by improving labour relations and establishing a communication process going forward:

We have been aware of disrespectful and abusive communication lately including the number, content and tone of emails. Disciplinary action will be taken for any disrespectful behaviour, language and/or any kind of communication, including emails.

The communication between the company and the union must be structured, organised and respectful. We want to deal with every issues respectfully, efficiently and in a timely fashion way. We want to be proactive and improve our service to Acadian. When the union wishes to address an issue the company is asking to receive detailed and organized information to help assuring that we answer correctly and in a timely fashion.

Emails will be no longer accepted to resolve any labour relations issues. We propose to use the grievance form if issues have not been resolved verbally. For any issues related to drivers, John Richardson is the one to contact. For the grievance procedure, John Richardson will be responsible for the step 1 answer and for the step 2 answers John and Yvan Marcotte will be responsible to look at the situation and take the decision together.

We have reassure John Richardson's position and responsibilities among us. Today is a new day and we look forward. John Richardson is the supervisor, he is the reference point for any questions, issues related to drivers and is responsible to a assure follow ups and make decisions. John reports directly to Yvan Marcotte who is in charge of the department of operations. The dispatch team is responsible to apply the collective agreement for work assignments and will collaborate with John when an issue is brought to his attention. The other managers in the operation team have also employees to supervise but are also responsible for specific files:

- Yves Chassé: labour relations for Orleans Express;
- Eric Lessard: coordinate the training programs;
- Francine Murray: supervise the dispatch employees;

...

[sic]

(emphasis added)

[23] On July 5, 2010, Acadian sent Mr. Carr a letter expressing its general satisfaction with their June 22, 2010 discussions, but raised continued concerns about the latter's communications:

We must say that we were generally satisfied with the meeting held on June 22, 2010 where we have settled many outstanding issues. However, we must mention that since that meeting, our disappointment is getting higher, day after day.

Mr. Carr, both parties clearly committed at that meeting on a process to resolve any issues. It did not take more than a couple of days for you to act against our joint commitment. **I must send you this formal letter telling you the level of our disappointment and advising you that we have no other choice than reinforce the application of what was agreed on June 22, 2010.**

- **As agreed, you will not send any email anymore and will not accept or answer any emails from you or anyone else from now on in relation to labor issues. There is a formal process in our collective agreement to deal with issues, we are requesting that you follow it.**
- As agreed, we must emphasize the importance for you to provide details when you raise an issue. You agreed to provide such information on June 22, 2010 when we explained that would allow our team to find the information and provide an answer more efficiently and in a timely fashion.
- We also agreed in June 22, 2010 that you would communicate only with John Richardson and nobody else for subjects related to drivers. Again, we found out today that you asked Eric Lessard to send you time sheets to validate amounts paid to you (which raised another question since you already have those time sheets as you are the one completing and sending them to the Quebec office).
- **Mr. Carr, we are very serious when we make commitment and agree on items and processes. The only way we can be efficient and deliver on our commitments is for you to participate as agreed to the process in place.** The way it is done right now is creating more frustration and delays than we wish and moreover, it makes it impossible for the Company to manage our labor-relations issues the way it should be: efficiently, fairly in a timely fashion.

[sic]

(emphasis added)

[24] On August 9, 2010, Acadian issued a letter of discipline to Mr. Carr regarding two grievances he had filed by email, with copies to several members of Acadian's management. Those grievances had raised a seniority issue, as well as a concern about managers doing bargaining unit work:

Re: Letter of Discipline

It is, again, with great disappointment that I have received your 2 emails (see attached) this weekend.

First of all, it has become evident to us that you do not intend to follow the process we agreed upon on June 22, 2010. Part of this process agreed upon is to follow the grievance procedure and provide all the information required to investigate issues when they arise.

Related to your first email, the grievances will be dealt by your supervisor, as we reinforced with you at the last labour management meeting and if you are not satisfied with the answer, you will submit your grievance at second step. It will then be discussed at the next labour management meeting (please let me remind you that the date of such meeting has been postponed to September 2010, following your request).

As for your second email, again, let me remind you to follow the grievance procedure. As agreed on June 22, 2010, we will not deal with an email in lieu of the grievance procedure.

Secondly, and of even greater concern, is that we consider the tone and the content of these emails totally inappropriate, disrespectful and clearly insubordinate on your part.

John Richardson is the supervisor responsible for the driver's team. Therefore, you should discuss any problem related to drivers with him, as agreed on June 22, 2010. If John needs to work on any subjects or opportunities with other members of our team, he will do so. At a second level, as also discussed, Yvan Marcotte will decide what action he needs to take. **In your email dated August 7, 2011 (11h11), you violated all of the above, and you also threatened to take the issue to Mr. Langis, President of the Company on August 16, 2010, instead of respecting the process and the people in place to deal with the process.**

(emphasis added)

[25] On August 17, 2010, Acadian imposed a one-day suspension on Mr. Carr for being absent from work without permission:

Re: Letter of Discipline

Today you received a letter of discipline regarding your insubordinate behaviour directed at your Supervisor and other Managers of our company. Because you have been on vacation we were unable to deliver the letter to you until today and therefore we are not relying on same in issuing this discipline.

Last week (on Wednesday, August 11, 2010) you were advised by Dispatch that it could not approve a leave of absence request for Saturday, August 14, 2010. You were advised by Dispatch that it could not approve the request given it had no replacement for you and you were to call by Friday, August 13, 2010 for your assignment. On August 11, 2010, you replied by email to the Company that you would not be at work on Saturday 14, 2010 and you did not show up for work. Therefore, you were absent from work without permission.

...

Your behaviour is completely unacceptable. You are hereby suspended without pay for a period of one day on August 24, 2010.

[sic]

(emphasis added)

[26] Also on August 17, 2010, Mr. Carr received a second two-day suspension related to an alleged refusal to scan customer tickets. Each party described its position about this event. The Board does not act as an arbitrator in such matters, but refers to the incident merely for context:

Re: Letter of Discipline

Today you received a letter of discipline dated August 9, 2010 regarding your insubordinate behaviour directed at your Supervisor and other Managers of our company. Because you have been on vacation we were unable to deliver the letter to you until today and therefore we are not relying on same in issuing this discipline. You also received a letter of discipline dated August 17, 2010 regarding your unauthorized Leave of Absence. Because we have only given you that discipline today, we are also not relying on same to determine appropriate discipline in this matter.

It has come to our attention that you are refusing to follow the company's directive to scan tickets issued in Moncton. You have also advised other bargaining unit employees not to scan the tickets. The company has the right to require its employees to do this work and doing so does not violate any provision of the collective agreement. In your position as President of the Local, you are well aware of the "work now, grieve later" body of law with respect to such issues. If you, or other employees, disagree with the company's directive, the grievance process is available.

...

Your behaviour is completely unacceptable. You are hereby suspended without pay for a period of two days commencing August 31, 2010 and ending September 1st, 2010. ...

