CANADA INDUSTRIAL RELATIONS BOARD: THE PROCESS IS THE MESSAGE

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I. INTRODUCTION[1]

It appears, perhaps paradoxically, that labour relations is becoming more practical yet simultaneously more legalistic.

On the practical side, many clients demand from their legal counsel, if they still use legal counsel, relatively *pro forma* legal opinions and advice. Clients want to settle cases and avoid potentially lengthy quasi-judicial proceedings. Gone are the days, at least for some labour relations practitioners, of being asked to prepare regular, formal legal opinions and to plead several labour law cases each month.

It is the same in employment law circles where the advent of mandatory mediation has reduced even further the number of employment cases which actually get tried.

On the legalistic side of things, however, decisions from the courts in certain areas have made it extremely challenging for labour lawyers to give *pro forma* opinions.[2] The complexity of the duty to accommodate in human rights law and the application of the Charter to labour relations issues make it challenging, even for seasoned legal counsel, to meet clients' ever increasing expectations.

Client demands for quicker and less costly resolutions have not gone unnoticed by either labour arbitrators or labour boards. It is no coincidence that today's popular labour arbitrators often have an impressive track record for achieving settlements. Labour tribunals have as well streamlined their processes in order to meet the needs of the parties and to deal with tighter budgets.

This paper will first consider some of the ways in which the Canada Industrial Relations

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[1] I would like to thank my colleagues Robert Cook and Akivah Starkman for their helpful comments on a draft of this paper. This paper objectively summarizes some of the recent issues before the Board. The comments are for information purposes only and do not bind the Board or any of its members.

[2] For example, the Supreme Court of Canada recently reversed its longstanding position and decided that the freedom of association under section 2(d) of the *Charter* now includes protection of the collective bargaining process: *Health Services and Support-Facilities Subsector Bargaining Assn* v. *British Columbia*, [2007] S.C.J. 27.

Board ("CIRB" or "Board") has improved its efficiency. It will then refer to certain recent cases that may be of interest. The paper will be divided into the following topics:

A. Duty of fair representation complaints;

B. The certification process;

C. Maintenance of activities agreements; and

D. Recent cases of interest.

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A. DUTY OF FAIR REPRESENTATION COMPLAINTS

The CIRB, as is the case with most other labour boards, finds itself overwhelmed with the volume of duty of fair representation ("DFR") complaints.

While the Board still has a backlog of cases, it has created a new process, inspired by practices at other labour boards, to cull those complaints which raise no *prima facie* case[3] from those which merit greater scrutiny.

Parties before the Board may have noticed this change in the DFR process. Initially, while a trade union and an employer still receive copies of all DFR complaints, the Board no longer requests that they file their response immediately.

Rather, a CIRB panel reviews the DFR complaint in order to determine whether the applicant has made out a *prima facie* case. If no *prima facie* case exists, then the panel will dismiss the complaint with short written reasons.

The *prima facie* process is not designed to eliminate all DFR complaints. However, there are a large number of complaints which, even if every alleged fact were accepted as true, would still not amount to a violation of the *Code*. Rather than ask the respondent parties

[3] "*Prima facie* case", a legal term of art, means the allegations are sufficient, unless rebutted, to prove the applicant's case.

to file their submissions automatically, as was its previous practice, the Board, on its own motion, will now consider whether they have any case to meet.

a. Experience elsewhere

The British Columbia Labour Relations Board ("BCLRB") has also reexamined how it deals with DFR complaints.

Section 13 of the British Columbia *Labour Relations Code*, RSBC c. 244 ("BC *Code*") sets out explicitly how the BCLRB must treat a new DFR complaint:

> 13(1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organization has contravened section 12, the following procedure must be followed:
>
> (a) a panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred.

The legislature added Section 13 to the *BC Code* in 1993[4]. Despite that amendment which was designed to streamline the process, some felt that the BCLRB still allowed too many DFR complaints to pass the initial threshold.

