COMMENTARY

Trends at the Canada Industrial Relations Board

*Graham Clarke**

1. INTRODUCTION

On January 1, 1999, the date on which amendments to the *Canada Labour Code* (the "*Code*") came into effect, the Canada Industrial Relations Board ("C.I.R.B.") replaced its predecessor, the Canada Labour Relations Board ("C.L.R.B."). Since then, employers, unions and their legal counsel have learned, sometimes the hard way, that the advent of the C.I.R.B. constituted more than a simple name change. The C.I.R.B. has exercised its expanded procedural powers liberally in order to streamline the adjudicative process, conserve scarce resources and avoid delays. For example, drawing extensively on its prerogative to issue a written decision based solely on the parties' written representations, the Board has sent a clear message that oral hearings are a privilege rather than a right under the new regime. Furthermore, the C.I.R.B. has not hesitated to review and sometimes reject familiar C.L.R.B. practices. While to some extent this change in approach flows from the amendments to the *Code*, the Board has sometimes declined to follow the previous C.L.R.B. interpretation of *Code* provisions that remain unchanged. For instance, the C.I.R.B. has decided that single employer declarations are no longer simply remedial in nature, but may be issued for other reasons as well. Similarly, the C.I.R.B. has embraced a more

* Graham Clarke is a partner of the law firm of Borden Ladner Gervais LLP in Ottawa. Legal counsel to the Chair of the Canada Labour Relations Board from 1988 to 1990, he is the author of *Canada Labour Relations Board: An Annotated Guide*, and *Clarke's Canada Industrial Relations Board*. This is a revised version of a paper originally presented in Ottawa at the Federal Mediation and Conciliation Service's Industrial Relations Conference on October 11, 2001.

interventionist approach to the duty of fair representation. This paper will begin by reviewing some of the major legislative changes to the *Code*. It will then focus on several emerging trends of which members of the labour relations community need to be aware.

2. HOW IS THE C.I.R.B. DIFFERENT FROM THE C.L.R.B.?

(a) A Representational Board

The C.L.R.B. was unique in Canada in that it was a non-representational labour relations board. On a three-person panel, all the members could have come from either a management or a union background. There was never any suggestion, though, that such a structure affected the Board's ability to operate as an impartial tribunal. During the C.L.R.B.'s existence in the years 1973-1998, few of its reported decisions contained a dissenting opinion. The C.I.R.B., by contrast, is fully representational (s. 9). Every three-person panel must have one representative from management and from labour. To date, there does not appear to have been an increase in the number of dissents, which may be due in part to more flexible quorum requirements.

(b) Quorum

The C.L.R.B. was required to appoint a three-person panel in almost all cases. In light of the fact that the Board held hearings across Canada, this led to scheduling delays and greatly increased costs. The representational C.I.R.B. enjoys greater flexibility in constituting a quorum (s. 14). The Chair or a Vice-Chair may now decide cases sitting alone, and, judging from the reported cases, this has become a frequent practice.

(c) Time Limits

The C.L.R.B. did not have jurisdiction to extend the *Code*'s strict time limits. If, for example, an employee missed the 90-day time limit for filing a duty of fair representation complaint, the C.L.R.B. was powerless to intervene. Section 16(m.1) now enables

the C.I.R.B. to extend the statutory time limits. Notwithstanding this new power, though, the C.I.R.B. has exercised its discretion sparingly and only for compelling reasons.

(d) Oral Hearings

In practice, the C.L.R.B. was not required to hold an oral hearing in every matter. Almost all unfair labour practice complaints were heard orally, however, forcing the Board to travel the country hearing cases that could perhaps have been decided on the basis of written submissions. Section 16.1 of the *Code* now expressly provides that the C.I.R.B. may decide any matter without holding an oral hearing. As indicated, the Board has frequently taken advantage of this provision.

(e) Review of Bargaining Units

The C.L.R.B. had interpreted its s. 18 power to review its previous orders and decisions as including the authority to review and merge previously certified bargaining units. The C.L.R.B. had also on occasion initiated such reviews on its own. However, the Board could not exercise this bargaining unit review power when dealing with single employer or sale of business applications. Section 18.1 of the *Code* clarifies the C.I.R.B.'s authority in this regard. The Board can no longer review the composition of bargaining units unless the employer or the union first files an application. Upon receipt of such an application, however, the Board has explicit power to combine bargaining units, to designate a new bargaining agent, and to deal with matters arising from the existence of multiple collective agreements. The Board can also exercise its power of review after making a single employer or sale of business declaration. However, it must first provide an opportunity to the parties to reach agreement on the appropriate bargaining unit.

