Canada Industrial Relations Board Conseil canadien des relations industrielles

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BY FAX

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Attention: Mr. G.D. Parkinson

Dear Sirs:

In the matter of the *Canada Labour Code (Part I–Industrial Relations)* and an application for review filed pursuant to section 18 thereof concerning the Telecommunications Employees Association of Manitoba, applicant; MTS Allstream Inc., employer. (29154-C)

A panel of the Canada Industrial Relations Board (Board), composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Daniel Charbonneau and David P. Olsen, Members, considered the above-noted application.

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

I–Nature of the Application

On December 7, 2011, the Board received from the Telecommunications Employees Association of Manitoba (TEAM-IFPTE) an application about the scope of its bargaining unit, requesting various orders, including one under section 16(*f*.1) of the *Code* requiring MTS Allstream Inc. (MTS) to provide full particulars about a corporate reorganization.

There are 23 positions in dispute. TEAM-IFPTE alleged that anyone in these positions met the definition of an employee under the *Code*. MTS disputed that position. Some positions are apparently currently vacant.

The Board certified TEAM-IFPTE on September 17, 2003 (Order no. 8516-U) for the following unit:

> *"all employees of MTS Communications Inc., **excluding** those employees covered by Board certification orders [6809-U] (CEP) and [6993-U] (IBEW), graduate engineers employed by MTS Communications Inc. who are members of or who are eligible to be members of an association of professional engineers and who occupy positions within MTS Communications Inc. requiring such membership or eligibility for membership in order to perform the tasks required in positions, and those employees occupying the positions listed in Appendix A."*

As noted in Order no. 8516-U, the Board had previously certified the International Brotherhood of Electrical Workers, Local 435 (IBEW) (Order no. 6993-U) and the Communications, Energy and Paperworkers Union of Canada (CEP) (Order no. 6809-U) for different MTS bargaining units, as shown below.

Order no. 6993-U, dated May 24, 1996, certifying the IBEW, reads as follows:

> *"all employees of MTSNet, a Division of MTSNetCom Inc. in the Province of Manitoba, including all classifications on Schedule "A" attached,* ***excluding*** *those employees occupying positions in Schedule "B" attached, those covered by the Manitoba Labour Relations Board Certificate Number MLB-4066, those covered by the Canada Labour Relations Board Certificate Number 555-3860 and all contract/term employees."*

Order no. 6809-U, dated July 27, 1995, certifying the CEP, reads as follows:

> *"all employees of Manitoba Telephone System, in the Province of Manitoba, including clerical employees, telephone operators, traffic operators, junior service assistants, service assistants, operating clerks, PBX operators, and quality advisors designated for the bargaining unit and* ***excluding*** *assistant manager operator services and those above the rank of assistant manager operator services, those employees occupying positions in Schedule "A" attached, those covered by the Manitoba Labour Relations Board certificate numbers MLB-3686 and MLB-4066 and all contract/term employees."*

On December 28, 2011, the Board received from MTS an objection to TEAM-IFPTE's application, as well as comments on the merits. MTS described the application as an abuse of the Board's process and argued, on the merits, that TEAM-IFPTE had known that MTS had treated the 23 positions in issue as being out of scope.

The Board has decided to dismiss MTS' objection to the application. The matter will proceed.

This decision also describes the Board's role regarding the scope of its bargaining unit orders and the next procedural steps the parties will be required to complete.

II–Facts

The application received from TEAM-IFPTE described a process the parties had negotiated in Appendix A of their collective agreement regarding the scope of the Board's certified bargaining unit. Page 2 of TEAM-IFPTE's application described the Appendix A process:

> The relevant notes from Appendix "A" are reproduced below:
>
> 1. The Company shall notify the Union of Appendix "A" vacancies, title changes, incumbent changes or when an Appendix "A" position is filled".
>
> 2. Existing bargaining unit positions shall remain in-scope unless otherwise agreed to between the parties.
>
> ...
>
> 4. In the event MTS Allstream creates a new position which it asserts should be added to Appendix A, TEAM shall be advised. Should the parties not reach agreement with respect to the exempt status of the position in question, the matter will be referred to the Canadian Industrial Relations Board for final resolution. It is understood that the position in question shall be treated as exempt while the issue is being adjudicated. In the event that the Canada Industrial Relations Board determines that the position in question falls within the scope of the bargaining unit, the Company shall reimburse the Union for past dues retroactive to the date the new position was created.
>
> [sic]