The BCLRB's decision in *Re Judd,* [2003] B.C.L.R.B.D. No. 63 ("*Judd*") examined the situation. In a change of its practice, the BCLRB resolved to apply section 13 of the BC *Code* in a tighter fashion despite the fact that most DFR complainants were individuals without legal knowledge or representation (para 99):

> "While trying to be accessible to individuals who are unrepresented is very important, simply passing these types of complaints through to the next step without fully engaging the Section 13 requirement is, in our view, inconsistent with the legislative emphasis of that section."

[4] The BCLRB has an additional power, found at section 133(4) of the *BC Code*, to dismiss any complaint which "is without merit".

The BCLRB also suggested that allowing unmeritorious complaints to proceed would be worse for a complainant than dismissing it at first instance (para. 100):

> "Experience has also tended to cast doubt on whether passing such complaints through the Section 13 threshold is, ultimately, beneficial to complainants. In our experience, the vast majority of complaints are still dismissed, but after a full process of exchanging written submissions, potentially holding a hearing or engaging in other processes with the parties, and all the cost and delay associated with this."

In *Judd*, the BCLRB adopted the position that tightening up access to the DFR process was in the interest of all parties, including complainants (para. 111):

> "In conclusion, we believe that complainants, the other parties, and labour relations in the province are better served by more efficient Section 12 decisions. Along with Section 12 complainants receiving more timely decisions, unions and employers, for their part, are entitled by Section 13 not to be engaged in section 12 litigation unless the complaint discloses sufficient evidence to establish an apparent contravention. The Board will direct its efforts toward these ends."

The complainant did not ask for judicial review in *Judd*. However, in *Budgell* v. *British Columbia* (Labour Relations Board), [2003] B.J.C. No. 2662 the BC Court of Appeal gave deferrence to an earlier BCLRB decision on whether a DFR complaint raised a *prima facie* case (paras. 12 & 13):

> " 13 Whether one agrees or disagrees with the Board's determination that Mr. Budgell did not make out a *prima facie* case on the facts he alleged, its decision was clearly explained. The panel applied the proper test. It considered the appropriate factors. It considered Mr. Budgell's submissions. It did so in accordance with its understanding of the duty a Union owes its members under s. 12."

> " 14 The extent of that duty is a question the Board is uniquely qualified to determine."

The Manitoba Court of Appeal reached a comparable conclusion regarding a Manitoba

labour board decision to dismiss summarily a DFR complaint that lacked merit.[5]

b. The CIRB Experience

The CIRB's *prima facie* process examines DFR complaints in order to determine if the Board needs to hear from the respondent trade union and the employer. In order to make this decision, the CIRB has implicitly decided that complainants, despite usually being laypeople, must nonetheless file sufficiently particularized complaints in order to raise a *prima facie* case.

In order to assist with the process, the CIRB created a s.37 form for complainants to complete. The Board also issued an Information Circular explaining the DFR process.

In *Virginia McRaeJackson et al.*, [2004] CIRB no. 290; and 115 CLRBR (2d) 161, the CIRB conducted an extensive review of the legal principles applying to DFR complaints. The Board indicated the need for complainants to raise a *prima facie* case but also commented on the CIRB's role (para. 49):

> "The Board is an independent and adjudicative body whose role is to determine whether there have been violations of the *Code*. Although the *Code* gives the Board broad powers in relation to any matters before it, it is not an investigative body. Accordingly, it is not mandated to go on a fact-finding mission on behalf of the complainant, to entertain complaints of poor service by the union, to investigate the union's leadership or to investigate complaints against the employer for alleged wrongs suffered in the workplace. Employees who allege that their union has violated the *Code* and wish to obtain a remedy for that violation must present cogent and persuasive grounds to sustain a complaint."

