



Reasons for decision

Teamsters Canada Rail Conference,

applicant,

and

Canadian National Railway Company,

respondent.

Board File: 25191-C
CIRB/CCRI Decision no. 362
September 13, 2006

The Board was composed of Ms. Julie M. Durette, Vice-Chairperson, and Ms. Laraine C. Singler, former Member, and Mr. André Lecavalier, Member. A hearing was held on August 9 to 11, 2005, in Vancouver, British Columbia.

Appearances

Ms. Shona A. Moore, Q.C., Counsel for the Teamsters Canada Rail Conference;
Mr. Thomas G. Keast, Counsel for Canadian National Railway Company.

These reasons for decision were written by Vice-Chairperson Durette.

I - Nature of the Application

[1] This is an application filed by the Teamsters Canada Rail Conference (the TCRC or the union), on July 19, 2005, pursuant to sections 15.1, 16(p), 98 and 99 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*), seeking a declaration confirming that a settlement was concluded between the TCRC and Canadian National Railway Company (CN or the employer) in regards to various outstanding complaints before the Board. The union also sought an order directing CN to execute the settlement agreement or a Board order incorporating the settlement agreement. CN opposes the present application, firstly on the basis the Board did not have the jurisdiction to determine the matter and alternatively, should the Board find it has jurisdiction, on the basis the parties did not reach a settlement.

[2] After hearing the parties on the preliminary issue of jurisdiction, the Board found it had jurisdiction to determine the union's application. The Board then proceeded to hear the parties on the merits of the matter and found the parties had reached an agreement. As a means of expediting the process, the Board communicated its disposition of the preliminary issue of the Board's jurisdiction, as well as the merits of the union's application by way of oral decisions at the hearing of the present matter. The Board issued an order on August 17, 2005, confirming its decision and incorporating the parties' settlement agreement.

[3] The Board indicated it would provide a detailed written explanation of its oral decisions on both the jurisdiction issue and the merits of the union's application. The following are the Board's reasons for its decisions.

II - Background and Facts

[4] The TCRC is the certified bargaining agent for a unit of employees of CN, including employees working at and from CN's Vancouver Terminal.

[5] The Board was seized of several unfair labour practice complaints filed by the TCRC against CN. An initial complaint was filed on October 15, 2003 by the International Brotherhood of Locomotive

Engineers (the BLE) - now the TCRC - following a merger between the BLE and the TCRC (the first Lee complaint - Board file no. 23999-C). In this complaint, the union claimed CN violated sections 94(1)(a), 94(3)(a), 94(3)(b), 94(3)(c) and 94(3)(e) of the *Code*. It alleged that CN commenced a disciplinary investigation and imposed disciplinary action against Mr. Bob Lee for alleged misuse of confidential information in relation to a comprehensive unfair labour practice complaint previously filed by the union against CN on July 25, 2003 (Board file no. 23768-C). In this comprehensive complaint, the union alleged that CN consistently targeted union officials for discipline by reason of their involvement in the union. A second related complaint was filed by the union against CN (Board file no. 24195-C). These latter two complaints are known as the Greater Vancouver Terminal complaints.

[6] The Board was also seized of a second complaint filed on November 22, 2004, by the TCRC on behalf of Mr. Lee (the second Lee complaint - Board file no. 24722-C) alleging violation by CN of the same provisions of the *Code* in relation to Mr. Lee's termination on November 19, 2004.

[7] The two complaints relating to the discipline and to the dismissal of Mr. Lee (Board file nos. 23999-C and 24722-C) were consolidated and heard together. A hearing was convened on April 4 to 7, 2005.

[8] During the course of the hearing, the Board, pursuant to section 15.1 of the *Code*, sought and received the parties' consent to accept the assistance of the Board, through Mr. Akivah Starkman, Executive Director, in resolving outstanding issues in relation to both Mr. Lee's and the Greater Vancouver Terminal complaints.

[9] Notwithstanding the parties undertaking to work toward a settlement of the above matters, hearing dates were scheduled to resume from July 18 to 22, 2005 in regards to the two Lee complaints.

[10] Pursuant to the parties' agreement and shortly after the adjournment of the hearing in April, the parties met with the assistance of Mr. Starkman and were able to make considerable progress in

concluding a settlement of the outstanding matters before the Board; however, some issues between the parties remained unresolved.

[11] On July 15, 2005, the parties filed and the Board granted a joint request to adjourn the commencement of the hearing scheduled to resume on July 18, 2005.

[12] The present application was filed by the union on July 19, 2005, under Board file nos. 23999-C and 24722-C (the Lee complaints). To simplify the processing, the Board opened and assigned a separate file number relating to the present application and consolidated all matters pursuant to section 20 of the *Canada Industrial Relations Board Regulations, 2001*. Given the nature of the union's application and the order sought, the Board adjourned the resumption of the hearing in the two Lee complaints, pending its determination of the union's July 19, 2005 application.

III - Jurisdiction

[13] The first aspect of the matter before the Board relates to the scope of the Board's jurisdiction and authority to look into the question of whether the parties had entered into a binding settlement of the disputes between them such that, if the Board found that a settlement was reached, it could enforce the terms of settlement as between the parties.

[14] Central to this issue is the interpretation of sections 15.1 and 16(p) of the *Code* which address the Board's power and jurisdiction to assist parties in resolving issues and to determine specific questions that may arise in the course of a proceeding. The two sections provide as follows:

15.1(1) The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled.

(2) The Board, on application by an employer or a trade union, may give declaratory opinions.

16. The Board has, in relation to any proceeding before it, power

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

(i) a person is an employer or an employee,

(ii) a person performs management functions or is employed in a confidential capacity in matters relating to industrial relations,

(iii) a person is a member of a trade union,

(iv) an organization or association is an employers' organization, a trade union or a council of trade unions,

(v) a group of employees is a unit appropriate for collective bargaining,

(vi) a collective agreement has been entered into,

(vii) any person or organization is a party to or bound by a collective agreement, and

(viii) a collective agreement is in operation.

