Canada Industrial Relations Board Conseil canadien des relations industrielles

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Dear Sirs:

In the matter of the *Canada Labour Code (Part I–Industrial Relations)* and an application filed pursuant to sections 18.1 and 45 thereof by Seaspan International Ltd., applicant; the Seafarers' International Union of Canada, and the International Longshore and Warehouse Union, Local 400, certified bargaining agents. (27938-C)

The Canada Industrial Relations Board (the Board) was composed of Mr. Richard I. Hornung, Q.C., Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*).

I–Nature of the Application

This matter is an application filed by the International Longshore and Warehouse Union, Local 400 (ILWU), which follows upon orders issued by the Board pursuant to section 18.1 of the *Code*, dated May 6, 2010 and August 18, 2010, and a decision of the Board dated December 6, 2010, *Seaspan International Ltd.*, 2010 CIRB LD 2469 (LD 2469). The orders of the Board consolidated two bargaining units of unlicenced employees of Seaspan International Ltd. (Seaspan or the employer), one formerly represented by the Seafarers' International Union of Canada (SIU) and the other formerly represented by the ILWU. The Board's orders also certified the ILWU as the certified bargaining agent of the new consolidated unit.

The issue before the Board, in LD 2469, addressed the application of certain provisions of the SIU/Seaspan collective agreement that was in effect at the time of the consolidation. The parties were in negotiations for a single collective agreement that would apply to the entire consolidated unit consisting of all SIU/ILWU members, now represented by the ILWU. The ILWU applied to the Board seeking an order that the provisions in the SIU/Seaspan collective agreement concerning financial bonuses be red-circled for the former SIU members until 2013, when the SIU/Seaspan collective agreement is set to expire. The Board characterized the ILWU's request in this way:

> Essentially, what it seeks is for the Board to direct that, irrespective of what the terms of the agreement arrived at between the ILWU and Seaspan for the new consolidated bargaining unit may be, the bonus provisions would continue for the former SIU employees.

The Board rejected the ILWU's request on the basis that to grant the request would, among other things, effectively compel the employer to cede the issue at the current bargaining table. In rejecting the union's request, the Board concluded as follows:

> The parties are presently negotiating the terms of a single collective agreement that will apply to the entire consolidated unit consisting of all ILWU/SIU employees. Consistent with the principles enunciated in *Joe Grasky, supra*, and *TELUS Advanced Communications*, 2001 CIRB 108, until such time as a new single collective agreement is concluded, the terms of the two previously negotiated collective agreements between Seaspan and each of the ILWU and SIU will continue in force and apply to the respective employees. This includes Article 1.25 of the SIU/Seaspan collective agreement.

And then:

> The issue of whether or not the bonus structure—which was originally in place for the SIU employees under the SIU/Seaspan collective agreement—should continue, is appropriately an issue that should be bargained by the parties in the current bargaining process in order that both parties might enjoy the benefit of the full range of bargaining tools available to them to reach a larger agreement for the entire unit.

The ILWU has brought the present application before the Board seeking an order that the October 1, 2010 financial bonuses contained in the SIU/Seaspan collective agreement be paid immediately to the former SIU members who are now in the consolidated unit, in accordance with the Board's decision in LD 2469.

The provision in the SIU/Seaspan collective agreement in question which addresses financial bonuses, provides as follows:

> 1.25 Rates and Frequence of Pay
>
> The rates of pay shall be set forth in the Pay Appendix "T" to this Agreement...
>
> ...
>
> The rates shown in the Pay Appendix are adjusted over the September 30, 2006 rates and the increases are as follows:
> ...
>
> October 1, 2010 3% or COLA or "me too"* whichever is greater plus $1,500 per member
>
> October 1, 2011 wage re-opener and $1500 per member
>
> October 1, 2012 wage re-opener and $1500 per member
>
> COLA to be based on annual Vancouver CPI as published by Statistics Canada in the month of April preceding the October 1 increase.
>
> *"me too" to be based on Guild or ILWU 2010 negotiations
>
> Employees paid on specific dates shall be entitled to a mid pay period draw up to fifty percent (50%) of their basic rate and may also on occasion request an additional draw.