[sic]

(emphasis added)

[27] By letter dated August 24, 2010, Acadian and the ATU agreed to suspend implementing Mr. Carr's discipline for being absent without leave and related to the ticket scanning issue, in order to discuss them at the next Labour-Management meeting:

This letter confirms the following:

During the conference call held on August 17, 2010, the Union asked the Company NOT to serve the 2 letters of discipline dated August 17, 2010 to Mr. Glen Carr until the next Labor Management Meeting. The subjects of these 2 letters are:

- 1) Mr. Carr unjustified absence on August 14, 2010: Mr. Carr did not receive permission for a LOA that date.
- 2) Mr. Carr's refusal to follow the Company's directive and him advising other bargaining unit employees not to scan the tickets.

The Company accepts the Union request to postpone the delays to take disciplinary actions until the next Labor Management Meeting.

[sic]

(emphasis added)

[28] On August 24, 2010, Mr. Carr drafted a letter on behalf of the ATU Executive to Mr. Sylvain Langis, the President of Acadian's parent company, Groupe Orléans, about communication issues, including concerns regarding Acadian's use of scanners without first discussing them with the bargaining agent:

Further to previous discussions wherein it was understood that open dialogue was beneficial to the smooth operation and viability of the Company, we bring to your attention our concerns about the severe lack of communication on matters affecting operations.

The introduction of the use of scanners for all electronic tickets took place without any discussions whatsoever. This technological change has ramifications on the drivers that requires discussions to resolve. It is painfully obvious that those making decisions to introduce such changes did not consider the operational impacts.

This is also true for the proposal to introduce scanners for extra baggage and parcels. Clearly, discussions concerning operational impacts and remuneration are required before such change is implemented.

The present lack of consultation causes our members serious concerns that requires your attention to avoid an absolute breakdown in relations leading up to negotiations.

Therefore, we request a meeting with you at your earliest convenience and we assure you that every member of this union shares the viability of a cost effective operation.

Thank you as we await your response.

[sic]

(emphasis added)

[29] Mr. Langis replied to Mr. Carr by letter dated September 3, 2010 and suggested he canvas the issues at an upcoming Labour-Management meeting:

I acknowledge reception of the ATU Local Executive Representatives letter dated August 24, 2010.

As you can suspect, the reception of your letter has motivated a communication with the local management team and it soon became evident to me that both parties have concerns that need to be addressed.

I understand that your request for me to meet with the Local Executive illustrates the level of your concerns. However, I have been informed that a Labour-Management meeting is already planned for September 16, 2010. With all respect, I must share that I find that this is exactly the forum to discuss those concerns and find solutions. As you probably already know, Mrs. Nancy Krisko, Vice-President of Human Resources and Mr. Louis Gagne, Vice-President Operations will be attending this meeting. These two influent [sic] members of our executive committee are the best individuals to work with you in finding long term solutions.

Mr. Carr, you and the other members of the ATU Local Executive Union will most certainly understand that I have full confidence in the team involved in the current process as well as for their commitment and competence to handle the situation. Therefore, I will encourage you and your team to fully participate to find win-win, efficient and productive solutions at the September 16, 2010 meeting.

Mr. Carr, I profoundly hope that you and the ATU Local Executive Union Representatives will receive this response as a mark of respect and confidence that our respective teams can certainly find viable tracks of solution to the different concerns raised from time to time, including the specific one you brought to my attention in your letter. Once these tracks of solution are found jointly by both parties it is however important that we then work as partners to make things happen accordingly.

[30] As the parties had earlier agreed, they discussed Mr. Carr's warning letter and two pending suspensions at their September 16, 2010 Labour-Management meeting. This resulted in an October 5, 2010 Letter of Agreement which removed one letter, and agreed not to serve the other two letters, related to Mr. Carr's discipline. The Agreement also reiterated Acadian's procedural expectations of Mr. Carr. The relevant portions of the Letter of Agreement read as follows:

As discussed at the last labour management meeting, the Company agrees to the following:

First, the Company agrees to remove the letter of discipline dated August 9, 2010 from his employee file following Mr. Carr's commitment to act and communicate respectfully (verbally and in writing) at all time.

Also, the Company accepts not to serve the letters identified in the attached document dated August 24, 2010 following Mr. Carr's commitment to follow and respect all company procedures at all time.

Finally, the Company accepts not to serve the other disciplinary letter "RE: absence on August 14, 2010", following Mr. Carr's commitment to respect procedures and act accordingly.

At the September 16, 2010 meeting, it has been clearly stated that being the president of the local union does not give Mr. Carr's the right not to respect procedures and rules. Also, it is clear that the Company will not accept any communication and/or behaviour that are not respectful. Mr. Carr has been notified that the Company will have no other choice than to take very severe measure if case of repetition.

This is agreed by the parties on October 5, 2010.

[sic]

(emphasis added)

[31] On October 9, 2010, Mr. Carr wrote a heated letter to Mr. Langis, with copies to other members of management, about Acadian's revised application to the EUB. He believed Acadian had failed to advise him of this matter at the September 16, 2010 Labour-Management meeting. Acadian, however, submitted that its representatives at the Labour-Management meeting were not aware of the application and that, in any event, the ATU would receive a copy automatically, since it was a party to the EUB proceeding. Mr. Carr wrote:

Subsequent to our Labour Relation Meeting September 16, 2010 where in we had full and frank discussions on all outstanding matters between the parties, **we are now shocked to receive from an outside party a notice that the Company is reneging on the submission to the Energy and Utility Board in March 2010.**

At the aforesaid Labour Relation Meeting we set the stage for the mutual respect essential for our upcoming negotiations.

However with the notice of the proposed run reduction, our Members feel betrayed. This betrayal ignores the unequivocal commitment given to those present {Doug Burgess- Rick Morrissey- Glen Carr- John Richardson- Louie Gagne- Francine Murray- Julie LaFlamme- Yves Chassie- Eric Lessard and Manon Piche} at the proposed, Schedule Change Meeting in Quebec City on November 30 2009 where in Manon Piche VP of Marketing/Research stated the following in response to my question, will there be any job loss?

“THERE WILL BE NO JOB LOSS”

It is obvious from the Energy and Utility Board correspondence the Company was requesting modifications of the corridor service August 9, 2010. **Therefore for the Company to be requesting substantial changes in early August 2010 and not bringing this matter to the Labour Relations Meeting September 16, 2010 undermines the goodwill, mutual respect and honesty we have been attempting to achieve.**

We request you as President and CEO to give the Union written assurance there will be NO job loss if the possible modification to the corridor service is approved by the Energy and Utility Board.

This would respect and confirm the oral representation Manon Piche VP of Marketing/Research gave on November 30, 2009. **Failing written assurance from you by October 14 2010 the Union will have no alternative but to submit to the Energy and Utility Board a request to rescind all approved and proposed reductions to our runs that affect the citizens of New Brunswick, PEI, Nova Scotia and Quebec.**

[sic]

(emphasis added)

[32] On October 13, 2010, when it had not heard back from Mr. Langis, the ATU sent a submission to the EUB. Mr. Carr also drafted a Schedule A to that submission. The following is just the introductory extract from that lengthy submission to provide some context:

The employees of Acadian Coach Lines LP (Acadian) are represented by the Amalgamated Transit Union local 1229. Our members, including the motor coach operators, thank you for the opportunity to make the following submissions in opposition to the amending of routes and scheduling by our employer, "Acadian".