[15] Also of relevance in regards to the duties and powers of the Board are sections 21 and 98(1) of the *Code*:

21. The Board shall exercise such powers and perform such duties as are conferred or imposed on it by this Part, or as may be incidental to the attainment of the objects of this Part, including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board.

...

98.(1) Subject to subsection (3), on receipt of a complaint made under section 97, the Board may assist the parties to the complaint to settle the complaint and shall, where it decides not to assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, determine the complaint.

A - Positions of the Parties

1 - The Employer

[16] CN takes the position that the Board has no jurisdiction to determine whether parties have reached a binding settlement agreement and that such determination rests within the powers of a court pursuant to a civil proceeding instituted by the party alleging that a settlement exists.

[17] CN disputes the union's contention that the Board has such jurisdiction under section 15.1 of the *Code* and maintains this section does nothing more than authorize the Board to assist the parties, conditional upon their agreement, in resolving issues before the Board. In CN's opinion, given that section 15.1 is explicit about facilitating settlement, its purpose is to protect the Board's jurisdiction to deal with any unresolved issues, but it does not go so far as to confer jurisdiction to determine whether or not issues have been resolved and thus whether or not a binding settlement has been reached.

[18] According to CN, a line must be drawn between encouraging and facilitating settlements and determining whether a settlement occurred. It argues that if Parliament had intended the Board to have jurisdiction to determine the latter, it would have made it clear in the wording of section 15.1 of the *Code*, as is the case under the *Ontario Labour Relations Act, 1995* (the *Act*), where section 96(7) provides as follows:

96.(7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

[19] CN maintains that section 15.1 of the *Code* should be interpreted in the same manner as the Board has interpreted sections 16(o), 16(p) and 21, in that these sections are viewed as being for the use of the Board only, to decide questions as they arise within existing and ongoing proceedings. CN argues those sections do not confer on a party the right to initiate a proceeding or to have the Board rule in a proceeding initiated for the sole purpose of having the Board exercise rights under that section. CN further argues that the general powers of the Board, such as those set out in section 21 of the *Code*, are not to be interpreted as granting the Board separate and autonomous powers not otherwise authorized by the *Code*, or for which there are specific powers prescribed elsewhere in the *Code*.

[20] Nothing in section 15.1, argues CN, suggests any legislative intent to provide parties with a basis to bring an application before the Board to have it determine whether or not a settlement between parties has been reached. It submits that the *Code*'s remedial provisions, sections 98 and 99, do not provide the necessary jurisdiction for the Board to make a determination pursuant to sections 15.1 or 16(p), which are procedural in nature.

[21] Finally, CN submits that as a matter of policy, the Board should not interfere with the private dealings of the parties who need to be assured and know that settlement discussions may be undertaken on a "confidential" and "without prejudice" basis. This is so, argues CN, given that matters may well proceed before the Board for determination, if settlement discussions ultimately fail.

2 - The Union

[22] As stated earlier, the union framed the present application under sections 15.1, 16(p), 98 and 99 of the *Code* within the context of outstanding complaints before the Board. It asserts that the Board's primary jurisdiction to determine its application arises out of the complaints already before the Board, which were the subject matter of the settlement discussions. According to the union, sections 15.1(1), 15.1(2) and 16(p) provide additional sources of jurisdiction, in addition to and to be used in conjunction with the Board's remedial authority under sections 98 and 99 of the *Code*.

[23] According to the union, the process of negotiations between the parties began as a result of the Board's invitation and the parties' agreement pursuant to section 15.1 of the *Code* to have the Board assist them in resolving the various complaints before it. The union maintains that the Board has clear jurisdiction under the various provisions of the *Code* to determine the nature of any settlement and ensure the enforceability of such settlement.

[24] The union submits that even prior to the addition of section 15.1 to the 1999 amendments to the *Code*, the Board always had the power to determine, at any time, whether some or all of the issues between the parties had been resolved or determined within the context of an application or complaint before the Board. This power, argues the union, is consistent with the purposes and

objectives as described in the Preamble to *Part I* of the *Code*, including the encouragement of the constructive settlement of disputes. According to the union, section 15.1 of the *Code* simply makes it clear that the Board has this general power.

[25] In addition, the union submits that since section 15.1(2) of the *Code* gives the Board the power to make declaratory opinions, and section 16(p) gives the Board the power to determine any issue that arises in a proceeding, necessarily, the Board has the power to make a declaration that no issues remain to be resolved, and hence to declare whether a settlement has been reached. The union states this is the very question to be determined in the present matter - whether or not the complaints before the Board have been settled.

[26] The union argues it would be contrary to sound labour relations policy and the objectives of the *Code* for the Board to allow parties to unilaterally repudiate a settlement reached in the course of resolving a complaint before it, simply because one of the parties may have had “second thoughts” or changed its mind about the settlement. The Board’s power to assist the parties in resolving disputes and the credibility of the process, argues the union, would be severely undermined if the Board did not have the jurisdiction to determine whether a settlement occurred in a matter with which it is seized and to enforce any such settlement in respect of proceedings before it. According to the union, to find the Board has no such jurisdiction would make a mockery of the Board’s process.

[27] In support of its position, the union cited several authorities from various provincial labour boards. These decisions will be reviewed within the “Analysis” portion of the present decision.

[28] In response to the employer’s submission that, from a policy perspective, the Board should decline to interfere with the private dealings of the parties and that all communications relating to settlement should be kept confidential, the union asserts that there is an exception to such a confidentiality rule which applies in the present matter. The union submits that the evidence and documents pertaining to a settlement, which would not otherwise be admissible on the basis of confidentiality, are admissible for the exceptional purpose of proving the parties did reach a settlement.

IV - Analysis and Decision on Jurisdiction

[29] After having considered all of the parties' submissions on this preliminary issue, the Board has concluded that it has jurisdiction to determine the union's application. More specifically, the Board concludes that in the circumstances of the present matter, it has the jurisdiction pursuant to sections 15.1, 16(p), 21, 98 and 99 of the *Code* to determine whether the issues in the different matters pending before the Board have been settled between the parties and to make the necessary orders to that effect.

