Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8
Fax/Télécopieur: 613-995-9493

Our File: 27915-C

Document No.: 288266

May 16, 2011

2011 CIRB LD **2558**

BY FAX

Trudel Nadeau
Lawyers
Place du Parc
Suite 2500
300 Léo-Pariseau Street
Montréal, Quebec
H2X 4B7 **514-499-0312**

Attention: Mr. Gaston Nadeau

Nelligan O'Brien Payne LLP
Suite 1500
50 O'Connor Street
Ottawa, Ontario
K1P 6L2 **613-788-3665**

Attention: Mr. Sean T. McGee

Ogilvy Renault
Barristers and Solicitors
Suite 1600
45 O'Connor Street
Ottawa, Ontario
K1P 1A4 **613-230-5459**

Attention: Ms. Mary J. Gleason
Legal Counsel

Emond Harnden
Barristers & Solicitors
Glebe Chambers
707 Bank Street
Ottawa, Ontario
K1S 3V1 **613-563-8001**

Attention: Mr. George Rontiris

Dear Sirs/Madam:

In the matter of the *Canada Labour Code (Part I–Industrial Relations)* and an application filed pursuant to section 18.1 thereof concerning the Canadian Union of Postal Workers, applicant; the Canada Post Corporation, employer; the Canadian Postmasters and Assistants Association and the Association of Postal Officials of Canada, intervenors. (27915-C)

On January 21, 2010, the Canadian Union of Postal Workers (CUPW or the applicant) filed an application pursuant to section 18.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*), requesting that the Canada Industrial Relations Board (the Board) merge three existing bargaining units at Canada Post Corporation (CPC or the employer) into a single unit. On May 11, 2010, CPC applied to the Board to have CUPW's application dismissed as premature.

The employer's motion was heard by the Board, composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Patrick J. Heinke and Norman Rivard, Members, on January 31, 2011. The Board has decided to dismiss the employer's motion and will deal with CUPW's application on its merits. These are the reasons for that decision.

I–Background

The last comprehensive review of the bargaining unit structure at CPC was conducted over a three-year period, from 1987 to 1990. The bargaining unit structure that existed at that time was a legacy from the period when the postal service was a government department, subject to the

Public Service Staff Relations Act. In the course of the 1987–90 proceedings, the predecessor to this Board, the Canada Labour Relations Board, consolidated a number of the bargaining units, which had previously been structured according to job classification. Following the conduct of a representation vote, CUPW was certified to represent a bargaining unit composed of inside and outside postal operations employees (see interim order 5337-U, issued on January 30, 1989, and amended on January 11, 1990, and final order 6586-U issued on December 8, 1994). This unit will be referred to as the "urban operations" unit.

During collective bargaining for the urban operations unit in 2003, the employer agreed to voluntarily recognize CUPW as the bargaining agent for a separate unit of rural and suburban mail carriers (RSMC), who had until that time been classified as rural route couriers and excluded from collective bargaining by virtue of the *Canada Post Corporation Act*, R.S.C. 1985, c. C-10. A separate, long-term collective agreement was subsequently negotiated for the RSMC unit. The Board recognized CUPW as the bargaining agent for the RSMC unit in a certification order (no. 9559-U) issued on October 21, 2008.

In its application, CUPW seeks to merge the two bargaining units that it is certified to represent, and also requests that the bargaining unit composed of staff in rural post offices, currently represented by the Canadian Postmasters and Assistants Association (CPAA), be folded into the proposed unit. CUPW also suggests that some of the supervisory employees now represented by the CPAA could be included in the supervisory employees' bargaining unit represented by the Association of Postal Officials of Canada (APOC).

II–Positions of the Parties

A–CPC

In its motion to dismiss the CUPW's application, CPC notes that, when it voluntarily recognized CUPW as bargaining agent for the RSMC in July 2003, it did so on the basis of CUPW's agreement that the unit would be separate from the urban operations unit. It notes that the parties

subsequently negotiated a collective agreement for the RSMC unit, which is in effect until December 31, 2011, that contains a Memorandum of Understanding (MOU) to the same effect. Specifically, CPC points out that the parties agreed in 2003 that a bargaining unit composed **only** of RRSSC (rural route and suburban service contractors – now known as RSMC) is appropriate for collective bargaining and expressly agreed and acknowledged that a bargaining unit combining RRSSC with other CPC employees would not be appropriate for collective bargaining and would give rise to significant labour relations difficulties.