It is obvious that Acadian pulled the wool over the eyes of the EUB and our members during their submissions on March 15, 16, and 17, 2010. In order to get EUB approval and avoid any opposition from our members for cutting/amending runs, routes and schedules Acadian proposed to increase the run frequency from 3 to 4 per day in the Moncton - Saint John corridor and the Moncton-Fredericton corridor; increase the run frequency from 2 to 4 per day in the Fredericton-Saint John corridor; increase the run frequency from 3 to 5 per day in the Moncton-Halifax corridor.

Now, after getting EUB approval July 16, 2010 to cut/amend runs, routes and schedules the company, Acadian is requesting that they be allowed to renege on their EUB approved agreement to increase the "corridor" service.

...

(emphasis added)

[33] While the Board heard evidence that Acadian considered terminating Mr. Carr over the content of the submission to the EUB, no discipline took place.

[34] On October 24, 2010, Mr. Carr wrote directly to Mr. Fabrice Bigeault. Mr. Bigeault was President of the majority shareholder from France in Groupe Orléans, the parent company of Acadian. In the letter, an extract of which follows, Mr. Carr suggested various ways to improve Acadian:

Let me introduce myself, My name is Glen Carr President/Business Agent for the Amalgamated Transit Union Local 1229 who represents the Members/Employees of Acadian Coach Lines LP here in New Brunswick.

Let me start by saying we are not writing you as a Disgruntle Union but as a Concerned Union with hopes you may be able to shed so light on this Major issue. We have done everything in our power to work with this Company to move forward as One Team to reach everyone's goal as to make this Company the best in the Area. To be profitable and to succeed as one of the best Companies in Atlantic Canada. Well Sir we are sorry we have tried and tired to help in every way. We will not give up on trying, but we need your help.

I have enclosed some past suggestions that we have sat down with the Company on many occasions with no success. **The waste of revenues that goes on here is heart breaking and has drove Moral so low it will be hard to recover from unless we work together at the end of the day to bring this Company back to where it was (3) three years ago. The mismanagement of this Company is despicable.**

...

[sic]

(emphasis added)

[35] On December 6, 2010, Acadian sent a letter to the ATU regarding a rumour that they might go to the media about certain issues related to the safety of mini-buses in difficult weather conditions:

During our discussion today in regard to the refusal of drivers to drive the mini-buses today, **you threatened going to the media and alleging that Acadian Coach Lines LP was requiring the drivers to drive unsafe vehicles in unsafe weather/road conditions.** We confirmed to you that Acadian had been investigating such conditions continuously today to ensure that the conditions were safe to drive, not only the mini-buses but also the motor coaches. At no time today were the conditions unsafe. Further, as already discussed, the mini-buses are safe for transporting passengers in winter conditions.

It was unclear as to whether your threat to go to the media was as individual employees or on behalf of the ATU Local. Regardless, please be advised that Acadian Coach Lines LP takes the position that any employee who participates in such insubordinate and potentially damaging behaviour, either individually or on behalf of the ATU, will be immediately terminated. Further, Acadian Coach Lines LP will take any other action it deems necessary against the ATU Local and/or any individual employee should any damage be caused to Acadian's reputation or financial position.

(emphasis added)

[36] Also on December 6, 2010, Acadian imposed a one-day suspension on Mr. Carr for, among other things, an allegedly disrespectful comment he made to dispatch. The Board understands each side's point of view on the issue, as described in oral testimony, but does not determine who was right and wrong. This issue has been grieved.

[37] Again on December 6, 2010, Acadian imposed a 10-day suspension on Mr. Carr for a complaint it had received about Mr. Carr's conduct while driving a route from Moncton to Fredericton. That matter has also been grieved.

[38] On or about December 30, 2010, Mr. Carr wrote a lengthy memo to all ATU members setting out his position on the suspensions he had received, as well as his comments on other matters. The initial paragraphs of that memo read:

Attention All Members,

First of all I want to wish everyone Happy Holidays and a Happy New Year.

As you are aware I was suspended for 11 days. This whole incident started December 6, 2010 when driver Doug Burgess of 29 years driving experience asked for a Full size bus to do a run instead of a Mini Bus. The weather was wind gust of 90 kms per hour and they were calling for a major storm up the coastline. When the driver arrived at work he noticed a mini bus on the ramp and called dispatch to ask for a full size coach telling dispatch he would do the run with a full size coach, not refusing to do the run but did not feel safe for himself and or his passengers to travel over 400 kms in inclement weather which Environment Canada had issued storm warnings. The driver asked again for a Full size coach only to be told NO, that driver went home. Dispatch then called Tony Zuurro (spare board driver) to do the run and Tony also asked for a Full size coach to do the run (not refusing to do the run Just the Mini Bus) due to the weather conditions and the safety of the passengers and himself and was refused by dispatch and sent home. I received a phone call on my day off, from the both drivers and was told of what happened so I called dispatch and talk to Yvan Marcotte who was in a meeting and talked to Yves Chassie who is the operation Manager for Quebec and told him the situation and that the drivers were not refusing to do the run that they were invoking their rights under **Article 2.05 of the Collective Agreement:**

...

[sic]

b) 2011 Events

[39] Despite these numerous 2010 events, relations between Mr. Carr and Acadian seemed to calm down temporarily once 2011 started.

[40] In the winter of 2011, the parties started to negotiate the renewal of the recently expired collective agreement. Some progress was made, a situation which prompted Mr. Carr on February 9, 2011 to email the conciliator to request a postponement of his meeting:

The Union and the Company have been able to sit down in the last week and are able to settle some difference and we have just pick March 13-14-15 in Quebec and April 11-12-13-14 2011 and we **both the Company and the Union would like to postpone you as the Mediator until after those talks have been exhausted before using a Mediator.**

[sic]

(emphasis added)

[41] In May, 2011, Mr. Carr temporarily stopped working as an Acadian driver due to a work-related injury. Mr. Carr continued performing his Local President duties, including those related to ongoing collective bargaining.

[42] While an issue arose in early May about Mr. Carr's need to provide Acadian with appropriate medical information (Ex-3; Tab 71), ultimately, there was no dispute that he was unable to work.

[43] During his time off on workers' compensation in the summer/fall of 2011, Mr. Carr continued to correspond with Acadian on various issues such as i) the calling-in sick procedure (Ex-3; Tab 72); ii) problems with Groupe Orléans drivers allegedly doing Acadian drivers' work out of Rivière-du-Loup (Ex-3; Tab 73); iii) issues related to the spare board (Ex-3; Tab 78); and iv) other unresolved collective agreement issues (Ex-3; Tab 74).

[44] On August 12, 2011, Acadian warned Mr. Carr about allegedly inappropriate conduct, including potential communications with outside agencies, such as the EUB:

Re: Inappropriate Conduct on Behalf of Amalgamated Transit Union 1229

On August 3rd, 2011 while purporting to act on behalf of the ATU 1229 and its members, you threatened to make a complaint to the New Brunswick Energy and Utility Board ("EUB") and the Government of NB to the effect that our Company is inappropriately using Group Orleans drivers to fill RDL runs when Acadian Coach Lines LP drivers are not available to take the runs. You and the ATU 1229 Executive are aware that our actions in doing so are neither in violation of the Collective Agreement nor our New Brunswick licences.