[30] Part of the employer's argument is premised on the fact that the union's application is a distinct or "fresh" application to have the Board determine the question of whether a settlement has been reached. It then relies upon Board jurisprudence dealing with sections 16(o), 16(p) and 21 of the *Code* (*Reimer Express Lines Limited et al.* (1973), 1 di 12; and 74 CLLC 16,093 (CLRB no. 1); *Canadian Union of Public Employees (CUPE) v. Canadian Broadcasting Corporation* (1985), 17 D.L.R. (4th) 709; (1985) 57 N.R. 188; and (1985) 14 Admin. L.R. 210 (F.C.A., no. A-720-84); and *Unitel Communications Inc.* (1991), 86 di 59; 15 CLRBR (2d) 301; and 92 CLLC 16,012 (CLRB no. 893)) in suggesting the Board is without jurisdiction to entertain the present application due to the lack of an underlying proceeding. However, this is not the correct characterization of the present matter.

[31] The case law relied upon by the employer in this regard, *Reimer Express Lines Limited et al.*, *supra*; *CUPE v. Canadian Broadcasting Corporation*, *supra*; and *Unitel Communications Inc.*, *supra*, is distinguishable in the circumstances and does not assist the employer in this particular case. The Board does not dispute that in order for it to issue a finding under section 16(p) of the *Code*, the Board has to be previously seized of a matter under the *Code*. This notion was explained by the Federal Court of Appeal in *CUPE v. Canadian Broadcasting Corporation*, *supra*:

Section 118 (now section 16) does not authorize the Board to rule on a proceeding undertaken for the sole purpose of having the Board exercise the powers set out in the section; these powers are given to the Board to allow it to decide any questions that may arise in proceedings it is called upon to adjudicate under other provisions of the Act.

(pages 714; and 217)

[32] As described at the outset of these reasons, the Board was seized of numerous complaints filed by the union, some of a general nature relating to the Greater Vancouver Terminal and two specifically related to the discipline and dismissal of Mr. Lee. It was in the context of the hearing of the two Lee complaints that the Board initiated, with the parties' agreement, settlement discussions pursuant to section 15.1 of the *Code*, in regards to the different outstanding complaints before the Board including but not limited to the two Lee complaints. It was in respect of these outstanding complaints that the union filed its request to have the Board determine and declare that a settlement had been reached and to have the terms of that settlement enforced. In this context, the union's request was not a distinct or "fresh" application with no underlying proceeding before the Board. It was not a stand-alone application that sought to have the Board exercise its general powers and remedial authority in isolation, as was the case in the decisions referred to above and relied on by CN.

[33] This does not end the matter; the Board must still address whether, even within the context of ongoing proceedings, the Board has the authority under the *Code* to make a determination as to whether a matter has been settled between the parties.

[34] Both parties argue that the language of section 15.1 of the *Code* provides the answer to the question, but each argues the opposite conclusion. The employer suggests that the language is not express and lacks the necessary parliamentary intent to give the Board the required jurisdiction. The union suggests that the language clearly provides the Board with the requisite jurisdiction.

[35] Read alone, section 15.1 does not expressly state that the Board has the authority to determine the issue of whether a binding settlement has been concluded in respect of a matter before it. However, the overall context in which the present issue has arisen as well as the legislative and policy objectives under this and other sections of the *Code* assist in determining the scope of the Board's power.

[36] The Board agrees with the position and arguments put forth by the union on the issue of the Board's jurisdiction. It cannot be doubted that one of the primary goals and legislative objectives of the *Code* is to promote the constructive settlement of disputes. Encouraging or enabling the parties

to resolve issues between themselves without resorting to formal adjudication is preferable for a multitude of reasons which are ultimately based on the fact that labour relations are never static. The parties must continue to deal with each other on an ongoing basis. Solutions to issues particular to a relationship which are achieved through mutual agreement by the affected parties are more likely to be acceptable and sustainable in the long term than are remedies imposed by a third-party adjudicator.

[37] The Board is committed to assisting parties in resolving disputes and reaching a settlement of complaints or applications filed before the Board prior to their formal adjudication or final determination by a panel of the Board. This has been a long-standing practice of the Board, in which its professional staff and panel members continue to participate. This commitment is reflected in several provisions of the *Code*, in addition to the general statement of the statutory purpose and objectives contained in its Preamble. The addition of section 15.1 to the *Code* in 1999 reflects the Board's enhanced and expressed commitment to this informal mediation process and settlement discussions. Previous statements of the Board acknowledge and confirm its role in this regard. With respect to section 15.1(1), the Board in *NorthwestTel Inc.*, December 13, 1999 (CIRB LD 158) stated as follows:

... The Board has a long-standing practice of encouraging parties to reach mutually acceptable settlements on disputes arising between them and, on many occasions, the Board's labour relations officers assist the parties to this end. Indeed, the most recent amendments to the *Code* include a general power to assist the parties under section 15.1(1): ...

(page 4)

[38] The Board has also expressed its view that section 15.1(2), which gives it the power to issue declaratory opinions, is intended to be a means by which the Board may assist the parties in resolving issues on their own, in furtherance of the statutory objective of the constructive settlement of disputes. In *Atomic Energy of Canada Limited*, [2001] CIRB no. 110, the Board stated as follows:

[20] The Board's view in this respect is reinforced by the recent amendment of the *Code* (on January 1, 1999) to add section 15.1(2) which expressly indicates that the Board may give declaratory opinions. It is most reasonable to construe this subsection as indicative of a statutory intent that the Board should give

opinions which, though merely of declaratory effect, will support the parties in their own endeavour to more effectively pursue the statutory objective of the constructive settlement of disputes.

(page 8)

[39] The Board is of the view that, where this commitment exists in support of this statutory objective, it is necessary to protect the integrity of the informal settlement process. The Board's general powers must be interpreted in a manner that allows it to fulfill its statutory objectives and commitment to the constructive settlement of disputes. To that end, the Board must have the authority to inquire into the issue of whether or not a settlement has been reached and if so, to enforce the terms of settlement in order to prevent parties from renegeing on commitments made during the informal dispute resolution process affecting the issues that are the subject of complaints or applications before it.

