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File Nos. 30728, 30729,
30730, 30731, 30732

February 5, 2013

FAXED

Mr. Jean-Daniel Tardif
Acting Regional Director & Registrar
CANADA INDUSTRIAL RELATIONS BOARD
5300 - 1 Front Street West
Toronto, ON M5J 2X7

Dear Mr. Tardif:

RE: IN THE MATTER OF THE CANADA LABOUR CODE (PART I – INDUSTRIAL RELATIONS) AND A COMPLAINT OF UNFAIR LABOUR PRACTICE FILED PURSUANT TO SECTIONS 19.1 AND 97(1) THEREOF BY THE TEAMSTERS CANADA RAIL CONFERENCE, COMPLAINANT ALLEGING VIOLATION OF SECTIONS 50(A), 50(B), 94(1)(A), 94(3)(A), 94(3)(B) AND 96 OF THE CODE BY THE CANADIAN PACIFIC RAILWAY, RESPONDENT. – 29635-C & 29637-C

We write in respect to Mr. Hampel's letter of January 29, 2013 received after the close of business on same day. Please accept this letter as our reply on behalf of our client in regard to Mr. Hampel's letter which relates to the above noted matter.

In accordance with section 23 of the Board's Regulations, a copy of this letter is being served concurrently upon the Respondent.

At the outset, we advised that our client maintains all of its positions and submissions filed with the Board in respect to this matter. This includes all of our previous positions and submissions filed with the Board in connection with the earlier related proceedings. This includes the Union's application for interim relief pursuant to section 19.1 of the *Code* (29635-C) filed in conjunction with our unfair labour practice complaint (29637-C).

As the Board is aware, the Board has issued two Orders and two decisions in respect to this situation. The Board's latest decision and Order in connection with Board File No. 29637-C are both dated December 19, 2012.

The Board's Order dated December 19, 2012 makes it clear that the Employer was to cease and desist from implementing wholesale cancellations of Local Agreements and to reinstate the Local Agreements that were cancelled by it. This Order should also be read in conjunction with the Board's decision of same date wherein the Board found that the wholesale cancellation of the Local Agreements by the Employer constituted a violation of section 94(1)(a) of the *Code*. Reference may be made to paras. 21 and 22 of the aforementioned decision.

As indicated in our earlier letter to the Board dated January 11, 2013 (Board File No. 29637-C) and our letter to the Board dated January 23, 2012, the Respondent Employer has recently engaged in the same prohibited conduct, i.e. the Respondent has, once again, cancelled on a wholesale basis Local Agreements in violation of the *Code*, Board decisions and Orders referred to above.

We also rely on the Affidavit of Ms. Corinna Traill filed with our letter of January 23, 2013. It is noteworthy that the Respondent has not taken issue with the allegation in said affidavit. In fact, the Respondent essentially agrees with said allegations but tries to avoid an overt concession via clever "wordsmithing".

Although the Respondent disagrees that it has failed to comply with the Board's Order referred to above, the Respondent concentrates on that portion of the Board Order which required a posting of same. Interestingly, the Respondent does not deny that it has once again instituted wholesale cancellations of Local Agreements. Rather, the Respondent expressly admits that it issued new notices to cancel Local Rules on a wholesale basis. The Respondent somehow thinks that its "partial admission" avoids the Board's Order because, the Respondent argues, "issuing the cancellation notices is far different from cancelling the Local Rules themselves".

The Applicant does not appreciate the distinction in the quotation above. The Applicant submits that it is a distinction without a difference. The Board ordered the Respondent not to issue wholesale cancellations of Local Agreements. In fact, the Applicant has once again done just that.

In addition to the above, the Respondent has compounded the situation by issuing more comprehensive wholesale notices to cancel Local Rules. For example, and as referred to at para. 3 of the Respondent's Affidavit (Mr. D. Freeborn), the Respondent wanted to initiate standardized calling rules across the system. As those rules were covered off in local Rules, the Respondent decided to serve notices to cancel those rules.

The above cancellations are not only in violation of the *Code*, Board's decisions and Board's Orders referred to above, but they are also in violation of the recently implemented collective agreement as Ordered by Arbitrator Kaplan. Reference may be made to the mandatory Interest Arbitration proceedings as a result of Bill C-39.

The Respondent had proposed in collective bargaining and in its submissions to Arbitrator Kaplan that it be able to initiate standard calling procedure rules across its system. The Respondent was unsuccessful in persuading Arbitrator Kaplan to rule in its favour in regard to the above.

The Applicant does not agree with the facts as recited in the Respondent's letter of January 29 or those in Mr. Freeborn's Affidavit. At the very least, and with respect to both, the Applicant submits that the facts and arguments revealed in both of these documents are either incomplete or skewed in favour of the Respondent.

