Canada Labour Code, Parts I, II and III

Canadian Pacific Railway Company (now known as Canadian Pacific Kansas City Railway)

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Reasons for decision

Canadian Pacific Railway Company (now known as Canadian Pacific Kansas City Railway); Canadian National Railway Company,

employers,

Teamsters Canada Rail Conference,

certified bargaining agent,

and

Maritime Employers Association,

interested party .

Board Files: 037673-C; 037674-C

Neutral Citation: 2024 CIRB **1144**

July 5, 2024

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, and Mesdames Elizabeth Cameron and Angela Talic, Members.

Counsel of Record

Mr. Ian Campbell, for the Canadian Pacific Railway Company (now known as Canadian Pacific Kansas City Railway);

Mr. Richard Charney and Ms. Jennifer Hodgins, for the Canadian National Railway Company;

Mr. Michael A. Church, for the Teamsters Canada Rail Conference;

Mr. Nicola Di Iorio and Ms. Mélanie Sauriol, for the Maritime Employers Association.

I. Nature of the Request

[1] The Board is currently seized of two ministerial referrals, made pursuant to section 87.4(5) of the *Canada Labour Code* (the *Code*), involving the Canadian National Railway Company (CN), the Canadian Pacific Railway Company (now known as Canadian Pacific Kansas City Railway) (CPKC), collectively referred to as “the employers,” and the Teamsters Canada Rail Conference (TCRC).

[2] The Board has received a request to intervene in these matters from the Maritime Employers Association (MEA). Pursuant to section 16.1 of the *Code*, the Board has determined that it can decide the request to intervene based on the written submissions and documents on file.

[3] For the reasons that follow, the Board declines to grant the MEA intervenor status in these proceedings.

II. Background

[4] The TCRC has been engaged in collective bargaining with both CN and CPKC for the renewal of collective agreements covering three different bargaining units. CN and CPKC filed their respective notices of dispute with the Minister of Labour (the Minister) on February 16, 2024. The Minister appointed conciliation officers to the disputes on March 1, 2024.

[5] On February 1, 2024, the TCRC and CN agreed that no services needed to be maintained during a lawful strike or lockout. Similarly, on March 4, 2024, the TCRC and CPKC agreed that none of their services or activities needed to be maintained during a work stoppage.

[6] The TCRC conducted a strike vote amongst the members of all three units. On May 1, 2024, it announced that members had voted in favour of strike action.

[7] In accordance with the provisions of the *Code*, the parties were to acquire the statutory right to strike or lockout on May 22, 2024, for all three bargaining units.

[8] On May 9, 2024, the Minister made two referrals to the Board pursuant to section 87.4(5) of the *Code*, asking it to determine whether the agreements entered into by the parties were sufficient to prevent an immediate and serious danger to the safety or health of the public in the event of a work stoppage at either employer. The referrals have the effect of suspending the parties' right to strike or lockout until the Board disposes of these matters.

[9] Upon receipt of the ministerial referrals, the Board invited the parties to provide written submissions. It also issued a public notice inviting affected groups and organizations to provide their written submissions and views on certain questions arising from the referrals. The Board has received 54 submissions from various groups and organizations.

[10] It is in this context that the MEA filed a request to intervene on May 21, 2024. Specifically, it filed the same request for both referrals. As these two requests raise the same issues, the Board will deal with them in one decision.

III. Positions of the Parties

A. The MEA

[11] The MEA argues that the Board must give precedence to the public interest and must therefore obtain and examine any evidence that may help it in its role of protecting the public. The MEA submits that it is in a unique position to assist the Board by providing it with relevant information related to the serious risks to the safety or health of the public that would arise in the event of a strike at CN and CPKC. It points to the submissions of the employers and the TCRC to support its contention that the parties themselves are not focussed on the public's interest but rather on their own private interests.

[12] The MEA explains that the intermodal nature of the activities at the Port of Montréal (the Port) is such that a work stoppage involving both rail companies would create a level of congestion that would make it impossible to move any goods to or from the vessels that are loaded and unloaded at the Port. The MEA indicates that those goods include medication, medical supplies, food and other commodities that are mentioned in the ministerial referrals.

[13] The MEA indicates that pursuant to section 87.7 of the *Code*, the movement of grain must continue during a strike or lockout. It contends that it can provide information relating to the transport of grain in and out of the Port and the impact that a work stoppage in the rail industry would have on the movement of grain, ultimately resulting in risks for Canadians and vulnerable populations across the world.