CPC argues that this agreement acts as a bar to CUPW's January 2010 bargaining unit review application. In CPC's submission, the agreement is binding and continues to have force until at least December 31, 2011. In CPC's submission, two sophisticated parties made a specific agreement that a separate bargaining unit for the RSMC would be appropriate and that it was not appropriate to combine them in a unit with any other CPC employees. CPC states that the *quid pro quo* for its voluntary recognition of the RSMC bargaining unit was that these employees would be in a separate and distinct bargaining unit. It points out that CUPW's written submissions admit that the parties agreed that separate bargaining units were appropriate for, at a minimum, the duration of the RSMC collective agreement. CPC argues that the Board should not allow CUPW's application to proceed, as that would amount to flaunting the agreements CUPW has signed.

CPC suggests that, given the threshold requirement in section 18.1 that the Board be satisfied that the bargaining units are "no longer appropriate" for collective bargaining, CUPW's application is speculative and premature. It argues that, given the 2003 MOU, CUPW cannot be heard to say that the bargaining units were no longer appropriate in January 2010, when it filed this application. CPC submits that a party cannot ask the Board to intervene to correct a hypothetical, anticipated future situation and that CUPW could not, in 2010, assert that the present-day bargaining units will be inappropriate in 2012. CPC cited a number of Board and court decisions in support of the proposition that the Board should not hear premature or hypothetical cases.

CPC argues that it would be a futile, time-consuming and wasteful exercise, with no labour relations purpose, for the Board to examine CUPW's application at this time and the application should therefore be dismissed.

B–CPAA

The CPAA supports CPC's motion and argues that CUPW's application is premature and theoretical. CPAA informed the Board that CPC's voluntary recognition of CUPW as bargaining agent for the RSMC in 2003 had created a dispute between CPAA and CUPW that was resolved in January 2005 with the signing of a Memorandum of Agreement that included the following provisions:

> 1. CUPW and CPAA recognize that a bargaining unit composed only of RSMCs is appropriate for collective bargaining and that it would not be appropriate to include RSMCs in a bargaining unit with other employees of Canada Post;
>
> 2. CUPW and CPAA also recognize that the bargaining unit for which CPAA is currently holding bargaining rights is appropriate and that CPAA members shall not be included in a bargaining unit with other employees of Canada Post;
>
> ...
>
> 5. The parties further agree to establish a joint committee to work together on issues of common interest, to develop a better relationship and to build for the future. The committee will also deal with any jurisdictional dispute between the CPAA and RSMC bargaining units and try to resolve it as between CUPW and CPAA.

The CPAA argues that this agreement was meant to be binding on the parties. It states that CPAA and CUPW have resolved significant litigation on the basis of this understanding. CPAA submits that this agreement sets the context within which the Board should deal with CPC's motion. It argues that CUPW should not be permitted to repudiate agreements that it has made by means of an application to the Board.

CPAA submits that it has signed a long term collective agreement with CPC that would be put in jeopardy if the Board grants CUPW's application.

CPAA also points out that the technological changes that CPC is implementing are in their early stages and that trying to make a determination now as to the impact they will have on CPC, the bargaining units and the bargaining agents would require findings based on facts that may never come to pass or that may change in the future. CPAA argues that there is no labour relations purpose to be served by conducting what it characterizes as an "anticipatory" bargaining unit review. Lastly, CPAA argues that this application is not about whether CUPW's vision of the best possible bargaining unit should be substituted for the status quo. In CPAA's view, the major philosophical differences between CUPW and CPAA are not a valid reason for a bargaining unit review that would merge the CPAA unit with those of CUPW.

C–APOC

APOC took no position on the merits of CPC's motion.