Also, in the recent past, while purporting to act on behalf of the ATU 1229 and its members, you have made unfounded complaints and numerous threats to go to various other governmental agencies such as Work Safe NB, Canada Labour Board, Environment Canada, etc.

The Collective Agreement contains a grievance procedure and this procedure should be followed in advancing any complaints or alleged violations of the Collective Agreement. Your threat to ignore the grievance process and contact the EUB shows a lack of respect for management and the process the parties have agreed to in the collective agreement. In addition, it is evidence that you and/or the ATU intends [*sic*] to cause harm to the reputation of our company with the EUB and/or the public and could potentially damage our relationship with the EUB, other governmental agencies and/or the public.

Please be advised that Acadian Coach Lines LP takes the position that any employee, who participates in such insubordinate and potentially damaging behaviour, either individually or on behalf of the ATU 1229, will be immediately terminated. Further, Acadian Coach Lines LP will take any other action it deems necessary against the ATU 1229 and/or any individual employee should any damage be caused to Acadian's reputation or financial position.

(emphasis added)

[45] Following a September 8, 2011 Labour-Management meeting, one member of management set out in a September 12, 2011 email her recollection of how Mr. Carr had acted at that meeting:

Here is my recollection of the words that Glen and George said during our Labour & Management held on Thursday September 8th in St John, New Brunswick.

We started on the grievances and Glen Carr immediately held up a pile of grievances in one hand and said he will fight this over all of Canada if need be; all these grievances are regarding outside drivers doing ACL work. He will never be gagged! Because that's what the disciplined letter he received was meant to do. All the time, he's waving the pieces of paper in his hands and speaking in a very angry tone. He told us to EXPECT THE UNEXPECTED! He says he's ready to be fired; that he can work at another job but he is willing to fight this fight! He says the Company is not following the grievance procedure. He tells us we will have guys in the street; they're pissed off! The situation is more clear to them than we think! He's willing to go on King street and march...as well as Main street in Moncton. He's on compensation and he still has to work on all of this shit(screaming this while waving his handful of grievances thru the air). He says they already have the signs printed and are ready for a strike. This went on for approximately 5 minutes and he ended this speech by saying that he will get back to us about ALL these grievances # 19, 24, 26, 28, 34, 36 and 37 by end of next week.

...

[*sic*]

[46] On September 22, 2011, Acadian warned Mr. Carr about his alleged inappropriate conduct which occurred during a Labour-Management meeting held on September 8, 2011:

On September 8th, 2011 a Labour Management meeting was held in Saint John, New Brunswick. **During this meeting, on more than one occasion, Mr. George Morrow and Mr. Glen Carr exhibited personal attacks and rude behaviours towards some members of the management team.** At this meeting, we addressed that this type of behavior needed to stop.

Today, the intent of this letter is to advise the Local 1229 Union Executive that this type of behavior will not be accepted nor tolerated.

In the future, if this behavior is repeated towards the management team, the company will have no choice but to adapt *[sic]* disciplinary measures.

(emphasis added)

[47] Also on September 22, 2011, Acadian resolved an issue Mr. Carr had raised the day before about Pre-Trip Books in bus trailers being in French only. Acadian verified the issue and advised Mr. Carr that the Pre-Trip Books were in fact bilingual:

i) text of Mr. Carr's concern

The Pre trip books in the Bus Trailers are in French Only. These Pre Trip Books must be in English as well. We have drivers that do not Read or understand French, therefore all Pre Trip books in the Bus Trailers must be English as well.

ii) Acadian's response

Mr. Carr, we have received your complaint and reviewed it: our bus trailer pre-trip books are bilingual.

[sic]

This information from Acadian ended the issue.

[48] On September 23, 2011, Acadian advised the ATU it would not attend already-planned negotiation dates, but would await a meeting with a conciliator from Federal Mediation and Conciliation Service (FMCS):

Following the revision of recent meetings, **all emails and phone calls addressed to our management team in the last weeks**, we have come to the conclusion that it is preferable to wait for the Conciliator in order to meet again in respect to the current negotiations.

Therefore, please be advised that next meetings be held with the conciliator on October 6th, 2011.

[sic]

(emphasis added)

[49] Shortly thereafter, Mr. Carr, on behalf of the negotiating team, posted a notice to all ATU members commenting on Acadian's letter:

ATTENTION TO ALL MEMBERS

Received a letter September 23 2011 Friday, from the Company saying they are canceling our Upcoming Negotiating Meeting, September 27-28-29, 2011.

Please see attached letter that was sent to the Union.

We, The Negotiating Committee have had 35 days of Negotiations and still are no closer to a Contract; The Company is offering 0%-0%-0%-0%-0% for a five (5) year Contract. We sat in Moncton with our International Union Representative (Robin West) and the Company in June and we sat for approx. Three (3) days and the Company came back with 3 pages of Uniforms and you must wear Black shoes and socks.

I, Glen Carr sent an email to the Company asking that they come to the Negotiating Table prepared to talk serious about the Negotiations and to come to the table with more then Black shoes and socks. I then called Robin West and asked his advise as I was getting no where with Dean, Serina or Christine so I called Louis Gagne directly and asked him the same question, to come to the Table and be serious before the Conciliator gets involved October 6&7 2011. If the talks were serious, then at that time the Union and the Company were able to extend the Conciliator and try to work out a suitable Contract for both parties, but instead the Company has chose to Cancel our Meeting alone September 27-28-29 2011 and go directly to Conciliation. Which fine, now the Company has to be serious.

[sic]

[50] At around this same time, Acadian also sent a notice to its employees about meetings it wanted to hold with them from September 27–29, 2011:

Louis Gagné (Vice-President of Operations) and Dean Chappelle (Manager of Operations) wish to meet with all New Brunswick employees in relation to different important matters;

- Re-engineering and ridership
- **Labour relations**
- **Negotiation process**
- Addressing rumours
- Questions and answers

We invite all employees to confirm their participation to the meeting as soon as possible and at the latest by Monday, September 26 at 1600. (see proposed schedule attached).

Because of the operational needs and the requirements to hold those meetings without delays, the proposed schedule is built to provide opportunities before or after employees' assignments and/or work schedules.

Moreover, the Company agrees to pay employees who will attend one of the meetings for the time of the meeting at straight time (or minimum 3 hours when applicable as per collective agreement and letter of agreement). The meeting is planned to last approximately 1 hour, including a dedicated period for questions.

(emphasis added)

[51] On September 26, 2011, the ATU issued a notice to its members about the meetings Acadian planned to hold with employees:

We have been contacted by many members stating that they prefer not to attend the meetings scheduled by the employer on September 27th, 28th, and 29th, 2011. Based on the memo put out by the company, it is our understanding that these meetings are not mandatory and therefore you do not have to attend. However, the Union will be in attendance due to the fact that we have some serious concerns that the company may have a hidden agenda for calling these meetings.