[40] The Board finds that in the context of matters pending before it, the powers under sections 15.1(1), 15.1(2) and 16(p) of the *Code* are sufficiently broad to encompass such power and authority without unduly stretching their intended scope. Contrary to the employer's assertion, the Board does not see the need for a distinct legislative provision to confer express authority to allow the fulfilment by the Board of the *Code*'s objectives in this regard. As an administrative tribunal, the general powers of the Board to determine matters before it necessarily include the power and jurisdiction to determine whether an application or complaint before it has become moot or is *res judicata*, for example, or whether there exists a labour relations purpose to proceed with a particular inquiry. This power, combined with its broad remedial powers under sections 98 and 99, exercised for the purpose of ensuring the fulfilment of the objectives of the *Code* is, in the Board's view, sufficiently broad to enable it to also determine the question of whether a binding settlement has been reached between the parties concerning a matter presently before it and, thus, whether or not it is required to proceed to adjudicate all or part of the matter. To find that the Board lacks this power, where one of the central legislative purposes and objectives under the *Code* is to assist the parties coming before it to effect the settlement of disputes, would seriously undermine the Board's authority and its process in fulfilling its statutory mandate. To force parties and the Board to proceed with the merits of a matter, or to force parties to have to institute civil proceedings for breach of agreement, would go

against some of the clearly established purposes behind the existence of the Board and its mandate under the *Code*.

[41] The specific issue of the Board's jurisdiction, as raised in the present matter, appears to have only been dealt with indirectly by this Board in the past. In *Maritime-Ontario Freight Lines Limited et al.* (1989), 78 di 219 (CLRB no. 762), the Board proceeded to hear evidence on a preliminary objection that the matter had been settled, and determined that the complainant had entered into a binding memorandum of settlement and was bound by that settlement. It therefore dismissed the complaint. As pointed out by CN and despite the fact that the source of the Board's jurisdiction was not raised or questioned, the decision nevertheless stands as authority for the Board having jurisdiction to make such determinations.

[42] In addition, there are numerous examples of Board orders issued, which acknowledge or incorporate settlement agreements reached by parties to a complaint or application before the Board and which order compliance with the terms of the settlement, or in which the Board reserves jurisdiction over the matter to ensure their implementation. Again, the orders themselves, often issued on consent, do not contain reasons or explain the source of the Board's jurisdiction to issue such orders.

[43] Support for the position expressed above is shared by various provincial labour boards and arbitrators across the country, as evidenced by the decisions submitted by the union. For example, in *MacLure's Cabs (1984) Ltd.*, no. 80/86, April 3, 1986, the British Columbia Labour Relations Board (BCLRB) discussed the issue of its jurisdiction and the rationale for finding that a binding settlement of a complaint pending before it should be enforced. In that case, a settlement was reached following discussion with two panel members of the Board assigned to deal with the application and complaint. The employer subsequently argued that it should not be required to comply with the terms of settlement. The BCLRB explained the importance of its informal settlement process as it relates to its statutory mandate:

The Board regards the informal process as an integral and vital aspect to its mandate under the *Labour Code*. In referring to "the informal process", I have in mind not only settlement efforts by panel members but also informal meetings conducted by Special Investigating Officers. Quite simply put, the Board is

committed to a policy of assisting parties whenever possible to resolve their differences without resort to formal adjudication. This is consistent with the scheme of the *Code* as a whole and, in particular, the purposes and objects set out in Section 27.

...

In order to protect the integrity of the informal process, there must be strict limits on the circumstances in which one party can unilaterally repudiate a settlement agreement. ... an agreement cannot be avoided merely because one party has had “second thoughts” or altered its position after further consultation and discussion: see *Tamco Limited*, [1975] 1 Can LRBR 219 (Ont LRB). ...

(pages 4-5)

[44] Subsequently, in *Langara Students’ Union Association and Vancouver Municipal and Regional Employees Union*, no. 9386, April 11, 1986 (QL), the BCLRB addressed the same issue and concluded that it did have jurisdiction to deal with the question of whether the parties had reached a settlement of an application and several complaints pending before the Board and whether or not that settlement was binding on the parties. After confirming that the applications and complaints were properly before it and that the Board had appointed one of its officers to meet with the parties with a view to settling the issues in dispute between them, the Board stated:

... Those informal proceedings are proceedings under the *Code* and where a settlement is concluded in respect of applications or complaints filed before the Board, the Board has exclusive jurisdiction to determine the nature of that settlement and the enforceability of that settlement.

(QL)

[45] Later decisions of the BCLRB have since followed and applied this rationale (see *Dynamic Maintenance*, no. C221/91 (BCIRC); and *Re Sunwest Food Processors Ltd.*, [1999] B.C.L.R.B.D. No. 49 (QL)).

[46] The same principles and rationale have been followed in Ontario. The Ontario Labour Relations Board (OLRB) made it clear, in an early decision, *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America et al.* (1975), Can LRBR 219 (Ont.), (cited in approval by the BCLRB in the decisions referred to above) that it was not prepared to allow parties to repudiate agreements made concerning matters before it, as to do so would undermine the efforts and effectiveness of the Board. In that case, a union attempted to withdraw from its agreement

on the bargaining unit description because “after further consultation and discussion”, it no longer agreed the unit was appropriate. The OLRB stated as follows:

... But unfortunately for it, this Board cannot function effectively if the agreements made before it by parties in interest can be considered inoperative by “second thoughts” or “second guessing”. Therefore on numerous occasions this Board has not permitted one of the parties unilaterally to repudiate such an agreement and we affirm the principle on this occasion as well; ...

(page 220)

[47] The OLRB has since continued to support and apply this principle (see *Rexway Sheet Metal Limited*, [1989] OLRB Rep. November. 1154; and *LaFarge Canada Inc.*, [2001] OLRD no. 2153 (QL)).