The Board also described the onus on complainants to file particularized complaints (para. 50):

> "A complaint is not merely a perceived injustice; it must set out the facts upon which the employee relies in proving his or her case to the Board. A complaint goes beyond merely alleging that the union has acted "in a manner that is

[5] *Rowel* v. *Hotel and Restaurant Employees and Bartenders' Union, Local 206*, [2003] M.J. No. 462.

> arbitrary, discriminatory or in bad faith." The written complaint must allege serious facts, including a chronology of the events, times, dates and any witnesses. Copies of any documents that are relevant, including letters from the union justifying its actions or decision, should be used to support the allegations."

In *Prince Rupert Grain Ltd.*, [2006] CIRB no. 361 ("*Prince Rupert*"), the Board reviewed the various tests used to reject a case without calling on the respondents to adduce evidence. While *Prince Rupert* concerned a motion for non-suit, the applicable principles remain the same.

The panel adopted the following passage from *Sopinka, Lederman and Bryant* in The Law of Evidence in Canada (second ed., 1999) at page 139:

> "The judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if it believed the evidence given in the trial up to that point. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it."

The panel in *Prince Rupert* described the *prima facie* case test as follows (para. 39):

> "The Board looks to see whether there is evidence before it which, if believed would form the basis for a *prima facie* case. The Board agrees with the conclusion that is found in The Law Of Evidence and that was referred to earlier in this decision, to the effect that a *prima facie* case is no more than a case for the defendant, or the respondent, to answer. If a *prima facie* case is established, the non-suit motion will be dismissed. If it is not, the motion will be granted, and the overall case will be dismissed."

In the past, even prior to the 1999 *Code* amendments, the Board has required a complainant to establish a *prima facie* case: *Air Canada* (1975), 11 di 5; [1975] 2 Can.L.R.B.R. 193 (CLRB 45). The 1999 amendments to the *Code*, and particularly section 16(o.1), have provided further authority for the CIRB to take this proactive approach.

c. Summary

The Board is still developing its *prima facie* process to ensure fairness to DFR

complainants while simultaneously respecting the rights of trade unions and employers not to be put to the unnecessary expense caused by unmeritorious complaints.

Another benefit from the *prima facie* process is that it relieves the Board's Labour Relations Officers ("LROs") from having to investigate and file a formal written report for every DFR complaint. This allows the LROs to spend more time on urgent applications, such as those relating to certification.

B. THE CERTIFICATION PROCESS

Up until 2004, the Board took on average 170 to 180 days to process certification applications. The Sims' Task Force[6] had criticized this delay and suggested labour boards could complete the process in 30-45 days. In 2004, the Board committed itself to examining its procedures in order to streamline its process.

The average time now for a certification application has been reduced to 55 days.

How did the Board streamline the process?

Several changes took place in the CIRB's internal procedures to deal with certification applications on a priority basis. The following are just a few of the initiatives:

a) Use of a fixed schedule

The Board creates a timeline for parties which sets out the exact dates by which they must complete certain steps. Rather than telling parties they have 15 days to complete a step, the Board now provides them with the exact date.

b) No extensions

The Registrar no longer grants extensions beyond two days for the filing of materials in certification applications. Only a Board panel in extreme situations may grant an

[6] Seeking A Balance: Canada Labour Code Part 1: Review (Public Works and Government Services Canada, 1995)

extension. This insistence on respecting a tight time schedule is no different from that demanded by the Ontario Labour Relations Board when it schedules its mandatory certification vote.

Parties can and do respect tight time lines for priority matters. Certification applications fall within this category.

c) Use of "ready panels"

The Board assigns "ready panels" each week. The panel usually consists of a three person panel or a single Vice-Chair who will issue decisions and/or orders for certification applications and other potentially urgent matters.

d) Expedited Investigation

The Board's LROs no longer prepare a written "Investigating Officer's Report" summarizing the certification application. They instead send a much shorter "letter of understanding" to the parties. The elimination of a full investigation has allowed the LROs to devote more attention to other areas. One of their prime duties in certification applications remains the verification of membership evidence.[7]

e) Disputes about inclusions and exclusions

If an applicant has overwhelming support, the Board will certify on an interim basis a bargaining agent even if some inclusions and exclusions from the bargaining unit remain outstanding.