The Applicant Union has not agreed with any of the above noted cancellations. Any agreements referred to by the Respondent in its letter are agreements reached some time ago which pre-date the proceedings before the Board. These agreements do not change the Applicant's position in this matter.

The Applicant disagrees that the Respondent is merely exercising its rights under the collective agreements. Moreover, the Applicant disagrees that there are no Local Rules in Eastern Canada.

The Applicant does note that the Respondent has conceded in its letter of January 29th, 2013 that it has initiated a system wide notice seeking to change and to standardize calling rules across its system. The Respondent admits that it initiated system-wide cancellation notices to allow for such (which the Union denies that the Respondent can do). The important point, however, is that the Respondent admits without reservation that it has once again initiated a wholesale cancellation of Local Rules across its system. The "wholesale cancellation of Local Rules" is the same issue that the Board ruled upon in the earlier proceedings referred to above.

The Respondent attempts to distinguish and to justify all of the above by later claiming that the net result of the changes is to modify many of the existing rules rather than cancelling such. Once again, the Applicant submits that this is a distinction without a difference. The simple fact is that the Respondent cancelled on a wholesale basis its Local Rules Agreements with the Applicant across its nationwide system.

The Respondent thereafter suggests that it should somehow and for some reasons (unexplained) be allowed an opportunity for the necessary adjustments to be made to the Board Order prior to such being filed with the Federal Court. This is yet again another unlikely request since the Respondent did not propose such "adjustments" from the Applicant prior to the unilaterally issuing the notice to cancel of the above Rules on a wholesale basis. The Respondent did not even discuss such with the Applicant's representatives before unilaterally issuing said notices. It is submitted that it is too late for the Respondent to ask for a "let" in these circumstances.

The Respondent then suggests that the Respondent is not *wholly* failing to comply with the Order. In other words, the Respondent concedes it is failing to comply with *at least a part* of the Board's Order. The Applicant submits that the Respondent is failing to comply with the most important and substantive part of the Board's Order.

The Respondent suggests that the issues are most appropriately dealt with by the Board rather than through the filing of the Order with the Federal Court. Once again, it is interesting to note that it is only after the Applicant requested that the Board file the Order with the Federal Court that the Respondent has shown any interest in returning to the Board to request a reconsideration of the Board's earlier decisions and Orders.

In response to the Respondent's strange allegation that all of its machinations are somehow in keeping with the intent and language of the Board's Order, the Applicant would like to note its strong disagreement. As per the reasoning of Vice-Chair Dorsey page 10 of the seminal decision, *Seafarers' International Union of Canada and Seaspan International Ltd., North Vancouver B.C. and Canadian Brotherhood of Railway, Transport and General Workers* [1979] 2 Can LRBR 493, the Applicant would like to emphasize that the Board plays a pivotal role in conducting the assessment under Section 23 (1) of the Code. Indeed, the first criterion, which requires the Board to register an Order in Federal Court in response to our written request unless "there is no indication of failure or likelihood of failure to comply with the order or decision", squarely places the question of the Respondent's noncompliance in the forum that initially made the decision: the CIRB.

The Applicant respectfully acknowledges this Board's jurisdiction, and submits that, in accordance with the intent of the provision; a provision which affirms the pro-active role to be played by the Board and which clearly shows that the provision is not meant to be a substitute for the procedures dictated by the Court; that given the Board's extensive participation and knowledge of the issues at hand, the CIRB has all the information necessary to reach a decision to file Order No. 699-NB with the Federal Court. The Applicant submits that the Board can easily make this decision because there has been both an (actual) failure and a likelihood of (further) failures by the Respondent to comply with the Board's decisions and Orders. Indeed, the Respondent has all but admitted such in its letter of January 29th, 2013.

The Respondent then turns its submissions to the second situation wherein the Board may refuse to grant a request to file an Order with the Federal Court - when such a filing would "serve no useful purpose". The Respondent suggests that it would serve no useful purpose to file the Order at issue with the Federal Court as the filing would, in and of itself, not do anything to promote a better understanding between the parties of what was intended by the Order. The Applicant strongly disagrees.

The Respondent suggests that because the parties have both a sophisticated and longstanding bargaining relationship, the parties should be able to resolve disputes between themselves without the need to resort to section 23 of the *Code*. While such an allegation may have been true years ago, it is certainly not an accurate description of the current relationship between CP Rail and the Applicant.