[48] CN points out that the *Act* contains an express provision, section 96(7), which speaks to the binding nature of settlements reached and the Board’s authority to enforce the terms of the settlement. The employer relies on the existence of this provision in the *Act* to suggest that where no such provision exists, there is no jurisdiction. However, a close reading of the OLRB decisions illustrates that the OLRB would take jurisdiction even without the existence of section 96(7), based upon the labour relations principles and rationale expressed above. For example, in *Rexway Sheet Metal Limited, supra*, the respondent union argued that the provision was not applicable because there was no underlying complaint, as required by the section, and thus the terms of the settlement should therefore not be enforced. Although the OLRB rejected that argument, finding that the provision did apply to the matter before it, it concluded it still had the jurisdiction to deal with complaints alleging a breach of a settlement of matters properly before it:

... Further, and in any event, I am satisfied that the Board has jurisdiction to deal with complaints that settlement of matters properly brought before it have been breached in circumstances like those in this proceeding. If that were not the case, it would tend to make a mockery of the settlement process and permit parties to ignore settlements with impunity. This Board is constituted as an expert administrative tribunal and is charged with the responsibility of applying and administering the *Labour Relations Act*. It would indeed be curious if a party could remove from the Board a matter which is within its exclusive original jurisdiction through the simple expedient of entering into and then not honouring a settlement agreement. **Even if an aggrieved party to a settlement agreement could go to some other forum for relief, surely the Legislature could not have contemplated or intended that some forum other than**

this Board should deal with the matter specifically within the labour relations expertise and original jurisdiction of the Board.

(page 1158; emphasis added)

[49] This sentiment of the OLRB strikes at the heart of the practical labour relations aspect of the issue. This Board agrees with the notion that it makes no labour relations sense to deny the Board jurisdiction to hear and determine the issue, where the result would be to require a party to commence civil proceedings to seek relief under the agreement or to have it enforced, when the Board is seized of and has exclusive jurisdiction over the underlying labour relations matters.

[50] In conclusion, where the parties have engaged in the informal settlement process contemplated by the express provisions and general statutory objectives of the *Code*, to resolve issues in disputes that are properly before it, the Board has the necessary jurisdiction to determine the issue of whether a settlement has in fact been reached, and if so, to enforce its terms. This remains true whether or not any Board officer is directly involved with the parties at the time a settlement is reached. The Board finds that there are compelling labour relations reasons and purposes, as contemplated by the *Code* and the Board's statutory mandate, to conclude that it has the requisite jurisdiction to make the determination in question and that the powers conferred on the Board under sections 15.1, 16(p), 98 and 99 are sufficiently broad to support and justify such a finding.

V - Admissibility of the Evidence Relating to Settlement Discussions

[51] Regarding the confidentiality issue raised by the employer, the Board is both mindful of and in agreement with the need for confidentiality over settlement discussions. This assures parties the freedom to truly and creatively address the issues underlying the dispute and to explore, on a “without prejudice” basis the opportunities for mutual resolution of issues and settlement of complaints before the Board. However, the Board is equally mindful of the need for finality and to have the parties know that once a deal is struck, they may not simply walk away from it with impunity. The Board agrees with the statements made in *Architectural Mouldings Ltd. v. U.S.W.A., Local 1-700*, [2005] O.L.A.A. No. 273 (QL), an Ontario arbitration decision in which Arbitrator Newman clearly and persuasively describes the conflicting interests between the two principles of

confidentiality and finality. In discussing the four elements of the *Wigmore* test for privilege, Arbitrator Newman concludes that there is a necessary and critical exception to the privilege that attaches to settlement discussions and that is where the existence of a settlement becomes an issue for determination:

[17] The scope of privilege that protects discussions in the grievance procedure, according to the Canadian Pacific Forest Products case, and the Inco case, should be interpreted broadly, and provide a level of freedom and protection that will not undercut, but will foster, good labour relations. And good labour relations require clear, safe opportunities for informal meeting, and unlimited exchange, about the issues that are disputed. The privilege is not unduly limited, for example, to the realm of formal grievance meetings. More is achieved in the hallways and parking lots of our workplaces than can ever be accomplished in the hearing room, and it is valuable to ensure that the parties have confidence in that universal practice.

[18] But none of these authorities address that which constitutes a clear and critical exception to the privilege. The privilege does not extend to protect from admissibility, the content of discussions which are said to have resulted in settlement. Once the existence of a settlement becomes the issue for determination by a court or board of arbitration, the privilege that would be granted by Wigmore's first three criteria is defeated by the considerations referred to in his fourth. When it is alleged that the discussions resulted in settlement, it is in the greater interests of justice, not to mention greater value to the relationship between the parties, that the allegation of settlement be explored in evidence, in order that the jurisdiction of the board can be correctly determined.

(pages 3-4)

[52] The decisions in *Rexway Sheet Metal Limited, supra*, and *Sunwest Food Processors, supra*, also support the finding that the Board may hear evidence to establish the existence of an agreement or to support a parties' allegation that terms of an agreement have been breached.

[53] The employer relies on the Board's decision in *Bank of British Columbia* (1983), 52 di 98 (CLRB no. 425), in support of its position that the Board should maintain the confidentiality of the settlement process and the related discussions between the parties. In that decision, the issue before the Board was whether or not the no-publicity clause of a settlement agreement resolving two unfair labour practice complaints had been breached. The underlying labour relations matter was no longer before the Board and the matter of the alleged libel and repayment of the settlement funds was already before the courts. In those particular circumstances, the Board decided it was preferable not to involve one of its investigating officers in the ensuing dispute. It considered the issue of the interpretation of the no-publicity clause of the previous settlement agreement, and the related

allegations of libel and harassment, to be a private matter between the parties and accordingly dismissed the complaints relating to that conduct. Moreover, the Board's comments in that particular decision relating to confidentiality of the settlement process were directed at the need to protect the integrity and neutrality of Board officers in the event matters do not settle or for future mediation efforts with the same parties.

[54] The facts and circumstances surrounding that decision differed substantially from those in the present case. Here, the underlying labour relations issues were immediately present and the Board was being asked to determine whether a settlement of those issues had been reached, which would in turn determine whether it was necessary for the Board to proceed to hear or continue hearing the underlying complaints.

[55] The Board finds that it is necessary to hear the evidence as to the existence of a settlement in order to properly ascertain whether there are issues that remain to be determined by the Board, as contemplated by section 15.1(1) of the *Code*, and such evidence is admissible for that purpose.