The Board has produced a new Information Circular on certification.[8] This document informs the parties of the certification process and the updated procedures being followed.

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[7] See *Genesee & Wyoming Inc.*, cob as *Huron central*, [2007] C.I.R.B. no. 388 where the Board dismissed a certification application after the investigating officer found irregularities in the applicant's membership evidence.

[8] The document is available on the CIRB's website at www.cirb-ccri.gc.ca

The implication is simple. The Board now treats certification applications on a priority basis. The speed of the process now mirrors that found at some provincial boards. The internal changes have allowed the Board to reduce delays by over 66%.

C. MAINTENANCE OF ACTIVITIES AGREEMENTS (S. 87.4)

Section 87.4 of the *Code*, added in 1999, is an essential services provision. The overriding principle arising from section 87.4 is that employers, trade unions and bargaining unit employees all have a duty to ensure that a strike or lockout does not cause an immediate and serious danger to the safety or health of the public. Often, the negotiation of a Maintenance of Activities Agreement ("MOAA") provides the necessary evidence that the parties have respected their obligations, subject to a review under the *Code*.

In *Marine Atlantic Inc.*, [2007] CIRB no. 386, the Board recently summarized the various inter-related stages created by section 87.4 of the *Code*.

The Legislator drafted Section 87.4 of the *Code* to encourage the parties to consider an early negotiation of a MOAA. As an incentive to complete this step, the Legislator decided that a failure to negotiate a MOAA, or to seek orders from the CIRB, could delay the parties' ability to engage in a strike or lockout.[9]

The Board's jurisdiction in this area ebbs and flows depending on the actions of the parties and/or the Minister of Labour.

a) Advance Preparation

While section 87.4 imposes strict time limits once a party has sent a notice to bargain, nothing in the *Code* prevents parties from negotiating a MOAA long before bargaining starts. Indeed, given that the steps for attaining the right to strike or lockout under s. 89 of the *Code* include completion of the s. 87.4 process, an early start to resolving the issue

[9] See section 89(1)(e) which delays the right to strike or lockout until the Board has completed its process arising under either section 87.4(4) (an application to the CIRB) or 87.4(5) (a Ministerial referral). See, however, section 87.5(3) for referrals or applications to the CIRB filed *after* the start of a strike or lockout.

would appear to be in one or both of the parties' interests.

b) The differing stages under section 87.4 of the *Code*

The decision in *Marine Atlantic Inc.* suggested four stages existed in section 87.4 of the *Code* prior to the start of a strike or lockout.

i) Stage 1 - Negotiate a binding MOAA

The first stage in the process, which can commence long before notice to bargain has been given, encourages an employer and a trade union to negotiate a MOAA.

However, if the parties only start the process after giving notice to bargain[10], then section 87.4(2) requires that an employer or a trade union provide the other with a draft MOAA within 15 days of that notice to bargain. The MOAA must set out the supply of services, the operation of facilities or the production of goods needed to comply with section 87.4(1). The MOAA notice must also indicate how many members of the bargaining unit will remain on the job.

If the parties negotiate a MOAA successfully, then it can be filed with the Board. Upon filing, it has the same effect as an order of the Board: section 87.4(3).

The MOAA will be binding, subject to the Minister's discretion to ask the Board to review it (section 87.4(5)).

ii) Stage 2 - Application to the CIRB if no MOAA (Section 87.4(4))

If the parties have been unable to finalize a MOAA, but have still respected the 15-day notice requirement in section 87.4(2), they can bring their dispute to the CIRB. However, the application to the Board must also be made no later than 15 days after the notice of dispute found in section 71(1) has been given. A notice of dispute under section 71(1) starts the conciliation process.