(f) Single Employer Declarations

In the past, the C.L.R.B. generally held that an employer was not entitled to initiate a single employer application. The *Code*'s amended s. 35 now gives employers this right. Moreover, if the

C.I.R.B. decides to issue a single employer declaration, it can make use of its extensive powers under s. 18.1 to review the single employer's bargaining unit structure.

(g) Just Cause Requirement

The C.L.R.B. had only limited power to intervene in an employee dismissal which took place after certification, but before the conclusion of a first collective agreement. Often, employees who had been dismissed filed an unfair labour practice complaint alleging that the reason for the dismissal was their involvement in the certification campaign. However, the Board's jurisdiction to provide a remedy for an unfair labour practice was restricted to situations in which the employer had acted on the basis of anti-union animus. In the absence of evidence of improper motivation, the C.L.R.B. had no jurisdiction to inquire into the existence of just cause. Section 36.1 of the amended *Code* includes a just cause provision governing the period between certification and the conclusion of a first collective agreement. An arbitrator will thus have jurisdiction to review any dismissal or discipline in accordance with the just cause standard. Furthermore, dismissal or discipline of an employee that occurs between the date on which the right to strike takes effect and the conclusion of a new collective agreement may also be referred to arbitration (s. 67(6)).

(h) Sale of Business

Previously, the C.L.R.B. was not empowered to issue a sale of business declaration unless both the purchaser and the vendor fell within federal jurisdiction. The Board's power to review the composition of bargaining units following the sale of a business was also limited; no review could take place unless employees had been "intermingled." The C.I.R.B., on the other hand, has the authority under s. 44 to issue a sale of business declaration even if the business in question originally came under provincial jurisdiction. The Board can also exercise its enhanced powers under s. 18.1 to merge bargaining units, designate a bargaining agent or modify existing collective agreements.

(i) Notice of Strike or Lock-out

During the era of the C.L.R.B., the *Code* did not impose any requirement to give advance notice of a strike or lock-out. Section 87.2 now requires that a union provide 72 hours' notice in advance of a strike. Employers are subject to an identical obligation in respect of a lock-out.

(j) Secret Vote

The former *Code* did not provide for secret strike or lock-out votes. Section 87.3 now makes a secret vote mandatory. According to the legislation, the result of a strike or lock-out vote remains valid for 60 days.

(k) Essential Services

Previously, the C.L.R.B. had no jurisdiction to define and oversee the administration of essential services. Current s. 87.4 enables the parties to a collective agreement to designate essential services which will remain in place during a work stoppage. If the parties cannot agree, the C.I.R.B. will decide the issue. The time required for a Board determination may delay the start of an anticipated strike or lock-out.

(l) Replacement Workers

Under the C.L.R.B. regime, federally regulated employers were permitted to hire replacement workers. While employers have retained this right under the revised *Code*, s. 94(2.1) confers on the Board a power to prohibit the use of replacement workers upon proof that the employer sought to undermine the union's representational capacity. The Board has yet to consider the application of this provision.

(m) Remedial Certification

The C.L.R.B. had no jurisdiction to certify a trade union that lacked majority support in the voting constituency, even if the

shortfall in membership was attributable to the employer's unfair labour practices. New s. 99.1 gives the Board the power to make a certification order where it is established that (i) the employer committed an unfair labour practice; and (ii) the trade union would have had the support of a majority of employees in the unit but for the unfair labour practice. The Board has exercised its power under this provision once, in a case in which the employer had repeatedly dismissed union supporters and failed to comply with Board orders.[1]

(n) Occupational Health and Safety

More recently, through the enactment of Bill C-12 on September 30, 2000, Parliament has modified the extent of the Board's jurisdiction with respect to occupational health and safety matters. Previously, the Board was authorized to review the decision of a Safety Officer as to whether or not a "danger" existed within the meaning of Part II of the *Code*. An Appeals Officer now performs this function. Bill C-12 has, however, increased the scope of the C.I.R.B.'s jurisdiction over complaints in which an employee alleges that he or she has been disciplined or discharged for exercising rights under Part II.