[14] The MEA submits that since it is the public interest that is at stake in these proceedings, and more so given that it is the Minister who referred the questions to the Board, the Board must address the request to intervene in a flexible and liberal manner. It states that its intervention would provide the Board with the full information it needs to respond to the Minister's questions. It invites the Board to consider the criteria enunciated in *Smith* v. *Canada (Attorney General)*, 2022 FCA 146 (*Smith*), to determine its request to intervene.

[15] The MEA indicates that it moves 40 million tons of goods through the Port. It submits that it has an obvious interest in these proceedings since a work stoppage at CN and CPKC would prevent the longshoring operations from continuing at the Port due to congestion and would result in the inability to receive or ship goods. It states that the Board will need to consider whether certain goods must continue to be moved by train. As such, the MEA can provide detailed information on whether this is feasible. It can also address issues related to the alternative methods of transportation. Since CN, CPKC and the TCRC agree that no services need to be maintained during a work stoppage, the MEA argues that it can offer a different perspective as to the necessity of moving certain essential goods.

[16] Even though the Board gave notice to the public to obtain the submissions from affected groups and organizations, the MEA is of the view that the short timelines did not allow for proper interventions to be made or provide the ability to respond adequately to the parties' position in the referrals. The MEA argues that not allowing it to participate in these proceedings would be contrary to the *Code* given that it takes a position that is contrary to the parties' position.

[17] The MEA distinguishes the previous decisions of the Board in *Maritime Employers Association*, 2020 CIRB 927 (*MEA 2020*), and *Canadian National Railway Company*, 2005 CIRB 314 (*CN 2005*), from the present matters. It argues that those decisions were made several years ago and in different contexts. It points to the rail blockade that occurred in 2020 and states that a number of issues were brought to light. The MEA is prepared to present evidence related to that blockade if it is granted intervenor status. It also reminds the Board that intervenor status was granted to six interested parties in the proceedings that led to the decision in *MEA 2020*.

[18] The MEA argues that it will suffer prejudice if it is not allowed to participate in the proceedings as its members will not be able to ship essential goods to the public in the event of a work stoppage at CN and CPKC. Conversely, it submits that granting it intervenor status would not cause any prejudice to the other parties.

B. CPKC

[19] In opposing the request to intervene, CPKC submits that the MEA's intervention would not assist the Board in furthering the objectives of the *Code*. Further, it states that the MEA's interests do not differ from those of any other interested third parties who have made submissions in response to the Board's public notice. It argues that the MEA would suffer no prejudice if the request is denied. CPKC emphasizes that the process that the Board put in place to obtain input from interested third parties preserves judicial economy while providing an opportunity to third parties to submit the necessary information that would assist the Board in determining whether certain services are essential to protect the safety or health of the public during a work stoppage.

C. CN

[20] CN also opposes the request to intervene. It makes three arguments:

1. The MEA does not propose to make different or useful submissions that would assist the Board in determining the issues in the referrals.

2. The MEA does not have a genuine interest in these matters that differs from that of any other group or organization that was invited to make its views known to the Board through the public notice.

3. It would not be in the interest of administrative justice to allow the intervention.

[21] CN further argues that the parties directly affected by the referrals are the ones whose rights to engage in free and fair collective bargaining have been impeded and who have the most genuine and important interest in the Board's determination. It is CN's view that this determination must be made in a timely manner and as efficiently as possible. The risk of significant delays caused by the intervention of third parties is significant and would not serve the Board or the parties in these matters.

[22] CN further states that the MEA has recently and unsuccessfully sought to have its activities designated as necessary to prevent an immediate and serious danger to the safety and health of the public pursuant to section 87.4 of the *Code* (see *MEA 2020*). The Board made its determination after 25 hearing days and the presentation of expert evidence. The Board's decision was upheld by the Federal Court of Appeal (FCA). CN submits that there is nothing that the MEA is seeking to provide in these proceedings that has not already been fully examined by the Board.

D. The TCRC

[23] Similarly, the TCRC submits that the Board has recently found that a work stoppage involving the MEA and its employees would not present an immediate and serious danger to the safety or health of the public and that no services have to be maintained by these parties pursuant to section 87.4 of the *Code*. The Board's decision in this regard was upheld by the FCA (see *Maritime Employers Association* v. *Syndicat des débardeurs (Canadian Union of Public Employees, Local 375)*, 2023 FCA 93, leave to appeal to the Supreme Court of Canada (SCC) denied). The TCRC asks the Board not to allow the MEA to reargue its position in the context of the present referrals, which concern different parties.