TEAM-IFPTE at page 3 of its application then described the current impasse between the parties:

> In reality, the process has not unfolded in the manner intended. The Company has not fulfilled its obligation to provide TEAM-IFPTE with all of the information that it needs to conduct its analysis. As a result, TEAM-IFPTE is unable to properly analyze whether the positions ought to be exempt.
>
> Since the parties signed off on the 2007-2010 collective bargaining agreement, the Company has asserted that several positions that fall under TEAM-IFPTE's bargaining unit ought to be excluded from collective bargaining. Of these positions, there are at least 23 positions which TEAM-IFPTE submits either:
>
> a) fit the definition of "employee" under the *Code* and are therefore not exempt from collective bargaining (based on the limited information supplied to date); or
>
> b) insufficient information has been provided by the Company to satisfy the onus upon it that the positions are exempt from collective bargaining.
>
> There has been no agreement between the parties on whether these 23 positions are in or out of scope. In the meantime, these positions remain exempt and the individuals occupying them are being denied the right to collective bargaining.

TEAM-IFPTE alleged that, despite its request for information, MTS had not provided it with sufficient detail to allow it to analyze whether the 23 individuals fell within the scope of its bargaining unit.

MTS alleged that the application was merely a "fishing expedition" designed to obtain information so that TEAM-IFPTE could decide whether to file an application with the Board. As a result, MTS argued the application was "not a bona fide complaint that the positions listed therein are improperly being treated out of scope".

MTS alleged that TEAM-IFPTE had known for a considerable period of time that it was treating the positions as being out of scope.

On the merits, MTS argued that the individuals involved do not meet the definition of "employee" as defined at section 3 of the *Code*. Moreover, it argued it had complied with its obligation at Appendix A of the collective agreement to give notice to TEAM-IFPTE of the newly-created positions it considered exempt.

In MTS' view, it has no further obligation "to provide the Union with information and documentation necessary for it to conduct its analysis as to whether the position is exempt or not (although the collective agreement does require the Company to provide the Union with information and documentation in other instances)".

MTS suggested that TEAM-IFPTE's inaction after receiving such notice amounted to acquiescence in its scope characterization.

Essentially, beyond its objection to TEAM-IFPTE's request for production, MTS argued that all 23 positions were either at the Director level in its organization, which it argued took them out of the definition of "employee" under the *Code*, or were involved in confidential labour relations matters.

III–Analysis and Decision

Section 3 of the *Code* defines an "employee" and references those individuals who fall outside the definition:

> 3.(1) In this Part,
>
> ...
>
> *"employee"* means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;
>
> (emphasis added)

Unlike many provincial labour boards, the Board retains jurisdiction over the description and interpretation of its bargaining unit orders. Ultimately, whether an individual falls within the scope of a bargaining unit is a question for the Board.

However, the Board has remained flexible to the labour relations realities of all parties, particularly when, on consent, they agree on exclusions or request the Board to update one of its certification orders.

Nonetheless, the Board's jurisdiction over its bargaining unit orders remains essential, particularly where it has certified more than one unit at the same employer, as is the case at MTS.

The Board described its continuing jurisdiction over bargaining units in *Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503:

> [28] The Board, contrary to the practice of many of its provincial counterparts, remains seized of the description and scope of all bargaining units it issues. The Board's model follows that found in Quebec labour law: see generally *Teleglobe Canada* (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198); and *Canadian Pacific Limited* (1984), 57 di 112; 8 CLRBR (NS) 378; and 84 CLLC 16,060 (CLRB no. 482).
>
> [29] While in Ontario parties are generally free to modify their bargaining unit description, and indeed, the original certification is often described as being "spent" after it is issued, parties do not have a similar freedom federally.

[30] Instead, if there are disputes about whether an employee falls within the scope of a bargaining unit, a party can bring that dispute to the Board, as CUPE did in this case, pursuant to section 18 of the *Code*:

> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[31] Similarly, if a question arises during an arbitration about which employees are bound by an existing collective agreement, the *Code* at section 65 allows the parties to ask the Board to determine the question:

> 65.(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for determination.
>
> (2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

[32] Because the Board retains jurisdiction over the bargaining certificates it issues, it can rationalize bargaining units, particularly if the Board has certified multiple bargaining units over time for one employer. The Board carried out just such an exercise when it rationalized Sécur's bargaining units in 2001 (see *Sécur* 109, *supra*). Section 18.1 of the *Code* governs this process:

> 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.
>
> ...