The Union would like to remind all members that there is a possibility that the company may attempt to sway your support for the Union.

Please note that the Union will be reporting back to the membership concerning these meetings.

(emphasis added)

[52] After Acadian's meeting with its employees took place, the ATU's negotiating team issued another notice to members of the bargaining unit which included these comments:

Your Union Representatives sat in all the Meetings that were held by the Company September 27 2011 in Saint John and Fredericton and September 28 & 29th 2011 in Moncton.

The Negotiating Team is very disappointed with the Company in trying to manipulate our Members with the Company's presentation to our Members directly. This is Union bashing at it's [sic] worst.

(emphasis added)

[53] Acadian disputed the ATU's characterization of the September 27–29, 2011 meetings with employees, as it set out in its own message to employees dated October 11, 2011:

MESSAGE FROM THE COMPANY

Acadian Coach Line thanks all employees that participated in the meetings held with the management group on September 27–28–29, 2011. If some employees were not able to attend one of these meetings and have questions or comments, please contact Dean Chappelle, Operations Manager.

A memo from the union was sent out shortly after these meetings were held. It is necessary for the company to correct inaccurate statements within this memo.

Purpose of the meeting:

The company's purpose in conducting these meetings was to inform and update all employees on the company's year-to-date with respect to matters such as financials, negotiations, network reengineering, customer focus initiatives, etc. The Company has held similar meetings in the past to keep employees informed and up-to-date on the company's operations.

...

(emphasis added)

[54] In October, 2011, another issue arose concerning Mr. Carr's phone call to a representative at Halifax Airport. In that call, Mr. Carr asked questions about buses idling when at the airport.

[55] Acadian took the position that Mr. Carr had not clearly identified himself when contacting its client. It believed he had misrepresented himself and should not have contacted a customer.

[56] Mr. Carr testified he had received calls from bargaining unit members about airport signs saying buses could not be left idling. He alleged the airport advised him that drivers could leave the bus to enter the terminal, but could not leave the bus idling.

[57] On October 13, 2011, Mr. Carr wrote again to Mr. Fabrice Bigeault, head of the major shareholder from France in Groupe Orléans. The letter asked Mr. Bigeault to have Ms. Judy Sheehan intervene, as she had in the 2008 round of bargaining. Mr. Carr also criticized certain alleged actions of Acadian's bargaining team:

We, The Amalgamated Transit Union Local 1229 representing our Members here in New Brunswick and Prince Edward Island are very concerned that your representatives here at Acadian Coach Lines LP are deliberately trying to force a work stoppage and bargaining in bad faith. The Company has sent 2 Memo's dated September 25 and October 11, 2011 to the Membership directly while we are in Negotiations and in Conciliation, trying to negotiate with our Members, shows Bad faith bargaining on the part of the Company.

The Company cancelled scheduled negotiation meetings on September 27-28-29, 2011 and instead Mr. Louis Gagne and his Team- Nancy Krisko, Dean Chappelle, Christine Robichaud and Serina Baker met with bargaining members directly to threatened, coerced and intimidated them.

We are requesting that you send Ms. Judy Sheehan here to New Brunswick as they did in 2008 as she was instrumental at that time in getting a resolve and as we stated above we are concerned that your representatives here are deliberately trying to force a work stoppage.

We have sat down with the Companies Team for numerous days and now we are in Conciliation, we have met for (2) two days here in Moncton new Brunswick with the conciliator and we have tried to reach many agreements with the company and the Company Team have not moved or are willing to move ahead to reach a fair contract for both parties to avoid a disruption in Service.

We are asking the Owners from France to get involved to put a stop to the way their representatives are manipulating and threatening these Negotiation Proceedings.

The Union Negotiating Team is willing to sit down anywhere and anytime to reach a fair Contract that both parties can live with at the end of the day.

Thank you in advance, if you have any question in regards to this letter please feel free to contact the undersigned.

[sic]

(emphasis added)

[58] On October 24, 2011, the date when Mr. Carr's workers' compensation leave ended, Acadian terminated his employment for the various reasons explained in its termination letter. Mr. Carr had not been scheduled to work until October 26, 2011, which he stated was the reason he did not go to the workplace when requested to do so on October 24, 2011:

On October 24th at 0833 AST, the Company contacted you to request a meeting with yourself and a Union Stewart either today or tomorrow. **You refused this meeting stating you were not available.** At approximately 1500 AST, the Company contacted you by telephone along with a Union Stewart to attempt to go through this letter with you. You hung up.

A copy of this letter is being sent to you today by e-mail, registered mail and courier. As per article # 9.03 of the Collective Agreement, a copy of this letter was given to the Union Stewart, Mr. Jason Richard.

In October of 2010 the Company agreed to the removal of disciplinary letters from your personal file upon your commitment to acting and communicating respectfully verbally and in writing. Our letter of September 22, 2011 confirmed to you that any further similar behaviour would result in discipline.

Since October of 2010, but in particular in the past number of months, there have been many disrespectful emails, accusations toward the company and a threat to go to the New Brunswick Energy & Utility Board ("EUB") when your complaints were not dealt with to your satisfaction. You continue to engage in insubordinate behaviour by directing your communications to VP's rather than to the HR Manager or your Supervisor. On many documented occasions since October 2010 you have been reminded of your obligations to be more respectful and to stick with the facts when discussing an issue, but this has not been done and your behaviours have escalated.

Your aggressive and disrespectful behaviour has now extended toward other employees and Supervisors within our company and has created a hostile and uncooperative working environment for both unionized and non-unionized employees who have been subjected to this behaviour. Your role as President of the Local Union does not give you the right to act in this manner and you have been told this on a number of occasions.

You have left us no choice but to terminate your employment with Acadian Coach Lines.

Any unpaid wages, including vacation pay will be paid to you with your final pay. All benefits including insurance and pension benefits will cease upon your termination date.

Please direct any questions to Christine Robichaud or Dean Chapelle only.
Sincerely,

[sic]

(emphasis added)

[59] Acadian's termination of Mr. Carr on October 24, 2011 lead to a communiqué from the ATU to its members:

The show of Solidarity by our Membership with the overwhelming **98% Strike Vote** hopefully will result in the Company finally taking our needs seriously.

In the face of our Strike Vote you will hear numerous rumors generated by the Company and others. First you will hear that we are going to go bankrupt and shut the Company down. We wish to point out that under the Federal Labour Laws we have Successor Rights Protection that requires the new owners to hire our Members—the only ones that will be out of a job will be the present Mangers [sic]. You can rest assure that the Provincial Governments will not let our Provinces be without Bus Services.

Another rumor that will circulate is that the Company will attempt to operate in the event of a Strike. We remind you that the Company has stated that our services are not deemed essential and nobody is required to work in the event of a Strike.

We have put a Plan Of Action that will convince the Owners in France and Quebec that it is in their Economic best interest to make you a Fair Offer and avoid disruptions in services.

If this Company cannot give us wages and benefits that allow us to live in dignity then it is time we sought out another owner that can.

[60] Mr. Carr continued to act as the ATU President following his October, 2011 termination. While the Board did hear evidence that, for a brief period after his termination, Mr. Carr stopped receiving Acadian emails related to union matters, this was quickly remedied.

