Canada Industrial Relations Board Conseil canadien des relations industrielles

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BY FAX

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Dear Sirs:

> In the matter of the *Canada Labour Code (Part I–Industrial Relations)* and an application filed pursuant to section 23(1) thereof by the Teamsters Canada Rail Conference, applicant; Canadian Pacific Railway Company, respondent. (30921-C)

A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Ginette Brazeau, Chairperson, and Messrs. Robert Monette and Norman Rivard, Members, considered the above-noted application.

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

I. Nature of the Application

On January 9, 2015, the Board issued a decision (*Canadian Pacific Railway Company*, 2015 CIRB 755) in an unfair labour practice complaint involving the Teamsters Canada Rail Conference (TCRC or the union) and Canadian Pacific Railway Company (CP Rail or the employer). In that decision, the Board found that CP Rail had breached the *Code* and issued a cease and desist order (Board order no. 748-NB). The order reads as follows:

> **WHEREAS** the Teamsters Canada Rail Conference (TCRC or the union) is the certified bargaining agent for a bargaining unit of running trades employees working for Canadian Pacific Railway Company (CP Rail or the employer) by virtue of a certification order issued by the Canada Industrial Relations Board (the Board) on March 25, 2004 (Board order no. 8600-U);
>
> **AND WHEREAS** the TCRC filed an unfair labour practice complaint against CP Rail on September 5, 2013 alleging that the employer is utilizing non-bargaining unit employees to perform work of the bargaining unit, specifically the employer's actions in allowing members of management to operate trains;
>
> **AND WHEREAS** the Board conducted a hearing into the complaint and heard evidence from both parties as to the circumstances giving rise to the complaint;
>
> **AND WHEREAS** the Board has determined that, by using management to perform bargaining unit work when unionized crews were available, the employer did violate sections 36(1)(*a*) and 94(1)(*a*) of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*);
>
> **NOW, THEREFORE**, as remedy for its breach of the *Code*, the Board hereby orders the employer to:
>
> (a) provide the union with a completed copy of the "Management Crew Train Order Checklist" each time a management crew is used to perform bargaining unit work;
>
> (b) cease and desist from replacing members of the union's bargaining unit who have been scheduled to work with management personnel in training; and
>
> (c) cease compelling members of the union's bargaining unit to participate in training managers to operate trains.
>
> **ISSUED** at Ottawa, this 9th day of January, 2015, by the Canada Industrial Relations Board.

On February 6, 2015, the TCRC filed this application to have Board order no. 748-NB filed in the Federal Court pursuant to section 23 of the *Code*. In support of its application, the TCRC provided a list of 11 situations that it contends, demonstrate that the employer is in violation of the Board order. The union submits that members of the bargaining unit are being displaced and asked to participate in the training of the employer's managers.

In its response, the employer denies that it is engaging in any practices that are contrary to the Board order. It submits that the examples provided by the union are related to the use of

management crews where unionized crews are available and that this is unrelated to the Board order. The employer states that it conducts training of management employees but that this is being carried out in a manner that complies with the order, namely, that members of the bargaining unit are not relieved of their responsibility to operate the train and that unionized crews are not being required to participate in the training.

In its reply of February 11, 2015, the union contests the employer's assertions. It also advises the Board that it has served a strike notice and will be in a legal strike position on February 15, 2015 at 12:01 a.m. The Board understands that the parties are currently in negotiations to try to reach agreement on the renewal of their collective agreement and avoid a work stoppage.

II. Analysis and Decision

Section 23(1) of the *Code* provides:

> 23.(1) The Board shall, on the request in writing of any person or organization affected by any order or decision of the Board, file a copy of the order or decision, exclusive of the reasons therefor, in the Federal Court, unless, in the opinion of the Board,
>
> (a) there is no indication of failure or likelihood of failure to comply with the order or decision; or
>
> (b) there is other good reason why the filing of the order or decision in the Federal Court would serve no useful purpose.

The Board has considerable discretion in deciding whether to file its order in court. The Board expects its orders to be obeyed, but its role is not to punish parties. Rather, it looks to remedy breakdowns in labour relations and encourage the constructive settlement of disputes between the parties. In *British Columbia Maritime Employers Association and DP World (Canada) Inc.*, 2009 CIRB 485, the Board reviewed the exercise of the Board's discretion under sections 23 and 23.1 in the following terms:

> [27] These sections of the *Code* require the Board to formulate an opinion as to whether to file a Board order in court (see *NAV Canada* v. *Canadian Air Traffic Control Association* (1999), 250 N.R. 321 (F.C.A.)). To formulate this opinion, the Board must take into consideration sections 23(1)(a) and 23(1)(b) of the *Code*. Section 23(1)(a) suggests that one good reason for not filing an order in court is a lack of indication of failure or of likelihood of failure to comply with the order. Section 23(1)(b) indicates that there may be other good reason not to file an order in court. This means that the Board may decide not to file an order in court even if there is evidence of failure or the likelihood of failure to comply with the order. It is up to the Board to form an opinion as to whether, in any given case, the circumstances in either (a) or (b) exist, so as to persuade it not to file the order in court. As Board jurisprudence indicates, the Board's discretion under (b) is very broad and the Board is entitled to use its judgment and expertise to determine whether, for labour relations reasons and in furtherance of the objectives of the *Code*, filing the order in court, even where there is some indication that the Board's order is not being fully complied with, would serve no useful purpose (see, for example, *Iberia, Airlines of Spain* (1988), 72 di 222 (CLRB no. 671); and *Maritime Employers' Association and Terminaux Portuaires du Québec, supra*).

It is not sufficiently clear from the submissions filed with the Board that the employer is deliberately failing to comply with the Board's order. However, the Board does not need to make a determination on this issue as it is of the view that this is an appropriate case to exercise its discretion under section 23(1)(*b*).

In *Seaspan International Ltd.* (1979), 33 di 544; and [1979] 2 Can LRBR 493 (CLRB no. 196), the Canada Labour Relations Board commented on this second discretionary ground:

> ... In short, the focus is not on strict adherence to principals requiring obedience in an ordered society to orders of the courts. Rather it is recognized that the Board must act as a flexible instrument in the often shifting labour relations climate where further proceedings on its decisions can be futile or contrary to the evolved circumstances. ...
>
> (pages 500; and 554)

In the present matter, the parties are facing the very real threat of a strike or lockout in a few days from the date of this decision and are actively engaged in collective bargaining in order to reach agreement and avoid a work stoppage.

This is not the time to detract the parties from dedicating all their efforts on collective bargaining. The Board finds that the filing of the order in the Federal Court would serve no labour relations purpose at this time and declines to do so.

This is a unanimous decision of the Board, and it is signed on its behalf by

Ginette Brazeau
Chairperson

c.c.: Ms. Natalie Zawadowsky (CIRB–Toronto)