[33] The Board's analysis is straightforward when considering if employees fall within the scope of an existing unit. Generally, if new employees fall within the original scope of a bargaining unit, then they will be added to that bargaining unit without a requirement that the trade union demonstrate majority support among the employees to be added. The union will simply need to establish that it holds overall majority support in the bargaining unit. A vote could also be ordered.

[34] There is an exception to this rule if the number of employees to be added would impact the overall majority the trade union already holds in the original bargaining unit (see *Viterra Inc.*, 2009 CIRB 472, at paragraph 27).

[35] Conversely, where a trade union seeks to add employees to its existing bargaining unit, but that addition would enlarge the scope of the bargaining unit, then the Board has required that the trade union demonstrate majority support among the group to be added.

[36] In such a case, while the Board will accept that the trade union maintains a majority in its existing bargaining unit, it requires the trade union to establish majority support among the new employees to be added, just as it would if the same trade union filed an independent certification application to represent that new group. This is commonly known as the "double majority" rule.

[37] In essence, a trade union is not obliged to sign up every new employee who falls within the scope of its existing bargaining unit. However, if a trade union wants to represent out-of-scope employees, then it must follow the recognized rules for certification and sign up a majority of those employees.

The parties' pleadings indicate they both understand to a degree that the Board retains jurisdiction over disputes whether an individual is an "employee", along with the subsidiary question of whether certain "employees" fall within the scope of an existing bargaining unit. The Board's review power at section 18 of the *Code* allows it to determine these issues as they arise following the original certification:

18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

Generally, a party seeking to exclude a person from the definition of "employee", or from the scope of the bargaining unit, bears the onus of proof in this regard. In *Consortium de télévision Québec Canada Inc.*, 2003 CIRB 224, the Board described its longstanding position about which party bears the burden of proof when the issue of "employee" status arises:

[66] To clearly understand the notion of dependent contractor, it is useful to examine this concept in the light of the overall objectives of the *Code*. One of the main objectives of the *Code* is to promote collective bargaining as a means of remedying economic imbalance. Collective bargaining is the basis of effective industrial relations, enabling the establishment of good working conditions and sound labour-management relations. As mentioned in *Canadian Broadcasting Corporation* (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRB no. 383), the public nature of the right to collective bargaining creates a presumption of fact to the effect that any individual affected by an application for certification or covered by the scope of a bargaining unit deemed appropriate by the Board is an employee within the meaning of the *Code*. Consequently, the onus is on the party claiming otherwise to show proof to the contrary.

(emphasis added)

In order to meet this onus, a party in an application before the Board would have to provide all the relevant evidence, whether documentary or otherwise, in support of its position.

Given the Board's continuing role for matters involving its certified bargaining units, it has decided not to dismiss the application.

However, the Board is not prepared to convene an oral hearing at this stage of the proceedings. Such an unfocussed hearing would be costly for the parties and a strain on the Board's resources. If the parties are not able to meet and have a full and frank discussion of these issues, then there are several other procedural steps they will have to complete before the Board decides whether to hold an oral hearing.

Firstly, the Board requests the parties to respond succinctly by **March 16, 2012**, to this question about the issues requiring determination:

1. For the 23 positions, is the only issue whether each one falls outside the definition of "employee" at section 3 of the *Code*, or is there a second, subsidiary question regarding, if employee status is found, whether they fall within the scope of the Board's bargaining unit?

Additionally, two more steps will be taken and/or considered:

1. If the parties consent, pursuant to section 15.1(1) of the *Code*, the Board mandates its Industrial Relations Officer John Taggart to meet with the parties in order to resolve the current dispute, or to resolve some of the issues which separate the parties; and

2. If the parties do not consent to mediation, or a resolution does not occur by **April 19, 2012**, the Board mandates Mr. Taggart, pursuant to section 16(k) of the *Code*, to conduct an investigation into the issues separating the parties and to provide the Board with a written report.

Following the completion of these steps, the Board will then consider how best to determine any remaining issues.

The Board strongly encourages the parties to meet and share their views and relevant information on the 23 positions in dispute in order to resolve some or all of the issues arising from the pleadings.

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

Graham J. Clarke
Vice-Chairperson

c.c.: Mr. John D. Taggart (CIRB–Winnipeg)

GJC/vm