[24] The TCRC further relies on issue estoppel and the principle of *res judicata*. It submits that the MEA has not provided any facts or particulars that would cause the Board to revisit its decision as it relates to the nature of the activities that the MEA undertakes at the Port. The TCRC argues that the MEA has not made out a *prima facie* case of any services, operations or movement of goods that are necessary to prevent an immediate and serious danger to the safety and health of the public.

[25] In essence, the TCRC argues that the MEA has provided no particulars or evidence of any specific examples that would cause the Board to inquire further. There is no indication in the MEA's request that new facts exist that the Board did not already consider in its previous decisions in *CN 2005* and *MEA 2020*. It takes the position that the MEA's interests are purely commercial or economic and do not justify intervenor status.

IV. Analysis and Decision

A. Preliminary Issue: The Supplemental Submissions

[26] After the filing of written submissions on the request to intervene was completed, counsel for the MEA filed an additional submission with the Board on June 21, 2024. The TCRC, CN and CPKC object to this additional submission. They submit that the MEA filed this submission well outside the time frames prescribed by the Board in accordance with the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*), and that it has no right to make submissions on the merits of the referrals until the Board grants it intervenor status. They ask the Board not to accept or rely on the information contained in the submission.

[27] The *Regulations* provide for responses and replies within set time frames. A party that wishes to submit additional material to the Board outside of the prescribed time frame or after the close of pleadings should first obtain the consent of the other party or parties. In the absence of such consent, it must request leave from the Board and clearly explain why it seeks to submit additional material that was not included in previous submissions.

[28] In this case, the MEA was attempting to respond to information that the parties had put forward in their reply on the merits of the referrals, even though it had not been granted intervenor status in these matters. Although the Board understands that an interested party may wish to present additional arguments to it, it expects the procedures for filing additional submissions to be followed.

[29] In this case, the MEA did not obtain consent from the parties or the Board prior to submitting the additional material. Accordingly, the Board will not consider or rely on the content of the MEA's submission of June 21, 2024.

B. Intervenor Status

[30] There is no common law right to intervenor status. The Board's power to grant intervenor status flows implicitly from its general power to hear and determine the matters that come before it (see Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thompson Reuters Canada, 2024), at chapter 16). The test applied by the Board in determining whether status will be granted is whether the proposed intervenor has an identifiable interest in the matter and whether the intervention would assist the Board in furthering the objectives of the *Code* (see sections 12.1(1)(b) and (c) of the *Regulations*). These criteria are consistent with those identified in the FCA's decision in *Smith*. As indicated by Justice Gleason in that decision:

> [11] … [the criteria] of greatest importance assess the ability of the proposed intervener to make useful submissions that will further the Court's determination of the issues raised by the parties such that the interests of justice favour granting leave to intervene. …

[31] The Board is also mindful of the process and its interest in ensuring that there is no unnecessary delay in the proceedings. A timely decision from the Board on the ministerial referrals is crucial to allow the parties to resume the collective bargaining process and conclude their collective

agreements. The Board must balance the principle of judicial economy and respect for the parties' collective bargaining rights with the interests of potential intervenors.

[32] The principle of judicial economy and the Board's limited focus in these cases is further underscored by legislative amendments that were recently adopted in Parliament (Bill C-58). Those amendments will require the Board to deal with future applications or referrals related to the maintenance of activities within 82 days of when such applications or referrals are filed with it.

[33] In the context of an application or referral under section 87.4 of the *Code*, the request to intervene must outline compelling reasons why the intervention would assist the Board, and such reasons must be clearly linked to the issue of the level of activity necessary to prevent an immediate and serious danger to the safety or health of the public.

[34] It is with these principles in mind that the Board must consider whether the MEA's intervention would further the interest of justice and, more particularly, the objectives of the *Code* for constructive collective bargaining practices and stable industrial relations.

[35] The question before the Board is whether the maintenance of activities agreements between CN and the TCRC and between CPKC and the TCRC are sufficient to prevent an immediate and serious danger to the safety or health of the public. Those parties agree that no services must be maintained during a work stoppage. The Board determined in *CN 2005* that it did not need to intervene in a similar agreement between CN and the TCRC as there was no indication that a work stoppage would result in an immediate and serious danger to the safety or health of the public. The Minister has now asked the Board to consider a similar question in the context of the agreements in place at both CN and CPKC.

[36] The MEA indicates that it is uniquely positioned to provide the Board with the necessary information for it to make a reasoned assessment on the questions posed by the Minister. It purports to be able to provide detailed and necessary information on the movement of goods in and out of the Port and the impact that a work stoppage involving CN and CPKC would have on its operations. It seeks to bring evidence on the consequential impact this would have on the availability of certain goods, such as medication, medical supplies, food and other goods it qualifies as essential. It also proposes to offer evidence on the availability (or unavailability) of alternative means to transport those goods in and out of the Port in the event of a work stoppage.

