2-13-2002

Re Aliant Telecom Inc and AC & TWU

Innis Christie

Re Aliant Telecom Inc. and Atlantic Communication and Technical Workers Union

[Indexed as: Aliant Telecom Inc. and A.C. & T.W.U. (Re)]

Canada
I. Christie

Heard: February 13, 2002
Decision rendered orally: February 13, 2002
Written confirmation: February 25, 2002

INTERIM AWARD concerning request for interim relief pursuant to s. 60(1)(*a*.2) of *Canada Labour Code*, R.S.C. 1985, c. L-2. Request denied.

R.F. Larkin, Q.C., *B. Quistgaard* and others, for the union.
J. McKenzie, *D. Mombourquette* and others, for the employer.

INTERIM AWARD

Policy Grievance 01-05 dated November 8, 2001 concerning the Contracting Out of Internet Member Services — Internet Dial Help Desk, which the Union alleges is contrary to Letter of Intent, Appendix E to the Common Part of the Collective Agreement between the Employer and the Union effective January 1, 1999 January 1, 2002, which the parties agree is the Collective Agreement applicable here. At the outset of the hearing, the parties agreed that I am properly seized of this matter and have jurisdiction to grant interim relief.

The arbitration hearing in this matter is scheduled before me on May 21, 22, 23, 30 and 31, 2002. Over the objection of the Employer, I decided to convene a hearing in this matter to consider the Union's request for interim relief pursuant to s. 60(1)(*a*.2) of the *Canada Labour Code*, R.S.C. 1985, c. L-2. The hearing was held on February 13, 2002, a date agreed upon by the parties. The Union sought an order precluding the contracting out of the work in issue until the conclusion of the arbitration scheduled for hearing in May. At the end of the hearing on February 13, I made an oral interim award denying the interim relief sought by the Union. These are those reasons:

. . . . .

I have decided not to grant interim relief.

In exercising my powers under s. 60(1)(*a*.2) of the *Canada Labour Code*, R.S.C. 1985, c. L-2, I think it is appropriate to take

account of the approaches of arbitrators under that provision and under similar provisions in provincial statutes, rather than simply following the courts or awards such as my own *Canada Post* award (*Re Canada Post Corp. and C.U.P.W.*, 1988 C.L.A.S.J. LEXIS 13800; 1988 C.L.A.S.J. 503495; 10 C.L.A.S. 99) which are based on reading a power to make interim awards into the *Canada Labour Code*, prior to the recent amendment that added s. 60(1)(*a*.2). Nor, as arbitrator Tacon ruled in *Re Better Beef Ltd. and U.F.C.W., Loc. 617P* (1995), 46 L.A.C. (4th) 46, at pp. 50-51, should the approach of labour relations boards necessarily be replicated, given the institutional concerns of such tribunals.

I think there is a two-step decision making process, involving the questions:

1. Is there a fair question to be arbitrated? What constitutes a fair question must be related to the second question. (In other words, the more serious the damage or harm which seems likely to result from either denying or granting interim relief, the more fully satisfied the arbitrator should be that the other party has a serious claim.)
2. Where does the balance of foreseeable damage or harm lie? Not so much can be made of this that it leads, effectively, to a decision on the merits, and therefore requires that the case to be fully argued on the facts and law.

In this case I think there is a fair question to be arbitrated, considering what is at stake. What then is the balance of foreseeable damage or harm?

I agree that the *Canada Labour Code* says nothing about urgency or exceptional circumstances. Of the two arbitration awards under s. 60(1)(*a*.2) put before me, one, that of Arbitrator Kelleher in *Re Canada Post and C.U.P.W. (Hiller Grievance, C.U.P.W. 739-95-002140)*, [1999] C.L.A.D. No. 333 (QL); [1999] C.P.A.S. No. 52 (QL), involves quite different facts. It provides little guidance in principle other than a list from the Ontario awards, of which the arbitrator evidently approves, of ten factors taken into account in the exercise of a similar power to grant interim relief under the Ontario legislation. The first four items on the list are relevant to a discharge case, but not here. Items 5-10 are [at para. 13]:

5. The relative labour relations harm.
6. The ability of the unsuccessful party to be compensated in damages or in some other manner for the harm suffered if the order is granted or denied.
7. Mitigating circumstances.
8 Mitigation of damages.
9. Expedition or lack thereof in bringing the application for interim relief.
10. The extent of delay before the resolution of the main application or the grievance.

