Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Mr. Brian Buckmire,

applicant,

and

Teamsters Local Union 938,

respondent,

and

Purolator Courier Ltd.,

employer.

Board File: 30030-C
Neutral Citation: 2013 CIRB **700**
November 22, 2013

The Canada Industrial Relations Board (the Board) was composed of Messrs. Graham J. Clarke, William G. McMurray and Patric F. Whyte, Vice-Chairpersons.

Parties' Representatives of Record

Mr. Brian Buckmire, representing himself;

Messrs. David I. Bloom and Ryan D. White, for Teamsters Local Union 938;

Ms. Marsha M. Lindsay, for Purolator Courier Ltd.

These reasons for decision were written by Mr. Graham J. Clarke.

[1] Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to issue a decision without an oral hearing.

I. Overview

[2] On June 14, 2013, Mr. Brian Buckmire asked the Board to reconsider its May 16, 2013 decision in *Buckmire*, 2013 CIRB LD 3024 (*Buckmire LD 3024*).

[3] In *Buckmire LD 3024*, a majority of the panel (Majority) dismissed Mr. Buckmire's complaint alleging that his trade union, Teamsters Local Union 938 (Teamsters), had violated its duty of fair representation (DFR) under section 37 of the *Code*:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[4] The minority decision (Minority) would have upheld Mr. Buckmire's DFR complaint.

[5] The complaint arose from the Teamsters' decision not to arbitrate Purolator Courier Ltd.'s (Purolator) termination of Mr. Buckmire's employment, allegedly for cause. Mr. Buckmire was a long-service employee who had worked at Purolator from January 1992 until November 2009.

[6] The Board has decided to dismiss Mr. Buckmire's application for reconsideration. Given the recent repeal of section 44 of the *Canada Industrial Relations Board Regulations, 2012* (*Regulations*), which summarized the traditional grounds for reconsideration, this decision will also comment on the Board's post section 44 reconsideration process.

II. The Original Decision

[7] In *Buckmire LD 3024*, the original panel held an extensive oral hearing in 2011 on these dates: February 24 and 25, April 18, May 19, July 25, October 6 and December 20, 2011 in Toronto, Ontario. On May 16, 2013, that panel issued a 32-page decision, which included the Majority's, and the Minority's, reasons.

[8] In *Buckmire LD 3024*, the Majority examined the investigation conducted by the Teamsters' Business Agent, Mr. Simon. Following his investigation, Mr. Simon recommended to the Teamsters' Executive Board that it take Mr. Buckmire's termination grievance to arbitration.

[9] Despite Mr. Simon's recommendation, the Teamsters' Executive Board decided against arbitration.

[10] The Majority concluded that Mr. Buckmire had not demonstrated that the Teamsters' process in deciding about arbitration had been arbitrary, discriminatory or carried out in bad faith.

[11] The Minority disagreed and found that Mr. Buckmire had met the significant burden of proof the *Code* imposed on him:

> In these particular circumstances, keeping in mind the principle of greater scrutiny that applies to this case, the Executive Board should have investigated the matter further before departing from Mr. Simon's recommendation.
>
> In my view, the Executive Board's decision-making process in this case was arbitrary in that:
>
> - it failed to examine the full details of the complainant's grievance;
> - it considered irrelevant factors, such as the complainant's prior work record, which the union knew was not a basis for his termination;
> - it assessed the complainant's credibility without interviewing the complainant and without viewing the video evidence; and
> - it put blind trust in the employer's anticipated evidence, without interviewing any of the alleged key witnesses.
>
> (pages 31 and 32)

III. Parties' Positions

[12] Mr. Buckmire argued that the Majority had failed to respect the "principle of greater scrutiny" when examining his complaint. The Board has noted in past decisions that it will examine closely a trade union's decision not to contest the termination of a long-service employee.

[13] Mr. Buckmire further argued that the Majority ought to have concluded, like the Minority, that the Teamsters' investigation had met the threshold of being arbitrary.

[14] The Teamsters argued that Mr. Buckmire's application did not meet any of the grounds for reconsideration in section 44 (now repealed) of the *Regulations*. In its view, Mr. Buckmire's application was simply an attempt to re-litigate the matter.

[15] In reply, Mr. Buckmire suggested that the Majority's failure to find that the Teamsters had acted in an arbitrary way constituted the type of error of law which obliged a reconsideration panel to intervene.

IV. The Board's Reconsideration Process

A. Review vs. Reconsideration

[16] Section 18 of the *Code* establishes the Board's review power:

> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[17] The reconsideration of recent decisions is just one component of the Board's review power. For example, the review power has been used in the past to revoke a certification which a trade union had abandoned: *PCL Constructors Northern Inc*., 2006 CIRB 345.

[18] Similarly, the review power allows the Board to retain jurisdiction over the description of the bargaining units it certifies. The Board can then determine whether new positions fall within an existing unit or if the trade union has double majority support in order to expand the scope of its current bargaining unit: *Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503.