II–Issues

From the union's perspective, the matter is simple. The parties have yet to reach a negotiated collective agreement applicable to the new consolidated unit. Therefore, in accordance with the Board's previous decision, LD 2469, both the ILWU/Seaspan and the SIU/Seaspan collective agreements remain in force and the financial bonuses set out under Article 1.25 of the SIU/Seaspan collective agreement were due and payable to those former SIU bargaining unit members as of October 1, 2010. The union alleges these payments have not been made by the employer and seeks an order from this Board directing the employer to make those payments forthwith. This application is simply a request to have the Board's decision, LD 2469, enforced.

Seaspan, on the other hand, views this request as a matter involving the interpretation, application and enforcement of a collective agreement provision (Article 1.25 of the SIU/Seaspan collective agreement), a matter within the exclusive jurisdiction of an arbitrator. It therefore asserts that the Board is without jurisdiction to entertain this application.

Seaspan takes no issue with the fact that the Board's decision, in LD 2469, determined that the two collective agreements continue in force and apply to the respective employees, until a new agreement applying to the new consolidated unit is concluded. However, it characterizes the union's present request as one going beyond the mere operation of the agreement to one that involves the interpretation of a specific provision to determine whether there has been compliance with it or whether rights under the agreement have been breached, falling within the purview of an arbitrator.

In response to the jurisdiction issue raised by the employer, the union asserts that its present request does not involve the interpretation of the SIU/Seaspan collective agreement provision, but rather involves the interpretation of the Board's decision in LD 2469. It argues that the Board has residual jurisdiction under sections 18.1 and 16(*p*) of the *Code* and/or LD 2469 itself, if the effect of the decision is in need of clarification.

III–Analysis and Decision

The ILWU and Seaspan are currently in the process of negotiating the terms of a new collective agreement that will apply to the whole of the new consolidated bargaining unit made up of the employees from the former SIU and ILWU units, who were brought into the new unit as a result of the Board's consolidation orders discussed above.

The issues that have continued to plague the parties are, in the Board's view, "consequential issues" that have arisen as a result of the section 18.1 bargaining unit review process. These issues would not be in dispute if the units had not been consolidated, with the resulting impact on the two former collective agreements and the respective rights of the parties and affected employees. The Board's December 6, 2010 decision, LD 2469, was itself issued in order to resolve a lingering dispute between the employer and the ILWU, the bargaining agent certified to represent the consolidated unit. In the Board's view, the present issue is no different and still speaks to the respective rights and obligations of the parties in the new relationship formed following the Board's decision to consolidate the two units, and its resulting orders. More specifically, the Board views the present request of the union as raising an issue as to the interpretation of the Board's decision in LD 2469 and the intended effect of that decision for the parties who are still without a collective agreement applicable to the whole of the new consolidated unit.

The Board does not agree with the employer that the issue currently before it is one that falls within the exclusive jurisdiction of an arbitrator and/or is outside its jurisdiction. It is not persuaded by the employer's argument that section 57 of the *Code*–the provision for final settlement of collective agreement disputes–and the cases cited by the employer, are directly applicable or sufficient to deprive the Board of jurisdiction over this matter. The circumstances here are distinguishable as this is not a matter of pure collective agreement interpretation. If the same issue of whether the financial bonuses were due and payable had arisen between the SIU and Seaspan during the life of the collective agreement–the bargaining unit review never having taken place–the employer's position might be more compelling. However, those are not the circumstances here.

The issue of whether the financial bonuses under Article 1.25 of the SIU/Seaspan collective agreement are due and payable forthwith, only arises because of the consolidation of the two former units and the Board's subsequent decision, in LD 2469, declaring that both of the former collective agreements remain in force until a new collective agreement is concluded for the single consolidated unit. As such, the issue is properly characterized as an issue that requires the interpretation or clarification of the Board's earlier decision. More specifically, it involves the implications and impact of that decision on the parties while and until they conclude their negotiations for a new collective agreement.

When the Board issued the certification order, following the representation vote, certifying the ILWU as the bargaining agent of the consolidated unit, it expressly retained jurisdiction over "any remaining consequential issues arising from the consolidation of the units or the implementation of the Board's orders in this file." This is found in the Board's cover letter to the parties dated August 18, 2010, enclosing the certification order. The employer did not take issue with, and expressly accepted, the ILWU's right to file–and the Board's jurisdiction over–the ILWU's subsequent application to red-circle the financial bonuses in question, which led to the Board's decision in LD 2469. The Board sees this application as a continuation of that same dispute, in that it involves a question as to the practical application of the Board's earlier determination both that the terms of the SIU/Seaspan collective agreement remain in force and its decision not to red-circle the financial bonuses provided for in Article 1.25 of that agreement.