IV—Relevant *Code* Provisions

[61] The ATU alleged that Acadian violated both sections 94(1)(a) and 94(3)(a)(i) of the *Code*. Section 94(1)(a) prohibits interference in the administration of a trade union and the related representation of employees :

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;

[62] Section 94(3)(a)(i) prohibits, *inter alia*, reprisals against union officers and representatives who participate in the promotion and administration of the trade union:

94.(3) No employer or person acting on behalf of an employer shall

(a) **refuse to employ or to continue to employ** or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline **any person, because the person,**

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or **participates in the promotion, formation or administration of a trade union,**

...

(emphasis added)

[63] Section 98(4) of the *Code* reverses the burden of proof for complaints made under section 94(3):

98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with **subsection 94(3)**, the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

(emphasis added)

V–Applicable Legal Principles

i) Protected Union Activities

[64] Acadian’s correspondence to Mr. Carr suggested on several occasions that his position as a union officer did not insulate him from being held accountable for his actions.

[65] In *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, the Supreme Court of Canada summarized the Board's longstanding jurisprudence on the issue of protected activities:

[67] The appellant argues that in making this decision the Board held that the purely political activities of unions were entitled to the protection of s. 94(1)(a). However, this describes the Board's finding too narrowly. The Board considered the specific act of this union in context. It recognized that s. 94(1)(a) has its limits. **The existing jurisprudence of the Board had already made it clear that in order for s. 94(1)(a) to apply *prima facie*, public statements by union officials had to relate to the interests of the union as a collectivity, and not to the personal concerns of the union official. Nor could such statements be reckless or maliciously untrue.**

(emphasis added)

[66] This Board's predecessor, the Canada Labour Relations Board (CLRB), had developed these concepts to which the Supreme Court referred. These principles remain applicable today.

[67] For example, in *Canada Post Corporation* (1987), 71 di 215 (*Samson*), a union Vice-President was disciplined for speaking publicly about the employer's corporate plan. The union hoped public pressure might lead to changes in that plan.

[68] After reviewing case law from other jurisdictions, including that coming from labour arbitrators, the CLRB accepted that it had to "weigh the competing principle of loyalty to an employer as opposed to the legislative prohibition that prevents an employer from participating in or interfering with the formation or administration of a trade union or the representation of employees by a trade union" (page 227).

[69] Ms. Samson spoke publicly about union issues. Some of those issues arose during a time of collective bargaining, though the CLRB noted a union's right to free speech was not limited solely to times of collective bargaining.

[70] The CLRB accepted that the concept of “representation” in section 94(1)(a) extended beyond interactions with the employer and could include representations to the public “and in any forum where the union feels it is in the interest of its members to do so” (page 228). Moreover, the Board noted that “the employer cannot tell the union how it is to administer itself. It is up to the union to determine how it is going to represent its members” (page 228).

[71] Based on these principles, the Board found the employer had breached the *Code* by disciplining Ms. Samson for speaking out publicly in her role as a union official.

[72] The CLRB later applied similar principles in *Québecair/Air Québec* (1987), 72 di 44; and in *Canada Post Corporation* (1988) 75 di 189. The latter decision involved comments by the President of a union local contesting the employer’s plans to introduce “super mail boxes”.

[73] In that case, the Board accepted that the union President, Mr. Kucey, had exaggerated to make his point, but that those points remained protected “representations” within the meaning of section 94(1)(a) of the *Code*.

[74] In *Wardair Canada Inc.* (1988), 76 di 103 (*Wardair*), the Board again examined the comments of a union officer, but found that these comments had in fact crossed the line and were therefore not protected by the *Code*. While the Board acknowledged that “any union official has the full authority and right under the law to represent their members”, it then commented on the limits of that right:

That right includes the right to talk to members of the media and to tell them things he/she believes to be true. That right is not, however, an absolute right. We believe that there is a line beyond which even a union officer can step that neutralizes the basic protections offered by the *Code* in section 184. The Board has no intention, in the instant case, as it was not its intention in the previous cases of *Canada Post Corporation* (1987), 87 CLLC 16,060 (CLRB no. 654), and *Québecair/Air Québec* (1987), 88 CLLC 16,035 (CLRB no. 659), to establish precise guidelines by which this line can be established. **We believe that the line cannot be a rigid one, but must be sufficiently flexible to allow the Board to make a determination in each case on the basis of the evidence proffered to it and through its appreciation of the evidence within the general framework established in the *Code* to balance the rights and responsibilities of the parties.**

(page 120; emphasis added)

[75] In *Wardair*, the *Code* did not protect the union official for several reasons, including; i) the comments were not related to collective bargaining or any current strikes; ii) the statements were patently untrue; and iii) the comments extended beyond mere exaggeration, but became knowingly and purposefully misleading.

[76] The issue of permissible union officer comments has arisen frequently before arbitrators. Indeed, but for the fact that collective bargaining had been taking place, and other concurrent events, the Board might well have deferred hearing Mr. Carr's ULP complaint in favour of the arbitration process. That is the usual forum to address such matters.

[77] A recent arbitral decision in *Re DHL Express (Canada) Ltd. and National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 4215 (CAW Canada)* (2010), 200 L.A.C. (4th) 263, summarized the test labour arbitrators apply for such cases:

[34] An anterior issue to be discussed is the extent of protection or immunity that Mr. Rae may be given because he was a Union officer. **There is little doubt that employees acting in their capacity as union officers do have more latitude in dealing with management personnel.** (See *Re School District No. 22 (Vernon) and C.U.P.E., Loc. 5523 (Hegler)* (2002), 104 L.A.C. (4th) 435 (Taylor)). **The theory behind the immunity is that unions and employers must meet each other to discuss common issues as equals.** However, as is noted by Brown and Beatty, **the protection or immunity is not an absolute one and does not extend to statements that are malicious in the sense that they are knowingly or recklessly false. I would add to this that the limits of union officer protection do not extend to statements and conduct that harass or ridicule other employees including management personnel.** The vigorous representation of union members and interests of the union are not compromised by union officers who are employees carrying out their functions in a civil and respectful manner. **Clearly there will be situations in which anger surfaces and the level of discourse may become heated, and may include profane and foul language. However, isolated instances must be distinguished from a course of action carried out over a period of time.**

(emphasis added)

ii) Burden of Proof (section 98(4))

[78] There will rarely be an admission that an employer took action against a union official for anti-union reasons. The Board must therefore weigh an employer's explanation for its actions given the overall context. In *Air Atlantic Limited* (1986), 68 di 30 (CLRB no. 600) at page 34, the CLRB described the focus of its analysis as follows:

The law on the subject of discrimination against employees for having exercised rights under the *Code* is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) [now section 94(3)(a)] against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the *Code*, then the employer's actions will be found to be contrary to the *Code*. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the *Code*:

[quote omitted]

[79] The Board recently described in *Plante*, 2011 CIRB 582, the role circumstantial evidence plays when evaluating whether an employer has met the burden imposed by section 98(4) of the *Code*:

[41] The ULP complaints made reference, *inter alia*, to section 94(3) of the *Code*:

94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union ...