[19] This Board's predecessor, the Canada Labour Relations Board (CLRB), formerly used the *Code*'s review power to merge an employer's multiple bargaining units. This bargaining unit review process has now been codified in section 18.1 of the *Code*.

[20] The Board may also exercise its review power if legitimate questions arise whether a party still falls within federal jurisdiction, for example, following a constitutional decision from the Supreme Court of Canada (SCC): *Treaty Three Police Service*, 2013 CIRB 677 (*Treaty Three 677*) at paragraphs 15−16.

[21] That type of application concerning the Board's jurisdiction is not a reconsideration of a recent decision, but is rather a request to review the Board's continuing authority over one or more parties. The time limits designed for the Board's reconsideration of recent decisions do not apply to that type of review: *Dilico Anishinabek Family Care*, 2012 CIRB 655 at paragraphs 26−27 and 35−38.

[22] The Board's reconsideration process for recently issued decisions has existed for decades, with some small modifications occurring over time. The Board has always exercised its power to reconsider with restraint and for exceptional situations only, given the importance of the principle of finality as set out in the *Code*'s privative clause at section 22. See also, *Kies*, 2008 CIRB 413 (*Kies 413*) at paragraphs 4−9.

B. CLRB Reconsideration

[23] In the 1970s, the CLRB developed the main, though not exhaustive, grounds for reconsideration applications.

[24] In *Canadian National Railways* (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41), the Board described how a party could bring new facts to the attention of the Board, if those facts would have caused the panel to arrive at a different conclusion. The new facts had to be those which the applicant could not have brought before the original panel. A failure to plead a case fully could not support a request for reconsideration.

[25] Similarly, an erroneous interpretation of the *Code* or a Board policy constituted a second ground for reconsideration: *British Columbia Telephone Company* (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220).

[26] In *Cablevision Nationale Ltd.* (1978), 25 di 422; and [1979] 3 Can LRBR 267 (CLRB no. 135), the Board noted that another ground for reconsideration could arise from a failure by the original panel to respect a principle of natural justice.

[27] The CLRB also developed a 21-day time limit for the filing of reconsideration applications. This time limit was later codified in section 37(2) of the *Canada Labour Relations Board Regulations, 1992*:

> 37 (2) An application under section 18 of the *Act* to reconsider a decision or order that is alleged to be erroneous in law or contrary to the policies of the Board shall be filed within 21 days after the date the decision or order being contested was made.

[28] The CLRB used "summit" (later renamed "reconsideration") panels, composed of either three Vice-Chairs or the Chair and two Vice-Chairs, to screen reconsideration applications. The role of these panels was either to dismiss the application or to send it to a plenary meeting of the Board: *Brewster Transport Company Limited* (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580).

C. Codification

[29] On December 5, 2001, the Board included section 44 in the *Canada Industrial Relations Board Regulations, 2001* (*2001 Regulations*) to describe the main, though not exhaustive, grounds for reconsideration:

> 44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:
>
> (*a*) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
>
> (*b*) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;
>
> (*c*) a failure of the Board to respect a principle of natural justice; and
>
> (*d*) a decision made by a Registrar under section 3.

[30] Section 44 of the *2001 Regulations* codified the Board's three main grounds for reconsideration: *TV Ontario*, 2001 CIRB 152 at paragraph 14. It also referenced the Registrar's power under section 3 of the *Regulations* to make binding decisions on specific consent applications.

[31] The CIRB did not continue using the plenary process the CLRB had followed: *Telus Communications Inc*. v. *Telecommunications Workers Union*, 2005 FCA 262. Instead, in relatively rare circumstances, the reconsideration panel itself could overturn the original panel's decision.

D. Current Practice

[32] On December 18, 2012, section 44 of the *Regulations* was repealed, based on the recommendation of the Standing Joint Committee for the Scrutiny of Regulations (Committee). The reasons for the Committee's request to revoke section 44 were described in *Treaty Three 677, supra*, at paragraph 11:

> [11] In 2002, the Standing Joint Committee for the Scrutiny of Regulations (the Committee) questioned the purpose of section 44 of the *2001 Regulations*. In particular, the Committee was concerned that this regulatory provision could fetter the broad discretion given to the Board under section 18 of the *Code*. Ultimately, the Board agreed with the Committee and section 44 was revoked in 2012 with the coming into force of the *2012 Regulations*. While the Board retains the power to reconsider any of its decisions or orders, the grounds for such applications are clearly not limited to those contained in the former section 44. At the same time, the Board extended the time period in which a reconsideration application can be made to 30 days, to be consistent with the time limit for the filing of a judicial review application under the *Federal Courts Act*.

[33] As noted in *Treaty Three 677, supra*, the previous 21-day time limit for reconsideration applications in section 45 of the *Regulations* was increased to 30 days to coincide with the time limit parties have to judicially review a Board decision.