D–CUPW

CUPW argues that the current bargaining unit structure was inappropriate when it filed its application in January 2010, that it has been inappropriate for some time and remains inappropriate to this day. It points out that during the last bargaining unit review in 1987–90, CPC argued that a single bargaining unit would be the most appropriate.

The collective agreement for the RSMC is in force until December 31, 2011, and CUPW indicates that it will respect the commitments that it made in that agreement. However, it does not agree that the agreement that it made with CPC in 2003 applies to the definition of the bargaining unit scope. It suggests that there is a great difference between respecting the collective agreement and challenging the appropriateness of the bargaining unit structure.

In CUPW's submission, many things have changed since 2003, when CUPW agreed to a separate bargaining unit for the RSMC as a compromise in order to obtain bargaining rights for those individuals. However, it argues, one cannot seriously suggest that a bargaining unit structure that

may have been appropriate in 2003 remains appropriate for all time. CUPW submits that the fact that the parties agreed eight years ago that the bargaining units were appropriate does not prevent an application to change them or limit the Board's power, pursuant to section 18.1 of the *Code*, to amend the scope of the bargaining units.

CUPW suggests that, if its allegation that the current bargaining unit structure is inappropriate is upheld, then a review of that structure is not premature. It is CUPW's position that the current structure divides employees who are doing the same work into three artificial groups and makes an artificial distinction between urban and rural services.

CUPW points out that, historically, Board proceedings related to bargaining unit reviews can take a considerable length of time. It suggests that, with this knowledge, it filed its section 18.1 application in January 2010 in the expectation that a decision would be made by the time the collective agreement expires in December 2011. It also states that, when it entered into the 2003 agreement and the long term collective agreement, its intention was always to seek a review of the structure after completion of the transition of rural route couriers – who were contractors – into employees of CPC. Whether the review takes place now or commences in January 2012, CUPW argues that a review needs to be conducted.

CUPW argues that there is nothing speculative about its application and that a decision can be made based on the facts as they currently exist. It distinguishes the cases cited by CPC on the grounds that the issue before the Board in this application is neither moot nor hypothetical nor is it dependent on the happening of some future event. CUPW points out that the *Code* does not establish any time limit on applications pursuant to section 18.1 of the *Code*, and that CPC's motion would require that the Board read in such a time limit.

Furthermore, argues CUPW, the issue of existing collective agreements will always exist, but can be dealt with by the parties. The existence of one or more collective agreements does not restrict the period within which the Board can proceed with a bargaining unit review.

Lastly, CUPW argues that only the Board has the discretion to determine the appropriateness of a bargaining unit, and that it cannot refuse to exercise this discretion.

III–Analysis and Decision

CUPW brought its application under section 18.1 of the *Code*, which provides:

> 18.1(1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.
>
> (2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board
>
> (*a*) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and
>
> (*b*) may make any orders it considers appropriate to implement any agreement.
>
> (3) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.
>
> (4) For the purposes of subsection (3), the Board may
>
> (*a*) determine which trade union shall be the bargaining agent for the employees in each bargaining unit that results from the review;
>
> (*b*) amend any certification order or description of a bargaining unit contained in any collective agreement;
>
> (*c*) if more than one collective agreement applies to employees in a bargaining unit, decide which collective agreement is in force;
>
> (*d*) amend, to the extent that the Board considers necessary, the provisions of collective agreements respecting expiry dates or seniority rights, or amend other such provisions;
>
> (*e*) if the conditions of paragraphs 89(1)(*a*) to (*d*) have been met with respect to some of the employees in a bargaining unit, decide which terms and conditions of employment apply to those employees until the time that a collective agreement becomes applicable to the unit or the conditions of those paragraphs are met with respect to the unit; and
>
> (*f*) authorize a party to a collective agreement to give notice to bargain collectively.