The other arbitration award under s. 60(1)(*a*.2) of the *Canada Labour Code* put before me, that of Arbitrator Michel Picher *Re Canadian Pacific Railway Co. and B.M.W.E.*, [1999] C.L.A.S.J. LEXIS 7465; [2000] C.L.A.S.J. 670528; 58 C.L.A.S. 315, is more relevant. There the arbitrator stated, at paras. 6 and 7:

> The jurisdiction of the Arbitrator to issue an order of the type requested by the Brotherhood is found in article 60(1)(*a*.2) of Part 1 of the *Canada Labour Code* R.S.C., 1985, c. L-2, as amended January 1, 1999 which reads as follows:
>
> "60(1) An arbitrator or arbitration board has
>
> . . . . .
>
> "(*a*.2) the power to make the interim orders that the arbitrator or arbitration board considers appropriate;"
>
> In my view the above quoted jurisdiction must be applied carefully, and in keeping with the general principles governing injunctive remedies insofar as the issuing of cease and desist orders is concerned. In that regard the principles enunciated by the Courts which govern the issuing of interlocutory injunctions are instructive and appropriate. *In considering whether to issue a cease and desist order a board of arbitration must consider the balance of convenience and, in particular, must determine whether the failure of injunctive relief will prejudice a party. More specifically, a board of arbitration must weigh the possibility that the action sought to be enjoined would, if carried out, place the grieving party in a position which frustrates the possibility of a fully effective remedy or make whole order upon the determination of the merits of the dispute.* [Emphasis added.]

Arbitrator Picher concluded in para. 9, on facts not dissimilar to those before me here:

> Most importantly, should the Company's arrangements with Progress Rail ultimately be found to be an improper contracting out the employees affected will be in a position to be made whole by a remedial order which may include compensation and a direction for the restoration of the *status quo*. Bearing in mind that a cease and desist order . . . is an extraordinary remedy, I am satisfied that the circumstances do not justify such a recourse.

The italicized portion of the previous quote must not be applied mechanically. I do not agree that the applicant for interim relief must

prove *irremediable* harm, but if the harm to the applicant which will result if the interim relief is denied is remediable that surely lessens the weight of its claim.

I agree with counsel for the Union that, on the face of the *Canada Labour Code*, I have no power to require the Union to post a bond, or to entitle the Employer to grieve if I were to grant interim relief and the Union were then to fail in the ultimate hearing of its grievance. However, my lack of power to do those things means that the Employer is more likely to be faced with irremediable harm if I grant the Union interim relief and the Employer ultimately wins. If I deny the Union interim relief and the Union ultimately wins there may be irremediable harm, but the Union's remedy in the grievance itself can take account of any harm flowing from the denial of interim relief and thus lessen the likelihood that it will be irremediable, or as serious as it would otherwise be.

Thus it is important for the Union applicant for interim relief to show that it has suffered real harm, which may be "labour relations harm", but if that harm would appear to be able to be effectively remedied by the ultimate order its weight will be lessened.

I think the Employer has overstated the damage it would suffer if I granted the relief sought, in the sense that that damage has to be valued by the cost to the Employer of delay, and not loss of all its sunk costs, with some allowance for what I consider to be the remote likelihood of the contractor treating the contract to run the Help Desk as repudiated and suing. I am also aware that the Employer has, in a sense, inflicted the damage on itself by proceeding with the contracting out arrangements. However, I am not satisfied that doing so was not a responsible business decision as the Employer moves to the provision of broadband data transmission technology and the phasing out of the service to which the Help Desk is addressed.

As has been well known to the Union, this was going to occur between the first of January and the first of March; certainly well before the May dates for the arbitration hearing in this matter.

The Union is seeking to protect two serious interests not easily remedied by my final order in this matter (the other matters raised can, I think, be relatively easily remedied should the Union win its policy grievance here):

1. The possibility that its permanent employee members might want to move to the jobs that are being contracted out if those

jobs are protected by an interim order by me, but of course those jobs would still be subject to a possible order adverse to the Union following the hearing of this arbitration in May.

2. The Union's bargaining credibility.

I have taken the harm both of these can inflict on the Union and its members seriously into account, but that harm does not outweigh the harm that the Employer's business may suffer if the interim order sought is granted and the Union does not win this arbitration.

The Union has not discharged the onus it bears to make out the case for the grant of the interim order it seeks.

. . . . .

This denial of the interim relief sought was effective when stated at the conclusion of the hearing on February 13. I hereby confirm it.