[34] The Federal Court of Appeal has reminded parties in numerous decisions that an application for reconsideration does not interrupt the time limit for judicial review of the Board's original decision. Judicial review of only the reconsideration decision will not result in the Court judicially reviewing the Board's original decision: *Remstar Corporation* v. *Syndicat des employé-es de TQS Inc. (FNC-CSN)*, 2011 FCA 183, leave to appeal to SCC refused *Remstar Corporation* v. *Syndicat des employés-es de TQS Inc. (FNC-CSN) et al*.,

[2011] S.C.C.A. No. 377. The Court consistently takes the view that an application for judicial review must be made for each distinct Board decision.

[35] The deletion of section 44 has not changed the Board's longstanding practice for reconsideration applications. That practice was summarized, albeit in reference to section 44, in *Kies 413, supra*.

[36] The main grounds for reconsideration, and the applicant's obligations when pleading an application for reconsideration, remain as described below. Decisions of the Registrar under section 3 of the *Regulations* similarly remain subject to reconsideration.

1. New Facts

[37] This ground involves new facts which the applicant did not put before the Board when originally pleading its case. It is not an opportunity for the applicant to add facts it had omitted to plead.

[38] As summarized in *Kies 413, supra*, an application for reconsideration will include, at a minimum, the following information about the alleged new facts:

1. What the new facts are;
2. Why the applicant could not have put them before the Board panel originally; and
3. How those new facts would have changed the Board's decision under review.

[39] Generally, the original panel will consider applications raising this ground, given its advantageous position to decide whether "new facts" exist and their impact, if any, on its previous decision.

2. Error of Law or Policy

[40] Any alleged error of law or policy must cast serious doubt on the Board's interpretation of the *Code*. This creates a two-pronged test. A mere difference of opinion about the legal or policy interpretation will not justify reconsideration.

[41] A party must also have raised the point of law or policy issue in question before the original panel.

[42] The minimum pleading requirements for an allegation raising an error of law or policy remain as set out in *Kies 413, supra*:

> 1. A description of the law or policy in issue;
> 2. The precise error the original panel made in applying that law or policy; and
> 3. How that alleged error cast serious doubt on the original panel's interpretation of the *Code* or policy.

3. Natural Justice and Procedural Fairness

[43] Reconsideration may raise allegations that the original panel failed to respect the principles of natural justice or those related to procedural fairness.

[44] As described in *Kies 413, supra,* a party's minimum pleading requirements would address the following issues:

> 1. An identification of the particular principle of natural justice or procedural fairness in issue; and
> 2. A description of how the original panel allegedly failed to respect that principle.

E. Summary of Main Grounds for Reconsideration

[45] In summary, the main grounds for reconsideration may be described as follows:

> (*a*) New facts that the applicant could not have brought to the attention of the original panel and which would likely have caused the Board to arrive at a different conclusion;
>
> (*b*) Any error of law or policy that casts serious doubt on the interpretation of the *Code* or policy;
>
> (*c*) A failure of the Board to respect a principle of natural justice or procedural fairness; and
>
> (*d*) A decision made by a Registrar under section 3 of the *Regulations*.

[46] It is with the above principles in mind that the Board will address Mr. Buckmire's application.

V. Analysis and Decision

[47] The reconsideration process as described earlier is exceptional. In normal circumstances, the Board hears a case once and, as the privative clause in section 22 of the *Code* illustrates, its decision is final.

[48] Unless a properly pleaded application for reconsideration raises a strong argument, a reconsideration panel will generally summarily dismiss it. To do otherwise increases the expense of these cases for all parties and undermines the key principle of finality.

[49] Lengthy reconsideration decisions which simply dismiss an application could promote the incorrect impression that the Board decides its cases twice.

[50] In Mr. Buckmire's case, the reconsideration panel is not required to decide whether it agreed with the decision of the Majority or the Minority. That type of analysis would have the reconsideration panel redoing the case in a situation when it never heard the oral evidence.

[51] Rather, the reconsideration panel must consider whether Mr. Buckmire has pleaded and demonstrated that a proper ground for reconsideration requires its intervention.

[52] A review of *Buckmire LD 3024*, and the pleadings in this reconsideration application, make it abundantly clear that the Majority and Minority opinions result entirely from their differing interpretations of the oral evidence. The seven days of oral evidence demonstrate the level of scrutiny all three members of the original panel brought to bear when deciding this case.

[53] The Majority found that Mr. Simon's investigation report, and the follow up review by the Executive Board, did not amount to arbitrary conduct. The Minority found that Mr. Simon's investigation, and subsequent review by the Executive Board, were arbitrary, in part due to the Executive Board overturning Mr. Simon's recommendation without conducting its own review of the evidence.

[54] Either conclusion results squarely from an evaluation of the oral evidence. This appreciation of the facts is a matter solely for the original panel. Mr. Buckmire clearly does not agree with the Majority's evaluation of the facts, but that is not a basis for reconsideration.

[55] Mr. Buckmire's application for reconsideration must accordingly be dismissed.

[56] This is a unanimous decision.

_____

Graham J. Clarke
Vice-Chairperson

_____

William G. McMurray
Vice-Chairperson

_____

Patric F. Whyte
Vice-Chairperson