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[10] See sections 48 or 49 of the *Code*

iii) Stage 3 - Ministerial referral (Section 87.4(5))

Whether the parties have attempted to negotiate a MOAA or not, the Minister retains a residual discretion to ask the Board to intervene. This was the case in *Marine Atlantic Inc.*, where the Minister asked the Board to consider the application of section 87.4(1) as between the parties.

iv) Stage 4 - CIRB hearing on the merits (Section 87.4(6))

Regardless of the route taken to get before the CIRB, this stage considers what actions are necessary to ensure the parties comply with section 87.4(1). The Board is required to give the parties an opportunity to agree on a MOAA before issuing a decision.

At stage 4, however, the *Marine Atlantic Inc.* decision found that any MOAA the parties agree to under section 87.4(6) does not bind the Board the way it would have earlier in the process at section 87.4(3). At stage 4 the Board will review the MOAA in order to ensure that it takes into account the public interest. In other words, the Board must be satisfied that a strike or lockout governed by the parties' proposed MOAA will not cause an immediate and serious danger to the safety or health of the public.

If the Board is not satisfied with a proposed MOAA, or if no MOAA exists, then it can issue orders to ensure compliance with section 87.4(1).

During a strike or lockout, an application or a Ministerial referral can be made to the Board to review the effectiveness of a MOAA or any Board orders (S. 87.4(7)). The Minister also can refer a matter under s.87.4(5). This process does *not* interrupt an ongoing strike or lockout (S. 87.5(3)).

c) Summary

Given the importance of public safety, the *Code* imposes important time limits in the area of essential services. There have been several draft Bills introduced recently on the subject of replacement workers. The most current, Bill C-415,[11] continues to stress the tight time limits. Bill C-415 would add the following section to section 87.4(7) to require

[11] First reading March 22, 2007

the CIRB to decide an essential services application "within 48 hours":

> "87.4(7.1) The Board shall render its decision with respect to an application or a referral made pursuant to subsection (7) within 48 hours after receiving it."

This draft new section appears to apply only to those applications or referrals arising *after* the start of a strike or lockout (section 87.4(7)).

D. SOME RECENT CASES

a) Constitutional jurisdiction over freight forwarding: *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, [2007] ABCA 198

On July 27, 2007, the Alberta Court of Appeal considered which labour board had constitutional jurisdiction over the freight forwarding business. The court noted that the employer in question, Fastfrate, was the subject of both provincial and federal certifications in various Canadian provinces.[12] The court split two to one whether Fastfrate's operations in Calgary fell under federal jurisdiction.

The court[13] described Fastfrate as a freight forwarding business which marketed itself as a national service. It did not perform inter-provincial transportation services itself but contracted with third parties to transport its shipments between provinces. CP Rail performed all of its rail carriage exclusively. Fastfrate has branches across Canada in order to serve the needs of its clients.

The Alberta Labour Relations Board ("ALRB") had decided that Fastfrate was not essential or integral to CP Rail or various road carriers and did not become subject to federal jurisdiction by virtue of those commercial relationships. However, the ALRB decided that Fastfrate's Calgary operation was "part of a single, indivisible interprovincial undertaking" notwithstanding that it contracted the actual interprovincial transport of goods to third party carriers.[14]

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[12] Madame Justice Conrad's dissent (para. 84)

[13] See paras. 3 - 5

[14] Paragraph 17

On judicial review, a reviewing judge quashed the ALRB's decision.

A majority of the Alberta Court of Appeal reinstated the ALRB's decision. The majority found that Fastfrate constituted an interprovincial freight collection and delivery service, even if it did not itself physically transport the goods between different provinces (para. 78):

> "The agreed facts reveal that Fastfrate is a single company, with integrated operations and centralized control, that operated a regular and continuous freight forwarding business designed to receive and deliver freight throughout Canada. If Fastfrate actually moved the freight itself across provincial boundaries, it would clearly be a federally regulated undertaking. If it supplied railway-sized containers it would arguably be so, even on the review judge's approach. The fact that it arranged to regularly hire CP Rail to physically transport the freight did not change its service provided to its customers, nor change it from the national enterprise those customers could logically assume that it is. Fastfrate was rightly found by the ALRB to be a federal undertaking."