[56] Having determined that the Board has jurisdiction to look into the issue of the existence of a settlement concerning matters with which it is seized, and that evidence of the settlement discussions pertaining to that very issue is relevant and admissible for that purpose, the Board proceeded to hear and determine the question of whether the parties had reached a settlement.

VI - Merits

A - Positions of the Parties

1 - The Union

[57] The union's arguments can be summarized under three headings: (1) were the terms agreed to between the parties sufficiently clear to constitute a settlement; (2) did Mr. Peter Marshall (Senior Vice-President - Western Canada Region) have actual or apparent authority to enter into a binding

settlement on behalf of CN; and (3) was the settlement subject to something else occurring in order to be binding, i.e., was it a conditional settlement.

[58] Following the union's arguments and at the commencement of its own arguments, the employer advised it was abandoning its position in regards to the lack of authority of Mr. Marshall. In light of the employer's revised position on this issue, it is not necessary for the Board to review the union's submissions on this point.

[59] The union described the situation that transpired as a case of Mr. Marshall concluding a settlement on behalf of CN, which later was second guessed by a higher level of CN managers. It would be contrary to sound labour relations policy and contrary to the objectives and purposes of the *Code*, argues the union, to allow a party to unilaterally repudiate a settlement agreement because it later has second thoughts or changes its mind in regards to certain issues previously agreed to.

[60] According to the union, the terms of settlement between the parties were certain. All that remained for the parties' respective lawyers was to reduce to writing the terms of the agreement. It states that the formal documentation reducing the agreement to writing was settled on Monday morning July 18, 2005, and the union's representatives had already signed the written settlement agreement when CN began to question certain aspects of the settlement.

[61] The union argues that the cases submitted by the employer in support of its position that what transpired between the parties on July 14, 2005 was merely an agreement in principle which was dependent on further conditions being met, are distinguishable from the present matter because they deal with commercial transactions within a completely different context, in which the parties had agreed to enter into a further contract.

2 - The Employer

[62] The employer takes the position that the discussions that took place on July 14, 2005 between Mr. Marshall and Mr. Shewchuk (General Chairman for Western Canada) did not sufficiently capture their common intention to constitute a settlement. While the employer recognizes that there

was a renewal of the negotiations by the parties during the July 14 discussions, it contends that what occurred constituted an agreement in principle only and, at a minimum, those discussions were subject to legal advice in regards to the appropriate reduction to writing and proper contractual wording. This process, argues CN, frequently gives rise to the need for clarification and formulation of the thoughts of the individuals who engaged in the discussion. In short, CN maintains that what took place was a non-binding agreement in principle that was subject to legal advice, proper written confirmation and execution by both parties.

[63] CN argues that without the final written format, settlement could not be manifest. It submits that the agreement in principle was subject to the input of the respective parties' legal advisors and the approval on each side by the appropriate authority. According to the employer, the union gave its approval and signed a formal agreement while the employer wished to further clarify and modify the union's draft.

[64] CN submits that, although a form of settlement agreement was executed by the union on July 18, 2005 and forwarded for signature, it did not execute the document as material issues remained outstanding. Those outstanding issues which required clarification were raised according to CN during a teleconference on July 19; however, the union refused to discuss them further and it immediately filed the present application.

VII - Analysis and Decision on the Merits

[65] In its written response to the present application, CN took the position that Mr. Marshall lacked the necessary authority to enter into a binding agreement on its behalf. As stated earlier, CN abandoned this position at the beginning of its final arguments before the Board. The Board is satisfied that both Mr. Shewchuk on behalf of the unions and Mr. Lee personally, as well as Mr. Marshall on behalf of CN, had the necessary authority to enter into an agreement to settle all outstanding matters before the Board. This finding is consistent with the evidence presented.

[66] The uncontradicted evidence establishes that following the April 2005 meeting with the Board's Executive Director, Mr. Starkman, discussions continued between the parties but no substantial

progress was made in reaching an agreement of the remaining outstanding issues at that time. During the week prior to July 14, 2005, Mr. Starkman again approached the parties with a view to exploring the possibility of concluding a settlement. On Thursday, July 14, 2005, Mr. Shewchuk and Mr. Marshall had two telephone conversations during which they renewed negotiations of the outstanding issues between the parties in relation to the outstanding complaints before the Board.

[67] The union called one witness, Mr. Shewchuk. In his testimony, Mr. Shewchuk reviewed the sequence of events which lead to his July 14, 2005 telephone conversations with Mr. Marshall. He confirmed Mr. Starkman's involvement with the parties on April 14 and 15, and the fact that the parties made considerable progress but that certain issues remained unresolved. Mr. Shewchuk explained that, at the end of April, the parties exchanged proposals but nothing further transpired for a period of about six weeks. By letter dated June 14, 2005, CN made a written proposal to settle the remaining outstanding issues. According to Mr. Shewchuk, the union rejected this proposal as it did not include some of the components that it considered necessary to reach an agreement. In particular, CN's proposal did not include the removal of the disciplinary measure and admission letter from Mr. Lee's record, the Federal Mediation and Conciliation Services (FMCS) diagnostic training and some monetary compensation. It is therefore in the context of resolving these remaining issues that the discussions of July 14 took place between Mr. Marshall of Mr. Shewchuk.

[68] Mr. Shewchuk described his telephone conversations with Mr. Marshall on July 14, 2005 and the terms of the settlement concluded with Mr. Marshall on that day with respect to the outstanding complaints before the Board. According to Mr. Shewchuk, there was no question during his conversation with Mr. Marshall that the remaining issue for the employer in regards to the assistance from the FMCS was the provision relating to the diagnostic training, and nothing else. Mr. Shewchuk explained that in his discussions with Mr. Marshall they were able to work out and come to an agreement with respect to that issue, as well as the other outstanding issues surrounding Mr. Lee's admission letter and the monetary compensation.

[69] Mr. Shewchuk explained that after he and Mr. Marshall came to an agreement on all of the outstanding issues, Mr. Marshall stated "consider this a handshake over the telephone as we have a deal." In answer to Mr. Marshall's question as to what needed to be done from that point on,

Mr. Shewchuk testified that he suggested that they each contact their respective legal counsel to advise they had reached a settlement and that “the lawyers could work out the details the next day.”