(o) New Regulations

On December 5, 2001, the *Canada Industrial Relations Board Regulations, 2001* came into force, replacing the Regulations which had been promulgated in 1992. The new Regulations reflect the Board's goal of streamlining the adjudicative process in order to use resources more efficiently and decide cases more quickly. Among other things, the changes permit the Registrar to decide uncontested matters, establish an e-filing system, and require parties to file all documents and a list of witnesses five days before the commencement of an oral hearing.

As this summary demonstrates, the C.I.R.B. has been given significant new procedural and substantive powers. The next part of this

1 *Transx Ltd. and Teamsters, Local 31* (1999), 58 Can. L.R.B.R. (2d) 91 (C.I.R.B.).

paper will consider some of the trends which are emerging in the interpretation and application of these provisions by the C.I.R.B. and the Federal Court of Appeal.

3. EMERGING TRENDS AT THE C.I.R.B.

Although in many respects the effect of the 1999 amendments to the *Code* remains to be seen, certain trends in C.I.R.B. jurisprudence have begun to develop. Those trends can be broadly categorized as: (i) the Board's need to operate efficiently; (ii) the C.I.R.B.'s re-examination of previous C.L.R.B. practices; and (iii) the Board's enhanced role in collective bargaining. The approach which the C.I.R.B. has taken to the following issues illustrates one or more of these trends.

(a) Oral Hearings

Under s. 16.1, the C.I.R.B. has clear legislative authority not to hold an oral hearing. Moreover, the Board's Regulations have always required that parties who wish an oral hearing submit a request for one (although the Board is not obligated to grant the request).

In *NAV Canada Inc.*,[2] the employer contested the union's application to have two new positions included in the bargaining unit, arguing that the positions were occupied by managers. The Board, in accordance with its usual procedure, advised the employer that any request for an oral hearing must be accompanied by reasons why such a hearing should be held. The employer did not request a hearing, nor did it make any further submissions in response to a Senior Labour Relations Officer's report which summarized the evidence filed by the parties. In the result, the C.I.R.B. included the disputed positions in the bargaining unit without holding an oral hearing. In an application for judicial review, the employer requested the Federal Court of Appeal to overturn the decision on the basis that the failure to hold an oral hearing constituted a denial of natural justice.[3] The Court, however, expressed little sympathy:

2 [2000] C.I.R.B. No. 88.

3 *NAV Canada v. I.B.E.W., Local 2228* (2001), 267 N.R. 125 (F.C.A.).

> The applicant cannot now, in the face of having ignored ss. 11(1)(f) and 19(1) of the Regulations, legitimately complain about the lack of an oral hearing. The applicant had ample opportunity both to put forward its evidence and arguments as well as to request an oral hearing. No oral hearing was requested and it did not request the opportunity to present further evidence and argument. The *audi alteram partem* rule does not require an oral hearing.[4]

The Court continued: "Further, s. 16(1) of the *Canada Labour Code* and s. 19(2) of the Regulations provide that the Board may decide any matter before it without holding an oral hearing. Thus even if the applicant had requested a hearing the Board was at liberty to decide the matter without granting an oral hearing."[5]

A similar result obtained in *Marine Atlantic Inc. v. C.M.S.G.*,[6] where the Board had certified the respondent union as bargaining agent for a group of the employer's employees. Dismissing the employer's application for judicial review, the Federal Court of Appeal wrote:

> While justice may in some circumstances call for an oral hearing, this case is clearly not in that category. The applicant did not take the opportunity provided to it to comment on the investigator's report. Although now the applicant alleges a variety of inadequacies in the report, there is no reason why such alleged inadequacies could not have been addressed in writing by the applicant to the Board. Nothing in the material before the Court indicates that written submissions would not have been an adequate way in which to address such concerns. There is, therefore, no basis to conclude that there was any breach of the principles of natural justice by the Board not providing for an oral hearing in this case.[7]

These decisions establish the following principles:

1. The C.I.R.B. is not obligated to hold an oral hearing. Parties must request a hearing and observe the procedures prescribed by the Regulations.
2. A party who requests an oral hearing must respond fully to a Labour Relations Officer's investigation report. A failure to do so may be held against the party in a later application for judicial review.

4 *Ibid.*, at para. 9.
5 *Ibid.*, at para. 10.
6 (2000), 258 N.R. 112 (F.C.A.).
7 *Ibid.*, at para. 115.