The dissenting judge focused on whether Fastfrate transported freight across provincial or international borders. Since the judge found this did not occur, she held that Fastfrate's labour relations fell under provincial jurisdiction (para. 82):

> "The only acts of transportation, however, performed by Fastfrate's various provincial operations, involved the occasional pickup or delivery of freight within the province. As neither Fastfrate's employees, nor its equipment, transport freight across a provincial or international border, Fastfrate is not engaged in the interprovincial or international transportation of freight. It follows that Fastfrate is not an interprovincial or international transportation undertaking and the mere fact that Fastfrate's various provincial operations are functionally integrated does not turn it into one."

The constitutional issues in this area continue to challenge labour boards and courts alike[15].

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[15] The leading cases in this area are *Re Cannet Freight Cartgage Ltd.*, [1976] 1 F.C. 176 (Fed. C.A.) and *Re the Queen and Cottrell Forwarding Co. Ltd.*, (1981) 124 D.L.R. (3rd) 674 (Ont. Div. Crt.)

b) Judicial Review of CIRB decisions: *Halifax Employers Assn. Inc.*, [2006] FCA 82

Several recent Federal Court of Appeal decisions have reminded parties how to judicially review a CIRB decision. This is especially pertinent where a party has asked the CIRB to reconsider its earlier decision.

In *Halifax Employers Assn.*, the court reminded parties that judicial review must be started for each individual CIRB decision. A party will not be able to judicially review an original CIRB decision if it has only sought judicial review of the Board's later reconsideration decision.[16]

The court stated (para. 3):

> "The applicant raised before us a number of grounds of review against the reconsideration decision, but did not seek judicial review of the initial decision. This does not go without difficulties because most, if not all, grounds of complaint against the reconsideration decision involve an indirect attack on the initial decision. This Court reiterated in *Lamoureaux* v. *Canadian Air Lines Pilots Assn.*, [1993] F.C.J. No. 1128 that it will not, during judicial review of a reconsideration decision of the Board, review the initial decision: see paragraph 2 of the decision."

c) The Board's jurisdiction under Section 37: *Élizabeth Buchanan*, [2006] CIRB no. 348

Section 37 of the *Code* reads as follows:

> "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."

The complainant had filed a pay equity complaint with the Canadian Human Rights

[16] See also *Williams* v. *Teamsters, Local Union 938*, [2005] FCA 302 and *Air Canada Pilots Ass.* v. *Air Lines Pilots Ass. et al.*, [2007] FCA 242.

Commission ("CHRC"). Her bargaining agent, the Canadian Telecommunications Employee's Association ("CTEA") also filed a related complaint with the CHRC. The CHRC sent the CTEA's complaint to the Canadian Human Rights Tribunal ("CHRT"). The CHRC held the individual complaints in abeyance.

Ultimately, the CTEA and the employer, Bell Canada, negotiated a settlement which included a recommendation to drop the individual complaints before the CHRC. This in fact happened.

The complainant alleged that her bargaining agent had breached its section 37 duties in two ways by:

> i) settling its CHRT case and recommending that the CHRC dismiss the individual complaints and;
>
> ii) refusing to assist her with a judicial review of the CHRC's decision to dismiss the individual complaints.

The parties differed over the scope of section 37.

The CTEA argued that section 37 only applies when an arbitrator has exclusive jurisdiction under the *Code*. Since the complaint to the CHRC did not fall within the exclusive jurisdiction of the arbitrator, the Board lacked jurisdiction.