[42] The complaints did not otherwise set out which specific subsections of section 94 of the *Code* were in issue.

[43] The parties did not dispute that the ULP complaints raised section 94(3) and that TWI therefore bore the burden of proof pursuant to section 98(4) of the *Code*.

98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

[44] In *Federal Express Canada Ltd.*, 2010 CIRB 519, the Board recently discussed a respondent employer's obligation when dealing with the reverse onus provision:

[38] Under the reverse onus provision at section 98(4), the Board considers the respondent employer's explanation of the situation. The Board must be satisfied that no anti-union animus motivated the employer's actions. A respondent's burden under section 98(4) was recently summarized at paragraph 97 in *Rousseau (Re)* 2007 CIRB 393:

...the burden is on the employer to refute, on a balance of probabilities, the allegations giving rise to the complaint, namely that it was aware of the complainant's union activities and that those activities were a factor in its decision to terminate his employment.

[39] The burden of proof on a balance of probabilities remains constant; it does not increase in difficulty based upon the severity of the issues at stake in the case. The Supreme Court of Canada, in *F.H. v. McDougall*, [2008] S.C.C. 53 recently confirmed the civil case standard:

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[40] Similarly, the burden remains with the respondent employer. It does not shift to the complainant. However, evidence from the complainant is often crucial in allowing the Board to examine the context and decide whether the employer has met its burden.

[41] There will seldom be direct evidence of anti-union animus. Rather, the Board must decide, based on the overall context, whether anti-union animus played even a small part in an employer's actions.

[45] The Board agrees with TWI's reference to Mr. Justice Adams' summary in *Canadian Labour Law*, 2nd Edition, Volume 2 (Aurora: Canada Law Book, 2010) of the general practice for these types of unfair labour practice complaints:

10.130 Canadian statutory provisions, barring discharge or other discriminatory treatment "because" or "for the reason that" employees are engaged in legitimate union activities, have been interpreted by courts as requiring scrutiny to see if "membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority" for the dismissal. Improper motive does not have to be the dominant motive. **Since employers are not likely to confess to an anti-union animus, tribunals have to rely on circumstantial evidence to draw inferences about employer motivation. These considerations may include evidence of the manner of the discharge and the credibility of witnesses, as well as "the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other 'peculiarities'", such as discipline disproportionate to the offence alleged.**

(emphasis added)

[46] The Board considered the circumstantial evidence in this case and drew inferences whether Mr. Plante's union activities played a role in TWI's decision. The Board agrees with TWI's proposition that involvement in union activities does not prevent an employee from being held responsible for the consequences of his or her actions:

Although Sandhu was clearly involved in union activity, to the knowledge of the employer, that union activity, in and of itself, does not serve to protect him from dismissal or discipline where such action is proven, by the employer, to have been taken without taint of anti-union animus. Employees cannot use the umbrella of the unfair labour practice provisions of the *Code* to protect themselves against disciplinary measures which are the result of their own misconduct ...

(*D.H.L. International Express Ltd.* (1995), 99 di 126; and 28 CLRBR (2d) 297 (CLRB no. 1147), pages 132; and 303-304)

(emphasis added)

[80] It is with these principles in mind that the Board will analyze the case of Mr. Carr.

VI—Issues

[81] The Board has two issues before it:

i) Did Acadian meet its burden of demonstrating that union activities played no part in its decision to terminate Mr. Carr? and

ii) Did Acadian interfere in the administration of the ATU or the representation of its members?

VII–Analysis and Decision

A) Introductory Comments

[82] During final argument, the Board was urged to find that Acadian was acting in bad faith on many occasions in its dealings with Mr. Carr and the ATU. The evidence suggested otherwise, however. The Board was impressed with the candour of both sides during testimony.

[83] The Board was satisfied that in 2010, when Ms. Krisko took over as Groupe Orléans' Vice-President, Human Resources, she and fellow managers hoped to improve relations with the ATU.

[84] Acadian's decision not to proceed with discipline for Mr. Carr when it entered into the October 5, 2010 Letter of Agreement is but one example of these good faith attempts. The Board makes no comment whether Mr. Carr's actions warranted any discipline.

[85] Similarly, Mr. Carr was candid in his testimony before the Board and appeared open to Ms. Krisko's invitation to improve labour relations.

[86] Despite the apparent initial willingness of both sides to deal constructively with each other, relations later soured for a variety of reasons.

[87] It appeared to the Board that each side took offence when they felt that their *bona fide* efforts to improve relations had been rebuffed. For example, Acadian thought it had an understanding

about how the ATU would communicate and file grievances.

[88] From Mr. Carr's perspective, it appeared he felt that the ATU had been duped about future employment prospects when Acadian sought to amend its 2010 application to the EUB.

[89] It is not for the Board to define how parties should conduct their labour relations. The spectrum of relationships runs from extremely consultative to continuously adversarial. Ultimately, the parties have to find the common ground which works for them. The Board was nonetheless struck by the fact that both sides appeared eager, initially at least, to have a successful relationship.

B) Did Acadian meet its burden of demonstrating that union activities played no part in its decision to terminate Mr. Carr?

[90] Acadian has not satisfied the Board that its termination of Mr. Carr was not related, in whole or in part, to his exercise of his rights under the *Code*. Mr. Carr's union activities as the Local's President were clearly a proximate cause for Acadian's decision to terminate him.

[91] There are several reasons for the Board's conclusion.

[92] First of all, the chronology of events demonstrated that Mr. Carr had not been driving for Acadian from May, 2011, due to a work-related injury. Acadian terminated him when he was due to return to work in October, 2011. This is not a case where a union president had received work-related discipline, but defended himself by saying the real reason for the discipline arose from his union activities.

[93] In this case, Mr. Carr was not actively at work for the five months preceding his termination.

[94] Almost all of Mr. Carr's actions from May–October, 2011 resulted solely from his role as the ATU President.

[95] The list of these union activities, which the Board summarized earlier, some or all of which

caused Acadian to take exception in 2011, included:

1. Collective agreement issues (paragraph 43);
2. A suggestion Mr. Carr lacked respect for management when Acadian believed he might contact the EUB or other governmental agencies about labour relations issues (paragraph 44);
3. His demeanour during Labour-Management meetings (paragraphs 45–46);
4. His comments that Pre-Trip Books were in French only (paragraph 47);
5. His September notice to members about Acadian cancelling scheduled collective bargaining sessions (paragraphs 48–49);
6. His subsequent September 26, 2011 notice to members about Acadian holding meetings with employees (paragraph 50–51);
7. His comments on Acadian’s meetings in late September with its employees (paragraph 52); and
8. His letter to Mr. Bigeault asking for Ms. Judy Sheehan to assist with negotiations (paragraph 57).

[96] In the May to October, 2011 period, Acadian clearly objected to the way Mr. Carr performed some or all of his union duties as the Local’s President. He had been performing no work-related duties during this period.

[97] This initial reason leads to a second comment. The Board considered Acadian’s reliance on 2010 events in support of its 2011 termination of Mr. Carr. Since Mr. Carr had been off since May, 2011, it is perhaps understandable why Acadian appeared to argue that a “culminating incident” supported its decision to terminate him. The culminating incident, however, could only have come from Mr. Carr’s continuing union activities as the ATU President, since he was on injury leave from regular work during the previous five months.