3. Parties must file with the Board full and complete written submissions, as opposed to a mere summary of the evidence that they expect to call at an oral hearing.
4. In some circumstances, the C.I.R.B. may be required to hold an oral hearing in accordance with the principles of natural justice.

In cases in which credibility is a significant issue, for example, an oral hearing may be necessary to safeguard the principles of natural justice.

The C.I.R.B. has a broad discretion in deciding whether to hold a hearing. Arguably, a party's means should constitute an important factor affecting the exercise of the C.I.R.B.'s discretion. If the risk that an oral hearing will be denied makes it necessary to prepare full written submissions in each case, the parties' costs will increase substantially. While larger employers and unions can readily absorb this cost, others, having more limited resources, may find it prohibitive. It would be unfortunate if the C.I.R.B.'s legitimate attempts to streamline its operations unintentionally restrict the ability of a party to access the adjudicative process.[8] As the Board's reported decisions to date have not provided guidance as to when it will hold an oral hearing, the formulation of a Board policy on this issue might be of assistance to the industrial relations community.

(b) Single Employer Declarations

In disposing of an application for a single employer declaration under s. 35 of the *Code*, the C.L.R.B.'s traditional approach was to examine whether the following five criteria had been satisfied:[9]

1. two or more enterprises, i.e. businesses,
2. under federal jurisdiction,
3. associated or related,
4. of which at least two, but not necessarily all, are employers,
5. the said businesses being operated by employers having common direction or control over them.

8 For example, individuals filing a duty of fair representation complaint and federally-regulated small family businesses could be affected.
9 For a review of the criteria, see *Murray Hill Limousine Service Ltd.* (1988), 74 di 127.

If the applicant met this initial threshold, the C.L.R.B. then considered whether it should exercise its discretion to issue a declaration. However, because the Board viewed a single employer declaration as being remedial in nature, it would exercise its discretion only on the basis of convincing evidence that the employer's structure undermined a union's collective bargaining rights. The C.L.R.B. stated on many occasions that it would not issue a single employer declaration simply to exempt a union from its usual obligation to recruit members for the purpose of certification.

As of January 1, 1999, however, s. 35 changed in two ways. First, the *Code* now permits an employer to file a single employer application. Second, if the C.I.R.B. issues a single employer declaration, it can exercise its significant powers under s. 18.1, as outlined above. In *Air Canada*,[10] the C.I.R.B. reviewed the amended s. 35 and concluded that the provision afforded a broader basis for the exercise of its discretion. In that case, following the merger of Air Canada ("ACC") and Canadian Airlines International Ltd. ("CAIL"), C.U.P.E., a bargaining agent for a unit at CAIL ("C.U.P.E. CAIL"), applied for a single employer declaration. A C.U.P.E. bargaining agent at Air Canada ("C.U.P.E. ACC") obtained intervenor status and opposed the application. The Board held that ACC and CAIL met the five criteria set out in s. 35. The C.I.R.B. then stated that it ought not to exercise its discretion in so restrictive a fashion as it had under the previous *Code*:

> A careful consideration of s. 35 and s. 18.1 in their present statutory context leads the Board to conclude that a broader basis for the exercise of its discretion is required. The Board considers that rationalization of bargaining units which will promote sound labour relations and which will prevent disruption caused by inter-unit conflicts is an appropriate labour relations purpose to make a s. 35 declaration. In this case, a single employer declaration is appropriate in order to rationalize the C.U.P.E. CAIL and C.U.P.E. ACC bargaining units.[11]

The decision gives a clear signal that the C.I.R.B. will not follow the C.L.R.B.'s restrictive approach to single employer declarations.

10 [2000] C.I.R.B. No. 78. The C.I.R.B. has issued two other decisions on this issue involving Air Canada: *Air Canada*, [2000] C.I.R.B. No. 79; *Air Canada*, [2000] C.I.R.B. No. 90.

11 *Air Canada*, [2000] C.I.R.B. No. 78, at para. 34.

Arguably, the Board could have applied the C.L.R.B.'s traditional remedial approach to arrive at the same conclusion. Instead, announcing its departure from previous practice, the C.I.R.B. chose to interpret the new *Code* according to its own terms.