The complainant argued that recent Supreme Court of Canada decisions such as *Parry Sound (District) Social Services Administration Board* v. *OPSEU, Local 324*, [2003] 2 S.C.R. 157 held that the rights and obligations arising from human rights legislation are implicitly contained in all collective agreements.

The Board made the following comments about section 37 (paras. 87-88):

> "87. A literal interpretation of section 37 of the *Code* may lead us to conclude that this legislative provision applies only when rights under the collective agreement are exercised in the traditional sense of the term. In such circumstances, the grievance process comes to mind. It is possible, however, that an overly literal interpretation of this legislative provision could, in certain circumstances, promote a lack of integration of the legislation dealing with human rights and serve to

> weaken the union's duty of fair representation, depending on the instance chosen by the latter."
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> "88. A broader interpretation of this provision leads us to question the real scope of employees' "rights under the collective agreement" in a bargaining unit. It is important to remember that section 37 of the *Code* places a duty of fair representation on the union with respect to "employees in the unit with respect to their rights under the collective agreement" and does not specify in any way to which instance this duty applies. Nevertheless, this provision was adopted to provide a counterbalance to the exclusive power conferred on a union to act as spokesperson for employees in a bargaining unit. An unreasonably broad interpretation of the duty of fair representation might, in a very concrete way, impose on unions a burden that exceeds their human, material and financial resources and undermine their representation capacity."

The Board ultimately did not need to decide the extent of its jurisdiction under section 37 for the purposes of this case. Even if section 37 applied, the CTEA had clearly fulfilled its obligations.

d) Validity of strike notices: *Canadian National Railway Company*, [2007] CIRB no. 379[17]

This case concerns the validity of a strike notice.

CN filed an application under Section 91 of the *Code* asking the Board to declare a strike unlawful.

CN argued that the section 87.2 strike notice was invalid. General Chairpersons for the United Transportation Union ("UTU") had issued the strike notice. CN and the UTU argued that the union constitution prevented the General Chairpersons from authorizing any strike.

The General Chairpersons of the UTU, who were separately represented, argued that the strike notice that they had provided was valid and that the Board did not have any

[17] This case is currently the subject of judicial review before the Federal Court of Appeal. This is merely a summary of the case for information purposes.

jurisdiction to enter into an examination of the UTU's internal constitution.

The Board described the issue at paragraph 48 of the decision:

> "The principal question in the present application is whether the strike notice was in fact given by "the trade union," as per the requirements of Section 87.2(1) of the *Code*."

The Board commented further about the General Chairpersons' key role in collective bargaining and their "ostensible authority to act on behalf of the trade union" (paras. 50 and 69):

> "In the context of the present application, it is not disputed that the strike notice was signed and issued by the four General Chairpersons. It is also not contested that, until just before the present application was filed, the four General Chairpersons were recognized as UTU officials in Canada with the authority to negotiate, ratify and administer collective agreements on behalf of the UTU. Furthermore, together, those four General Chairpersons represented all of the UTU members employed by CN in Canada and were the UTU officials responsible for this round of collective bargaining with CN."

The Board concluded at paragraphs 76 and 77:

> "In conclusion, the Board is of the view that the strike notice in question meets all of the essential elements and the statutory objectives of the requirement to give strike notice, pursuant to section 87.2(1) of the *Code*. CN was made sufficiently aware of the impending strike action. It was given the required 72 hours advance notice and was advised of the precise time when the strike would commence. The employer was informed in a timely manner, and it could therefore have made whatever alternative arrangements it deemed necessary. The Minister of Labour was also given the strike notice through representatives he appointed to assist the parties. The notice in question served its required statutory purpose."
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> "... The fact that the General Chairpersons may not have had the requisite authority to give the notice pursuant to certain provisions of the UTU's constitution must be seen as an internal union issue and, as such, must not be seen to vitiate the validity of the notice given pursuant to section 87.2(1) of the *Code*."

The Board highlighted in the above citation the fact the strike notice had been given before an internal dispute arose between the UTU and the General Chairpersons.

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