[98] This leads to a third observation. Since Mr. Carr’s performance as a bus driver was not the reason for his termination, the Board must examine whether Mr. Carr’s actions as the Local’s

President consistently went beyond the scope of protected activities under the *Code*.

[99] As the Board's earlier review of the jurisprudence demonstrates, union officials have a certain level of immunity when representing their members, whether during collective bargaining or not. The immunity is not absolute, however. While momentary flare ups may be excused, a union officer will not be protected for making continuously reckless or untrue public statements. Neither can a union official continuously ridicule or harass other employees or members of management.

[100] During the hearing, the Board sensed there might have been confusion about the extent to which an employer may control, or set guidelines for, the conduct of a union President.

[101] Acadian was clearly frustrated with Mr. Carr continuously sending emails to managers in both Acadian and Groupe Orléans, rather than using the grievance procedure exclusively. If Mr. Carr had been a member of management then, evidently, he would have been obliged to follow the employer's hierarchy when dealing with issues. That is how hierarchical organizations function.

[102] Similarly, a regular employee would be obliged to follow Acadian's directions, based on the "obey now grieve later" principle.

[103] But Mr. Carr was not a member of Acadian management or a regular bargaining unit employee. He was not subject to the strict "reporting relationship" that Acadian seemingly believed applied to him.

[104] A union officer's role when representing his or her members is not limited to the collective agreement's grievance process. While it is conceivable that labour relations could deteriorate to the point when no communication takes place except via the grievance process, this is certainly not the norm.

[105] The ongoing relationship between trade unions and employers extends beyond the grievance process. Indeed, successful labour relations occur when there are open lines of communication

between an employer and union representatives.

[106] Acadian insisted that Mr. Carr exercise his duties according to their process. Mr. Carr's failure to agree with, or follow, this process led to both warnings and discipline. However, unless Mr. Carr's union activities crossed the line of protected activities as described earlier, Acadian's decision to discipline him for these activities violated the *Code*.

[107] That is not to say that Mr. Carr could do whatever he wanted. The case law describes various limits, usually for discreet fact situations. Only Mr. Carr will know the utility of constantly emailing all managers, especially after there had been a request to start any initial discussions with a local manager. For Mr. Carr, he risked simply being ignored, since the other managers could have simply deleted any email coming from him.

[108] This email approach may or may not assist Mr. Carr in the long term as he attempts to represent the interests of his members. On the other hand, given that a lot of Acadian's management chain worked outside New Brunswick, this may have been Mr. Carr's method of insuring he kept their attention.

[109] Acadian also took exception to Mr. Carr's other union-related actions. For example, they had issues with his involvement with the EUB and his writing directly to Mr. Bigeault. Indeed, Mr. Carr's final October 13, 2011 letter to Mr. Bigeault, in which he criticized Acadian's bargaining team, and asked for someone from the outside to assist with the negotiations, seemed to be the final act, at least chronologically, prior to his termination.

[110] The question here is not whether Mr. Carr could take these actions. Indeed, trade unions often file applications with outside agencies for matters relating to their labour relations. Similarly, appeals to third parties, which also occurred in *Samson, supra*, have been going on for decades, in the hope of gaining a bargaining advantage. In some sets of negotiations, both employers and trade unions have bargained quite publicly, including by publishing newspaper advertisements and maintaining public websites.

[111] These campaigns may also include some unflattering characterizations of those on the other side of the bargaining table.

[112] It was up to Acadian to demonstrate to the Board that these otherwise normal actions lost the protection of the *Code*. Given the jurisprudence, Acadian failed to meet this burden.

[113] The Board has set out in some detail the correspondence between the parties. Even if Mr. Carr's submission to the EUB in October, 2010, might have merited discipline, a question which would ultimately be resolved by an arbitrator rather than this Board, the delay of over a year before Acadian relied on it is the type of circumstantial evidence which the Board cannot ignore.

[114] In short, when viewed in the overall context, Acadian has not satisfied the Board that Mr. Carr's legitimate union activities as the ATU President did not play a part in its decision to terminate him. Indeed, given the fact that Mr. Carr was not actively at work, almost all of his activities during the May–Oct, 2011 time frame were union activities.

[115] While some of those union activities could raise interesting debates about whether Mr. Carr had crossed the line at certain discreet points, the Board is satisfied that the vast majority, if not all, of Mr. Carr's efforts constituted permissible and protected activities for a union President.

[116] As the CLRB said in *Samson, supra*, it is not up to the employer to tell the union how to administer itself.

C) Did Acadian interfere in the administration of the ATU or its representation of its members?

[117] The ATU also asked the Board to find that Mr. Carr's termination was a breach of section 94(1)(a) of the *Code* since it interfered with the ATU's representation of its members. This was clearly a subsidiary argument, especially after the ATU decided not to pursue other alleged

events which it had used to support its position on section 94(1)(a).

[118] The ATU had the burden of proof for this allegation.

[119] The Board is satisfied that the ATU met its burden of demonstrating interference contrary to section 94(1)(a) of the *Code*.

[120] The evidence in this case showed that Acadian took exception with how Mr. Carr performed his union duties. Acadian was fully entitled to take action if Mr. Carr's actions ceased to be protected under the *Code*. However, Acadian's general stance, which suggested Mr. Carr could not pursue legitimate union activities, whether internally or externally, based on a mistaken notion of insubordination, constituted interference.

[121] For that reason, we would also find that Acadian also violated section 94(1)(a) of the *Code*.

VII–Remedy

[122] This case has examined the termination of a union President, during collective bargaining, based on his behaviour over a period of time.

[123] The ATU alleged that Mr. Carr had acted at all times within the zone of protected activities as established by this Board and in the arbitral jurisprudence.

[124] Acadian argued that it had allowed Mr. Carr to carry out his duties as union President, even after his termination, but that his specific actions justified his termination.

[125] For the reasons set out above, the Board found that Mr. Carr's actions generally fell within permissible actions for a union officer representing the bargaining unit. Acadian did not meet its burden in demonstrating that legitimate union activities were not a proximate cause for Mr. Carr's dismissal.

[126] Similarly, the ATU satisfied the Board that the discipline Mr. Carr received for carrying out his duties as the union President also interfered with its legitimate activities, contrary to section 94(1)(a) of the *Code*.

[127] The Board therefore orders the following remedies:

1. Acadian shall reinstate Mr. Carr to his employment within ten (10) days of receipt of this decision;
2. Acadian shall forthwith compensate Mr. Carr for all remuneration he would have earned from the date of his termination to the date of his reinstatement;
3. For greater certainty, Mr. Carr is not entitled to compensation for any time when the bargaining unit was locked out;
4. Should the parties be unable to agree on any aspects of Mr. Carr's reinstatement and compensation, then they may address those remaining issues in writing to the Board, within thirty (30) days of the date of this decision.

[128] Should either party require a formal Board order, they will consult with each other and file a suggested order, approved as to form and content, if possible.

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David Olsen
Member