[70] Mr. Shewchuk testified in regards to the finalization of the written form of the July 14, 2005 agreement and the execution of the written agreement by the unions and Mr. Lee on July 18, 2005. He explained that, on the morning of July 15, he received a phone call from Mr. Joseph Torchia of CN enquiring about the settlement he understood had been reached. Mr. Shewchuk testified that after he outlined the terms of the agreement, Mr. Torchia confirmed that it represented what he understood was the deal between the parties. The same day, Mr. Shewchuk also received a call from Mr. Marshall requesting a copy of the Lee letter which formed part of the parties’ agreement. Mr. Shewchuk immediately faxed the letter to Mr. Marshall.

[71] On Friday July 15 and Monday July 18, parties’ counsel worked together to reduce to writing the agreement. Counsel agreed to use the union’s format for the written agreement. On July 18, the union as well as Mr. Lee signed the written settlement agreement.

[72] Mr. Shewchuk testified concerning the events of Tuesday, July 19, in particular the fact that a conference call was scheduled at CN’s request between himself, Mr. Marshall and Mr. Myron Becker, Director of Labour for CN. Mr. Shewchuk testified that during this conversation, he concluded that Mr. Marshall and Mr. Becker wanted to renegotiate some aspects of the agreement. In particular, three issues were raised which Mr. Shewchuk considered had already been agreed to, and that CN was now attempting to renegotiate: the removal of the Lee confession letter from his file after one year, but retaining notation in Lee’s record; the addition of a new provision in regards to other possible grievances by other members; and the removal of the provisions dealing with FMCS’s involvement.

[73] According to Mr. Shewchuk, during their conversation, Mr. Marshall did not deny they had in fact reached an agreement on July 14, but now maintained that, after consultation, the technical changes sought were required and would result in a better agreement between the parties.

[74] Shortly before the Board's scheduled hearing, CN requested an adjournment on the basis that one of its two announced witnesses, Mr. Peter Marshall, was unavailable due to a derailment that occurred in the preceding days. Although the Board refused CN's request to adjourn, it nonetheless indicated that it was prepared to accommodate the employer in the presentation of its evidence. CN did not take the Board up on its offer. It did not ask to present the evidence of Mr. Marshall out of order or to present it in any other manner. Nor did the employer chose to call Mr. Myron Becker, although present at the hearing and previously announced as a witness for CN, or any other witnesses.

[75] The Board finds that the parties did reach an agreement on July 14, 2005 on all substantive matters to settle the various outstanding complaints before the Board, and that the terms of settlement agreed to by the parties are those reflected in the document signed by the unions and Mr. Lee on July 18, 2005 (Exhibit # 1, Tab 7).

[76] The following factors persuaded the Board in arriving at this conclusion:

(a) the uncontradicted evidence of Mr. Shewchuk confirming that he and Mr. Marshall had reached an agreement on all outstanding issues during their July 14, 2005 telephone conversations and the terms of that agreement;

(b) the events that transpired following Mr. Shewchuk and Mr. Marshall's July 14 telephone conversations, including:

(i) Mr. Torchia's unsolicited telephone call to Mr. Shewchuk on July 15, 2005, confirming the fact that a settlement had been reached by the parties and confirming Mr. Shewchuk's understanding of the terms of the settlement;

(ii) the exchange of emails between the parties' respective legal counsel;

(iii) the parties' agreement to adopt the union's format for the written settlement agreement;
and

(iv) the reducing to writing and subsequent signing of the agreement by the unions and Mr. Lee.

[77] The Board is satisfied that the terms of the agreement reached between Mr. Marshall and Mr. Shewchuk were sufficiently clear to constitute a settlement and finds that the subsequent involvement of counsel was simply to reduce to writing the terms of that settlement and to allow for the parties to sign it.

[78] In addition, the Board finds that the parties' agreement was not conditional on it being in writing or conditional on further approval or negotiation. In the present matter, the Board is of the view that the discussions between Mr. Shewchuk and Mr. Marshall to contact their respective counsel to "work out the details" was merely an expression of their desire as to the manner in which the transaction already concluded would in fact go through. The Board finds that the parties had already agreed upon all of the essential provisions. Their decision to leave it to the lawyers to reduce to writing does not detract from the fact that a binding enforceable agreement had been reached. The employer appears to put a lot of emphasis on the fact that, at the end of their July 14 discussion, it was Mr. Shewchuk who suggested to Mr. Marshall that the parties' respective lawyers be contacted and that the language be left to the lawyers. The Board finds that when the deal was struck and Mr. Marshall stated "consider this a handshake over the phone," the parties had then reached an agreement. The Board is persuaded that by the end of the telephone conversation, it was clear in the mind of both Mr. Shewchuk and Mr. Marshall, that the matters before the Board were settled. Mr. Shewchuk's suggestion was merely in response to Mr. Marshall's enquiry as to what needed to be done next.

[79] The Board accepts the union's contention that the reduction of the earlier oral agreement to writing was not a condition to the settlement and was merely to reduce to a written form the terms already agreed to. The Board is satisfied that there was a meeting of the minds on July 14, 2005, in regards to remaining outstanding issues between the parties and both parties considered the complaints before the Board resolved. There were no matters left in dispute. The outstanding issues between the parties had been resolved.

[80] The Board is also satisfied that, although all that was discussed between Mr. Shewchuk and Mr. Marshall on July 14, 2005 were the outstanding issues, a binding settlement still took place. In the context that the resumption of the hearing of Mr. Lee's complaints was imminent and time was of the essence, it is to be expected that the parties would deal with what remained outstanding between them given that a number of issues had already been dealt with and agreed to between the parties. The uncontested testimony of Mr. Shewchuk confirms that what remained outstanding were (1) the treatment of the Lee admission letter; (2) the diagnostic training with FMCS; and (3) the monetary compensation. Documents and evidence support that Mr. Shewchuk and Mr. Marshall were both aware of what had been previously agreed upon up to that date and what issues remained outstanding. Mr. Shewchuk's testimony confirms he had faxed Mr. Marshall the documents confirming what had previously been discussed and agreed to by the parties.