(c) Picket Lines and Illegal Strikes

Some parties have negotiated collective agreement provisions stipulating that bargaining unit members will not be required to cross a picket line raised by another union. For example, in *B.C. Terminal Elevator Operators' Assn.*,[12] the union and the employer had negotiated the following clause:

> The Union agrees that in the event of strikes or walkouts, the Union will not take similar action on the ground of sympathy, but will continue to work. *The Companies do not expect members of the Union to pass a picket line.*[13]

Despite this provision, the C.I.R.B. held that union members who had exercised their collective agreement right not to cross another union's picket line engaged in an illegal strike, contrary to the *Code*. In the Board's view, the parties were not permitted to contract out of the *Code*'s prohibition against strikes during the term of a valid collective agreement.[14] The Federal Court of Appeal affirmed the decision, ruling that it was not patently unreasonable to conclude that an illegal strike had taken place.[15] This result is not surprising. It demonstrates, however, that knowledge of the *Code* and the Board's application of it will assist collective agreement negotiators working in the federal sector.

(d) Duty of Fair Representation

When it was first enacted in 1978, the *Code*'s duty of fair representation was framed in broad terms:

12 [1999] C.I.R.B. No. 6.

13 Emphasis added.

14 The Board came to the same conclusion in *Westshore Terminals Ltd.*, [2000] C.I.R.B. No. 61.

15 *I.L.W.U. v. B.C. Terminal Elevator Operators' Assn.* (2001), 273 N.R. 160 (F.C.A.).

> Where a trade union is the bargaining agent for a bargaining unit, the trade union and every representative of the trade union shall represent, fairly and without discrimination, all employees in the bargaining unit.

Accordingly, the C.L.R.B. held that the duty of fair representation extended to a union's actions during collective bargaining. Since nothing in the provision suggested a temporal limit on the scope of the duty, the Board maintained that it had jurisdiction to receive complaints from individual employees alleging that the union had breached its duty in the course of negotiating a collective agreement. In 1984, Parliament amended the provision to read as follows:

> 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.*[16]

This remains the wording of current s. 37 of the *Code*. Most post-amendment C.L.R.B. decisions have held that the phrase, "with respect to their rights under the collective agreement that is applicable to them," removed collective agreement negotiations from the ambit of the Board's jurisdiction. Nevertheless, in some cases, panels of the Board continued to hold that the union's conduct during negotiations was subject to review for compliance with the duty.

More recently, the C.I.R.B. has clearly indicated in a series of decisions that the duty of fair representation will henceforth apply to collective bargaining. In *George Cairns*,[17] the complaint originated in a Board order consolidating into a single bargaining unit two separate units at VIA Rail, each with a different bargaining agent, covering locomotive engineers (Brotherhood of Locomotive Engineers or "B.L.E.") and conductors (United Transportation Union or "U.T.U."). In a representation vote, B.L.E. was selected by a narrow margin to represent the newly consolidated unit. The collective agreement subsequently negotiated by B.L.E. on behalf of the unit markedly favoured the interests of the locomotive engineers, and provided inferior seniority and job transfer rights to the conductors. On application

16 Emphasis added.
17 [1999] C.I.R.B. No. 35.

by a group of conductors, the Board held that B.L.E.'s actions during the negotiations violated the duty of fair representation:

> The B.L.E.'s failure to adequately and fairly balance the interests of all its members in circumstances that touched upon the very core of their employment relationship constitutes, in the Board's view, a failure to represent the membership's legitimate interests. This failing to assume its responsibilities with integrity and competence amounts to bad faith as prohibited by the *Code*. The union's behaviour is tantamount to the absence of representation within the context of collective bargaining. In view of the treatment of the complainants, the respondent union is liable for the consequences that attach to the Board's findings.[18]

Upon reconsideration,[19] the Board came to the same conclusion, upholding the original panel's decision by reference to the extent of its jurisdiction under s. 37:

> The notion that seniority rights, essential working conditions, the right to employment and other rights of minority employees already in existence under one collective agreement could be arbitrarily and conclusively terminated by a collective agreement supported by a narrow majority and that any inquiry by the Board as to whether this was done fairly would be prohibited by s. 37's wording appears to this Board to be inconsistent with a reasonable interpretation of that section of the *Code* in the light of its statutory context as is indicated by the authorities cited above. The present Board does not feel that it can apply the present *Code* in a manner to so limit its jurisdiction on the basis of the text of s. 37 in its statutory context. The argument on authority that the Board should so limit its jurisdiction appears therefore to the reconsideration panel to be without merit as the authorities do not appear to provide the unequivocal support contended for such a position. More importantly, it appears that no such intention to limit the scope of the Board's inquiry is manifest in the text of the section itself.[20]