The employer suggests that the only effect of the decision was to confirm the continued existence of two collective agreements. However, with respect, the plain language of the Board's decision indicates something more. The two most relevant passages from LD 2469 have been reproduced above. They reflect that the Board confirmed not only that two collective agreements continued to exist, but that the terms of each of the two agreements were to continue in force and apply to the respective employees, until such time as a new single collective agreement is concluded. The Board expressly stated that Article 1.25 of the SIU/Seaspan collective agreement, which contains the financial bonus provisions, including the date on which bonus payments are to be made, continues to apply.

In making this observation, the Board is not here engaging in an exercise which involves the interpretation of the collective agreement. It merely restates and confirms the meaning of the Board's earlier determination that the particular financial bonus provision in question, including the stipulated payment dates contained therein, remains in force until a new single collective agreement is concluded. To date, the parties have not yet concluded a single collective agreement, and therefore Article 1.25 of the SIU/Seaspan collective agreement, which provides for a payment to be made on October 1, 2010, is in force and applies, as of the date of this decision. The logical meaning to take from this is that the payments stipulated in Article 1.25, which were to be made on October 1, 2010, are now overdue.

The employer argues that such a conclusion would be inconsistent with the Board's other statements contained in LD 2469 to the effect that the Board did not want to involve itself in the actual negotiations or collective bargaining process, or otherwise affect the relative bargaining power of the parties. This is why, according to the employer, the Board declined to red-circle the bonuses. The Board, however, does not see any such inconsistency. Rather, one follows upon the other. The Board first determined that the two agreements would continue in force while negotiations for a new agreement carried on. The Board then declined to "go further" and red-circle the bonuses in the future, until 2013, regardless of what else was negotiated for the single unit, because to do so would be to interfere in the collective bargaining process. It stated:

> For the Board to go **further** and grant the order requested in this case, namely that one provision of one of the former collective agreements **will continue into the future** for only a portion of the present bargaining unit members—in addition to whatever other terms and conditions are negotiated for the entire unit—would subvert the purpose and objectives of the *Code*. Such an order would represent both a departure from the intention of the *Code* as set forth in section 56 and would effectively insert the Board into the current collective bargaining process and alter, or at the very least significantly affect, the relative bargaining power between the parties.
>
> (emphasis added)

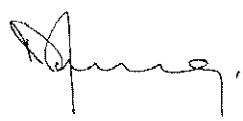
It should be made clear, from the above statement, that the Board's concern in LD 2469 was to avoid making a determination that would effectively commit the parties to a position in the future or adversely affect their current bargaining positions going forward. During the course of the hearing, and the arguments leading to the Board's initial interim order in this matter, both parties were aware

that if the ILWU was successful in the vote following the Board's consolidation order, the bonus provisions in the SIU collective agreement would be put in jeopardy (in that it was subject to bargaining) when a new collective agreement which applied to the entire consolidated unit was negotiated. What the Board did, in its earlier order, was to confirm the long standing principle that (in the case, as here, of two competing unions) following a consolidation order, both collective agreements continue in effect until a new single agreement is negotiated. The Board will not, nor can it in these circumstances, "cherry pick" provisions of one collective agreement or another that apply to a select group of employees and compel either party to include that provision in the new collective agreement which applies to the consolidated unit. It is therefore appropriate to maintain the parties' past collective bargaining commitments, during the negotiating period, only to the point where a new agreement for the consolidated unit is concluded.

This determination, however, does it entitle the ILWU to merely hold out on concluding the terms of a new single agreement until 2013 when the remaining bonuses are to be paid out under the terms of Article 1.25 of the SIU/Seaspan collective agreement. To do so would enable the ILWU to accomplish, indirectly, what the Board–for all of the labour relations reasons already described above and as set out in LD 2469–specifically declined to order directly.

For the above reasons, the Board confirms that Article 1.25 of the SIU/Seaspan collective agreement is in full force and effect at the present time because there is no single collective agreement yet concluded and applicable to the new single consolidated unit. The provision that requires a payment to be made to the affected employees on October 1, 2010 is thus valid and binding on the employer.

For the Board,



Richard I. Hornung, Q.C.
Vice-Chairperson

c.c.: Mr. Ken Chiang (CIRB–Vancouver)