[81] The Board finds that the July 19, 2005 teleconference does not support the employer's contention that the parties had not previously reached a settlement or were not *ad idem* on several matters. The documents submitted and the evidence of Mr. Shewchuk point to the fact that what occurred in the present matter is a change of mind on the part of the employer after the parties had reached an agreement. The Board is of the view that what transpired on July 19, 2005, is more properly characterized as an attempt by the employer to renegotiate certain issues previously agreed upon between Mr. Marshall and Mr. Shewchuk. After further consultation and reflection, the employer may well have had second thoughts about certain aspects of the settlement agreement, but this does not detract from the fact that an agreement had already been reached between the parties, through Mr. Shewchuk and Mr. Marshall, to settle all outstanding matters before the Board.

[82] Both the issue of the enforceability of an oral agreement and what constitutes a conditional agreement have been well captured in many arbitration and labour board decisions which are similar to the matter at hand and which, in the Board's view, apply.

[83] In *Re Bilt-Rite Upholstering Co. Ltd. and Upholsterers' International Union of North America, Local 30*, [1979] 24 L.A.C. (2d) 428 (Rayner), an arbitration panel ruled on its power to arbitrate and the binding effect of an unsigned settlement agreement. In that case, the union argued, like CN did

in the present matter, that what took place between the parties was a non-binding agreement in principle. In concluding that a settlement existed, the arbitration panel stated:

Union counsel argued that there was no more than a proposed settlement. He argued that the parties' intention was that there was no binding settlement until all documentation was complete. He pointed out that the settlement agreement was not signed. He indicated that there was no reason for the board to adjourn the matter if a final settlement had been reached. He further argued that the settlement had to be signed to be binding. He argued this point by analogy to the requirement that a collective agreement be signed.

...

The board is of the opinion that the parties reached settlement on all substantive matters. There were no matters left in dispute after the parties had reached their settlement. It is true that the settlement contemplated the reduction of the settlement to writing and signing by both parties. However, in our view, this was a mere procedural matter and was not an essential part of the settlement. If the union had suggested that there was some substantive terms that had not been covered by the settlement, the matter would be quite different. No suggestion was forthcoming.

(pages 430-431)

[84] In *Lafarge Canada Inc.*, [2001] OLRD No. 2153 (QL), the OLRB dealt with a similar issue in respect of the binding effect of an oral agreement and the need to reduce such agreement to writing. In that matter, an oral agreement had been reached but was not recorded accurately when reduced to writing. The OLRB found that where an agreement to settle a complaint has been reached, there are sound policy reasons for the Board not to enquire further into a complaint, whether or not the agreement has been set down in writing:

14. Good labour relations are built, in part, on trust between the parties. Where there has been a meeting of the minds on an issue, it is important that both parties be in a position to know that the matter is resolved. We find that, in this circumstance, there was an agreement reached prior to the involvement of the lawyers in drafting the agreement. The lawyers are merely involved in the process of post-agreement paperwork. The Board asked in its decision of October 30, 2000 the following question: does the fact that a party inaccurately sets out the terms of an earlier oral agreement and the inaccuracy was subsequently removed by the party mean that the other party can resile from its original oral agreement either before or after the inaccuracy has been removed? We can now answer that question conclusively. Where there has been, as we earlier found, an oral agreement reached, the fact that it is not recorded accurately in writing is immaterial. There is still a deal. Whatever happened after the deal was made, both parties appeared to be less interested in the settlement that had been reached. The Board finds that the parties have entered into the following settlement: ...

(QL)

[85] A similar conclusion was reached by the British Columbia Labour Relations Board (BCLRB) in *Vancouver (City) (Re)*, [1999] BCLRBD No. 499 (QL) in regards to the settlement of a grievance. In that case, the union applied under section 99 of the British Columbia *Labour Relations Code*, seeking a review of an arbitration award on the preliminary issue of whether the arbitrator had jurisdiction to hear the case. The arbitrator found that the grievance had been settled and consequently had no jurisdiction to proceed. The BCLRB, in upholding the arbitrator's decision, stated:

24. ... it would be antithetical to the policy expectations in the Code of holding parties to the settlements they have made to permit them to resile from their agreement. **To allow a party to repudiate a settlement reached by a person with authority would seriously erode the finality necessary to promotion of peaceful settlements of labour disputes.** While that panel commented on the injustice of allowing an accepted settlement made by one echelon of management to be revoked by a higher level of management, as the panel stated, that rationale against overriding settlements reached applies as much to union stewards as it does to management representatives: at pp 416-417.

25. Although the rule on the binding nature of settlements is applied with rigour, one important qualifier on that principle is the requirement that the settlement must be reached by persons with actual or apparent authority to deal with a grievance and to obtain a settlement. The adjudicator must also be satisfied that what was mutually intended was a resolution of the dispute. A settlement cannot imposed unilaterally, but must be consensual.

26. While the intent to settle must be manifest, a settlement need not be in writing to be enforceable as the consent required may be inferred from actions. The parties' actions may lead to a conclusion that a matter has been settled, despite one party's later attempt to disavow the existence of a settlement. As the authorities relied upon by the Union recognize, a settlement can be inferred from a course of dealings between the parties. What is required is an objective assessment of the parties' words or acts at the material time, regardless of any subsequent unilateral statements of subjective intention.

(page 5; emphasis added)

[86] In the circumstances of the present matter, the Board has no difficulty finding that the parties did reach an agreement on all essential terms of a settlement to resolve the outstanding complaints before the Board and consequently they should be held to that agreement.

VIII - Conclusion

[87] For the above reasons, the Board finds that it has the jurisdiction to determine whether the parties had reached an agreement on the complaints pending before it, and that under the

circumstances the parties had in fact reached an agreement. As stated at the beginning of the present decision, the Board communicated its disposition of the present matter by way of an oral decision at the end of the hearing of the present matter. The Board also issued an order on August 17, 2005, incorporating the parties' settlement agreement.

[88] This is a unanimous decision of the Board.

Julie M. Durette
Vice-Chairperson

Laraine C. Singler
Member

André Lecavalier
Member