The Board also affirmed the original panel's remedial order, which required the parties to re-open the negotiations and appoint an independent representative to defend the rights of the conductors. The conductors' representative was to "share an equal voice with B.L.E. representatives in coming to an agreement."[21]

18 *Ibid.*, at para. 122.
19 [2000] C.I.R.B. No. 70.
20 *Ibid.*, at para. 64.
21 *Supra*, note 17, at para. 130.

Both the original and the reconsideration decisions came before the Federal Court of Appeal on an application for judicial review.[22] In the Court's view, the C.I.R.B.'s interpretation of s. 37 was not patently unreasonable, and was therefore not subject to review. Indeed, the Court endorsed the Board's analysis:

> Section 37 imposes upon a union a duty to fairly represent its members in the representation of the rights that they have acquired by virtue of the collective agreement that is applicable to them. This does not necessarily relieve the union from such a duty outside the term of a collective agreement. Indeed, once notice of collective bargaining has been given, the terms or conditions of employment or any right or privilege of the employees in a bargaining unit are frozen by s. 50(b) until the parties gain the right to strike or lock-out in accordance with s. 89. The statutory freeze would have no meaning unless those terms, conditions, rights or privileges which are its object have a source. That source is the former collective agreement. Thus, the union has a duty, during a freeze period, to fairly represent its members with respect to the terms, conditions, rights or privileges that are protected from alteration by s. 50(b).
>
> I have no doubt that the duty of fair representation extends to the administration of the frozen matters. The question is whether this duty can extend to the union's actions during collective bargaining that takes place during the freeze period.[23]

The Court rejected arguments by the employer and B.L.E. that extending the duty of fair representation to collective bargaining would destroy the necessary give-and-take of contract negotiations, reasoning as follows:

> To hold otherwise would be to allow a union to simply put off dealing with controversial matters such as the crewing initiative in this case, so as to address them with the employer during collective bargaining instead of during the term of the collective agreement. While dealing with the matters during the term of the collective agreement would give rise to a duty under s. 37, delaying negotiations would shelter the union from scrutiny under s. 37. In my opinion, an interpretation that allowed such a result would be irrational and absurd.[24]

The result in this case is hard to contest. Employees represented by a rival union appear to have been systematically discriminated

22 *VIA Rail Canada Inc. v. Cairns* (2001), 270 N.R. 237 (F.C.A.), leave to appeal to S.C.C. refused December 6, 2001.

23 *Ibid.*, at paras. 52-53.

24 *Ibid.*, at para. 55.

against by a bargaining agent to whom the *Code* granted an absolute right to negotiate on their behalf. Such a wrong clearly demands a remedy. But did Parliament intend to provide that remedy through s. 37? An analysis of three important time periods defined by the *Code* suggests that it did not. More specifically, the C.I.R.B. and the Court addressed only two of the three relevant periods set out in the *Code*.

(i) *Time Period I: During the Term of the Collective Agreement*

During the term of a collective agreement, the duty of fair representation applies. The duty will also apply to interim negotiations that amend an existing collective agreement.

(ii) *Time Period II: The Statutory Freeze*

The Federal Court of Appeal held that, unless the duty of fair representation applied to a union's negotiation efforts during the statutory freeze period prescribed by s. 50(b),[25] an "irrational and absurd" result would ensue. The result to be avoided, according to the Court, was that a union could simply await the termination of the collective agreement, and then cease to negotiate fairly on behalf of minority employees during the statutory freeze.

(iii) *Time Period III: The Right to Strike or Lock-out*

If it is "irrational and absurd" to allow a union to await the expiration of a collective agreement in order to avoid its duty of fair representation, one would think that it is equally "irrational and absurd" to prevent a union from behaving in this manner once it has acquired the right to strike. The C.I.R.B. and Federal Court of Appeal decisions did not address this third time period contemplated by the *Code*, which often precedes the conclusion of a new collective agreement. The statutory freeze in s. 50(b) applies only until such time as the parties are in a legal strike or lock-out position. Once a strike or

25 Section 50(b) prevents an employer during negotiations from modifying a right or privilege of a bargaining unit employee unless the bargaining agent consents. It does not impose any explicit duty on the bargaining agent.

lock-out can take place, the collective agreement has expired,[26] as has the statutory freeze. All that remains is the economic warfare that the *Code* permits in these circumstances.