Recently, CP Rail has demonstrated that it is not interested in engaging the Applicant in fruitful discussion. In fact, CP Rail has not initiated any discussions an effort to promote constructive dialogue, but rather, the Company "does what it wants" without advance notice to the Applicant. This combative approach is consistent with the Respondent's "new way" of doing things in respect to labour relations matters. For example, one need only recall the Respondent's infamous announcement of layoffs of approximately 25% of its workforce to the business community in New York City in the early winter without any notice to its Canadian unions, employees or the public. These unilateral actions are illustrative of the Respondent's autocratic disdain for its obligations in respect to its bargaining agents, collective agreements and employees.

Finally, the Respondent suggests that because very few Orders have been filed with the Federal Court, the paucity of the jurisprudence ought to persuade the Board to refuse to file the Order in these circumstances. The Respondent suggests that the Board ought to assume that because so few Orders are either requested to be filed with the Federal Court or are actually filed with the Federal Court, then the Respondent simply ought to be able to avoid its violation of the Board's decisions and Order in these circumstances. The Respondent's argument is entirely self-serving and without merit. The Board should disregard this argument. Simply because a legislative provision is rarely invoked is no reason to deny its exercise; indeed, it is the very exercise of such infrequently-used rights and protections that must be especially safeguarded and observed in order to ensure the continued integrity of the entire system. As Albert Einstein famously stated, "nothing is more destructive of respect for government and the law of the land than passing laws which cannot be enforced".

Section 23 asks the Board to concern itself with one simple question: has the Respondent complied with the Board's Order? If the Respondent has not complied with the Order, particularly, in light of the Applicant's letters and requests to the Board, by this point the Board can reasonably infer that the Respondent will not comply with its Order until and unless the Order is filed with the Federal Court. Once filed with the Federal Court the Board's Order will have the strength of the Federal Court behind it. Hopefully, the Respondent will at least by this stage - even if unwillingly - have gained some appreciation for the rule of law in Canada. The Applicant also emphasizes that it is requesting the filing and registering of the Order for the purpose of enforcement of the Board order only. As per the decision in *Seafarers, supra* (page 10), and affirmed in both *International Brotherhood of Electrical Workers, Local Union No. 529 v. Central Broadcasting Company Ltd.* [1977] 2 F.C. 78 at p. 81 and *International Association of*

Longshoremen, Local 375 v. Association of Maritime Employers, p. 295, the Applicant is not invoking the protections afforded by section 23 of the Code as a method of reviewing the Board's decision. Such an invocation would not be consistent with the intent of the provision, as section 23 clearly requires the filing of the Order "exclusive of the reasons therefor". Rather, the Applicant's position has remained consistent and is straightforward: when confronted by the Respondent's non-compliance with Order No. 699-NB, and in the absence of a compelling reason not to grant the registration of the Order as per the two "exclusions" described in section 23(1)(a) and 23(1)(b), the Applicant now appeals to the Board's comprehensive remedial authority to exercise the procedural safeguard enshrined in section 23 of the *Code* to enforce an order of the Board.

The Applicant also distinguishes the *Seafarers, supra* case from the present circumstances. In the *Seafarers* decision, the Board declined to file its Order in Federal Court pursuant to section 23 because the request for filing was made by the unsuccessful party. That is, the unsuccessful party in *Seafarers* made the request solely for the purpose of initiating proceedings at Federal Court – Trial Division for a stay of execution of the Order. Furthermore, the request did not, as here, allege non-compliance by the opposing parties as required by section 23(1)(a) and, consequently, the Board quite rightfully refused to file and to register the Order in Federal Court.

The Applicant concedes that the Board's role proper is not to punish parties, but rather, to remedy breakdowns in labour relations. Consequently, it is the Applicant's position that the filing and registration of the Order in Federal Court will also further the Board's policy objectives as expressed in the Preamble of fostering positive labour relations and of assisting with the resolution of labour relations problems by giving greater meaning and authority to Board decisions.

The Applicant respectfully requests that the Board file with the Federal Court Board Order No. 699-NB as soon as possible. If the Board does not grant this request, it is submitted that the Respondent, having demonstrated its sheer disregard for following the decisions and Orders in question, will have been successful in its efforts to thwart the Board's processes and to circumvent the Applicant's ability to register an Order in Federal court as affirmed in section 23 (1) of the *Code.*

In the alternative, and without prejudice to the arguments referred to above, if the Board is not inclined to file the said Order with the Federal Court at this time, then the Applicant requests a hearing in Order to present additional evidence and argument in support of its request.

All of which is respectfully submitted.

Yours truly,
CaleyWray

Michael A. Church
MAC/sh

cc: D. Able, F. Finnson, D. Olson, S. Brownlee, B. Hiller, B. Brunet, G. Brazeau, R. Hampel (fax)