The first objection to CUPW's section 18.1 application is that it is barred by the agreements that CUPW has signed with CPC and the CPAA. While the Board endeavours to respect agreements reached by the parties, it is not bound by such agreements. As the Board indicated in *Canada Post Corporation*, 2009 CIRB 438:

> [20] The Board began by determining the description of the bargaining unit that it considers appropriate for collective bargaining. Section 27 of the *Code* provides the Board with broad discretion in determining the scope of a bargaining unit; the Board is not limited by the description of the proposed unit contained in a union's application for certification. Neither is the Board bound by any agreements between the parties. The Board has the sole discretion to determine the unit that, in its opinion, is appropriate for collective bargaining.

The Federal Court of Appeal expressly approved of this approach in *Canada Post Corporation* v. *Canadian Union of Postal Workers*, 2010 FCA 19, in which it stated:

> [13] Finally, with respect to the Board's refusal to describe the bargaining unit by reference to the agreement reached in 2003, the Board properly notes that it is not limited by the description of the proposed unit contained in a union's application for certification nor is it bound by any agreement between the parties (Reasons, para. 20). The Board has explained extensively why it chose not to reproduce the wording of the agreement in certifying the bargaining unit (Reasons, paras. 21 to 24). We can detect no error in this regard.

In this case, the Board cannot find that the 2003 agreement between CUPW and CPC operates as a bar to CUPW's section 18.1 application. CPC admits that the 2003 agreement may have no validity after December 31, 2011, the expiry date of the current RSMC collective agreement. To the extent that this agreement would have the effect of fettering the exercise of the Board's discretion to determine the appropriateness of a given bargaining unit or bargaining unit structure, then it interferes with the Board's exclusive authority to make such determinations. Although CUPW's agreement with CPAA does not appear to have a similar time limit, it also infringes on the exercise of the Board's discretion. These agreements thus cannot operate as a bar to the Board's proceedings.

The second objection to CUPW's application is that it is speculative and premature. CPC and CPAA submit that the Board should not intervene to correct a hypothetical, anticipated future situation. The Board understands this objection to refer to those portions of the application that make

reference to various technological changes that CPC is in the process of implementing. However, CUPW's application also alleges that the existing bargaining units are not appropriate for collective bargaining at the present time, for a variety of other reasons. In view of the various grounds that CUPW has raised in support of its application, the Board is unable to agree with the respondents' submissions that CUPW's application is entirely premature or speculative.

There is never a good time for a bargaining unit review. It is an extremely resource intensive exercise, both for the parties and the Board. As noted by CUPW, the *Code* contains no temporal limitation on the timing of an application under section 18.1. Such reviews can be initiated by either an employer or a bargaining agent at any time. The only precondition to such a review, as set out in the statute, is whether the Board is satisfied that the existing bargaining units are "no longer appropriate for collective bargaining."

CUPW is also correct in its assertion that the process of conducting a bargaining unit review can be a lengthy one. In this case, some 16 months have already passed since the application was originally filed. Although the Board has not yet commenced its inquiry into the threshold question, namely a determination as to whether a review of the bargaining unit structure is warranted, considerable time and effort have been expended in merely giving notice to the affected employees that the application was filed. It would be impractical for the Board to allow CPC's motion to dismiss on the basis of alleged prematurity now, when CUPW could simply make an identical application in six or seven months time. In the Board's view, the better course of action is for it to deal with CUPW's application on its merits.

The Board also takes this opportunity to note that the existence of collective agreements, whether the one between CPC and CUPW or that between CPC and CPAA, does not prevent the Board from commencing an inquiry into the threshold question. Given the nature of collective bargaining, it is not unusual that at least one, if not more, of the units in a multi-unit bargaining structure would be subject to a subsisting collective agreement at a particular moment in time.

For all of these reasons, the Board dismisses CPC's motion to dismiss CUPW's section 18.1 application. The Board will therefore commence its inquiry into the threshold question of whether the existing bargaining units are no longer appropriate for collective bargaining. CUPW is hereby granted 30 days from the date of this decision to provide the Board with any additional written submissions on this question that it wishes the Board to consider. The respondents shall have 30 days from the delivery of CUPW's further submissions to respond and CUPW shall have ten (10) days for reply.

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

Elizabeth MacPherson
Chairperson

c.c.: Mr. Andrew Boyle (CIRB–NCR)

EM/io