Could it be persuasively argued that current s. 37 applies during this period, even though neither the collective agreement nor the statutory freeze continues to subsist? If the collective agreement has expired, how can a duty that is explicitly tied to it remain in effect? The *Code*'s pre-1984 duty of fair representation provision might have covered the period, since it was not limited by a temporal reference to the collective agreement. This suggests that the change to the wording of the provision was in fact intended to exclude negotiations, notwithstanding that it would deprive vulnerable employees of a remedy against the union. Parliament apparently decided that the benefit of certainty in concluding a new collective agreement outweighed the risk that a bargaining agent might abuse its exclusive bargaining rights.

In its judgment in *Cairns*, the Federal Court of Appeal also affirmed the C.I.R.B.'s remedial order to re-open the negotiations with regard to certain of the conductors' rights, and to appoint a spokesperson on their behalf:

> In my opinion, the Board's order was rationally connected to the union's breach and to its consequences. The Board found that the B.L.E. had failed to represent the conductors fairly with respect to three specific matters dealt with in the C.C.A.A. [Crew Consist Adjustment Agreement]. It was only with respect to those matters that new negotiations were ordered. The Board found that the union's breaches were the result of its failure to determine or consider the interests of the conductors during the process of negotiating the CCAA. It ordered the B.L.E. to design a process to consult with the conductors and to hire a professional who would have an equal voice with the locomotive engineers' representative during negotiations. These measures were a rational and proportional response to the contraventions of the B.L.E.
>
> I am unable to conceive of any more appropriate remedy, nor were VIA or the B.L.E. able to propose one. It is true that the order will have an impact upon VIA, even though there was no finding of any contravention of the *Code* on its part. However, this impact is a necessary and inevitable result of the Board's finding against the B.L.E. The employer was made a party to the original complaint, and permitted to make submissions before the Board, at least in part due to the recognition that its interests might be impacted by any eventual order.[27]

26 Specific statutory language such as that in s. 67(6) is required to maintain in force a collective agreement provision for arbitration of discipline cases after the freeze has ended.

The significance of the Court's interpretation of the duty of fair representation is that unions and employers alike must be vigilant when engaging in negotiations. Unions will be called upon to represent fairly employees who have clearly divergent interests. A well-organized bargaining agent will carefully document the steps it took in considering issues affecting minority members. Employers, for their part, should keep in mind the possibility that the C.I.R.B. may re-open the terms of a concluded collective agreement following a successful duty of fair representation complaint. In order to avoid significant prejudice, an employer may well be entitled to demand an opportunity to renegotiate any concessions affected by the Board's intervention.

4. CONCLUSION

The revised *Code* that created the C.I.R.B. will have profound effects on the way in which labour relations in the federal jurisdiction are conducted. The nature and extent of some of the legislative changes, such as those relating to replacement workers and essential services, will remain uncertain until a jurisprudence has developed in which the Board definitively expounds the governing principles. In the meantime, parties are advised to be cognizant of the trends revealed by recent caselaw. Most notably, the C.I.R.B. will use its new powers to enhance the efficiency of adjudication. Resort to one-person panels and restrictions on the number of oral hearings are one manifestation of this emphasis on efficiency. The C.I.R.B. has also indicated that, in light of the amendments to the *Code*, parties must not assume that principles applied by the C.L.R.B. will continue to be accepted as normative. The Board's re-examination of the exercise of discretion in single employer applications demonstrates the impact that even seemingly minor amendments can have. Moreover, it is possible that the Board will adopt a more interventionist approach to the collective bargaining process. The Board's willingness to apply

27 *Supra*, note 22, at paras. 59-60.

the duty of fair representation to union decisions made in the course of collective bargaining indicates that it does not share the former C.L.R.B.'s reticence in this regard. The legitimacy of the C.I.R.B.'s expanded role is difficult to dispute, given the total dependency of bargaining unit members on their bargaining agent. But is the occasional instance of abuse an adequate rationale for calling into question the finality of a collective agreement?