[37] The Board has already turned its mind to the operations and activities of longshoring in the Port. In *MEA 2020*, it concluded that none of the activities or services provided by the MEA and its employees were necessary to prevent an immediate and serious danger to the safety or health of the public. The FCA upheld this decision, and the SCC refused to grant leave to appeal the FCA's decision. Although the employer argues that this decision dealt with circumstances from six years ago, prior to the COVID-19 pandemic and the resulting strain on the Canadian and global supply chains, the Board did confirm its conclusions for the current round of bargaining involving the MEA in a recent decision (see *Maritime Employers Association*, 2024 CIRB LD 5302).

[38] It is difficult to see how the MEA would assist the Board by providing the same or very similar information to what it presented in the context of its own proceeding. Although the Board has no doubt that a work stoppage in the rail industry would significantly affect the MEA's operations in the

Port, it is not persuaded that the information that the MEA intends to provide in these proceedings would assist it in answering the Minister's questions; this is particularly so since the Board already concluded that none of the MEA's activities or operations are necessary to prevent an immediate and serious danger to the safety or health of the public.

[39] While the MEA's argument regarding section 87.7 of the *Code* and the movement of grain vessels was not raised or considered in *MEA 2020*, the Board notes that this provision only applies to employers in the longshoring industry or other industries listed in paragraph (a) of the definition of "federal work, undertaking or business" in section 2 of the *Code*. In the present referrals, the employers are railway companies; as such, section 87.7 does not apply to them. Therefore, the MEA's submissions on this issue would not be relevant to the question that is currently before the Board.

[40] The MEA indicates that the Board granted intervenor status to six interested parties in the proceeding that led to *MEA 2020* and that, accordingly, it should be granted the same status in these matters. In that proceeding, the Board was considering the application of section 87.4 of the *Code* to the longshoring operations at the Port for the first time. The employer and the union did not agree on which, if any, services or activities needed to be maintained during a work stoppage. In that context, the Board concluded that the interested parties had a sufficient interest and would assist it in deciding the matter with full knowledge of the related issues.

[41] Each request to intervene must be examined within its own factual context. The fact that intervenor status was granted to some parties in one case does not necessarily guarantee that it will be granted to interested parties in another case. In the present matters, the Board will examine the activities performed and services provided by CN and CPKC. While the MEA may have significant commercial interests in a dispute involving the rail industry, the Board was not persuaded that the information it suggested it could provide would assist it in determining whether a work stoppage would cause an immediate and serious danger to the safety or health of the public. The MEA makes several general statements regarding how a work stoppage would affect the movement of certain goods, including medication, medical supplies and food products in the Port. Those issues were fully canvassed in *MEA 2020* in the context of a potential work stoppage affecting all longshoring activities in the Port and were found not to pose an immediate and serious danger to the safety or health of the public. The Board does not see the need to revisit these particular issues in detail in the context of a potential work stoppage at CN or CPKC.

[42] Although the MEA's position on the merits of the referrals is opposed to that of the parties, the Board is of the view that the MEA does not have an interest that is different or distinct from that of several other groups and organizations that made submissions to the Board. The Board appreciates that the timelines for making submissions were short, but, nevertheless, several groups and organizations were able to point to the concerns they had and the potential impact of a work stoppage. The Board set up a specific process to obtain submissions from any affected groups or organizations as the most efficient way of gathering information on the questions raised in the referrals. The MEA did not use this process and instead requested that the Board grant it intervenor status. As such, it must meet the criteria for intervention set out in section 12 of the *Regulations*.

[43] The MEA's interest primarily relates to the effect that a strike at CN or CPKC would have on the movement of goods and the loading and unloading of vessels in the Port. The Board already determined that these Port operations were not essential in *MEA 2020*. CN, CPKC and the

TCRC have intricate knowledge regarding the goods that are transported on the rail lines and have provided the Board with a significant amount of data in this regard. Given these circumstances, the Board is not convinced that the MEA's participation would be helpful at this time.

[44] Given the above considerations, the Board finds that the stated criteria do not weigh in favour of granting the MEA intervenor status in these matters. The proposed intervention by the MEA would not assist the Board in making its determination or in furthering the objectives of the *Code*.

V. Conclusion

[45] For the reasons set out above, the Board dismisses the MEA's request to intervene.

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

Ginette Brazeau
Chairperson

Elizabeth Cameron
Member

Angela Talic
Member