Cour d'appel fédérale | Federal Court of Appeal

Date: 20121214

Docket: A-67-12

Citation: 2012 FCA 329

CORAM: **BLAIS C.J.**
NADON J.A.
TRUDEL J.A.

BETWEEN:

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) and its LOCAL 114

Applicant

and

PACIFIC COACH LINES LTD., CANTRAIL COACH LINES LTD.

Respondents

Heard at Vancouver, British Columbia, on November 20, 2012.

Judgment delivered at Ottawa, Ontario, on December 14, 2012.

REASONS FOR JUDGMENT OF THE COURT BY: BLAIS C.J.
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REASONS FOR JUDGMENT OF THE COURT

Introduction

[1] This is an application for judicial review from a decision of the Canada Industrial Relations Board (the Board) issued on January 24, 2012, reported at 2012 CIRB 623 (the Decision).

[2] By its Decision, the Board adjudicated on an application brought by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-CANADA) and its Local 114 (the Union) for a declaration of single employer and a declaration of sale of business pursuant to section 35 of the *Canada Labour Code* , R.S.C., 1985, c. L-2 (the Code), which for the purposes of the hearing and determination by the Board, was consolidated with an unfair labour practice complaint also filed by the Union.

[3] Subsection 35(1) reads as follows:

Board may declare single employer	Déclaration d'employeur unique par le Conseil
35. (1) Where, on application by an affected trade union or employer, associated or related federal works, undertakings or businesses are, in the opinion of the Board, operated by two or more employers having common control or direction, the Board may, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business. Before making such a declaration, the Board must give the affected employers and trade unions the opportunity to make representations.	**35.** (1) Sur demande d'un syndicat ou d'un employeur concernés, le Conseil peut, par ordonnance, déclarer que, pour l'application de la présente partie, les entreprises fédérales associées ou connexes qui, selon lui, sont exploitées par plusieurs employeurs en assurant en commun le contrôle ou la direction constituent une entreprise unique et que ces employeurs constituent eux-mêmes un employeur unique. Il est tenu, avant de rendre l'ordonnance, de donner aux employeurs et aux syndicats concernés la possibilité de présenter des arguments

[4] Within the context of the application for a declaration of single employer, the Board issued an interim decision (2010 CIRB LD 2427) determining that both of the employers concerned with the Union's application, *i.e.* Pacific Coach Lines Ltd. (PCL) and Cantrail Coach Lines Ltd. (Cantrail) were subject to federal jurisdiction for labour relations purposes. In January 2011, both the Union and the Board were informed by PCL that it no longer engaged in extra-provincial work. This significant change raised the question of the Board's authority to consider the Union's application and complaint as one of the two employers concerned by the application was allegedly no longer a federal undertaking. As a result, the Board's jurisdiction to seize itself with the matter became a threshold issue.

[5] In the end, the Board found that it had no jurisdiction to entertain the application. As a consequence, it also found that the unfair labour practice was moot. These findings form the basis of the application for judicial review in front of our Court.

[6] At the heart of this application for judicial review is an intensely factual question about the relationship between PCL and Cantrail. PCL is a privately owned company operating regularly scheduled bus services and charters solely within British Columbia since January 12, 2011. In August 2005, PLC, whose workers are unionized, acquired Cantrail, an independent corporation then under receivership, whose workers are not unionized. After PCL's acquisition, Cantrail continued to operate as a separate entity, with its own buses, employees and corporate branding. Cantrail also maintained its extra-provincial activities.

[7] The question with respect to the relationship between the two corporate entities drives the essentially dispositive issue concerning the jurisdiction of the Board to decide the matter before it: as of January 2011, PCL operates only within British Columbia. Thus, it is only if PCL is determined to be an integral part of Cantrail, an extra-provincial operator that the Board will be able to properly assert jurisdiction over what could otherwise be characterized as a provincial entity for labour relations purposes.

The Union's position

[8] In front of the Board, as well as in this Court, the Union has argued that the Board should have considered its application on the basis of the facts as they existed before PCL ceased offering extra-provincial services. It argued that to act otherwise defeats the labour relations purpose of section 35 of the Code by allowing PCL to escape the application and effect of section 35 through arrangements made or conditions arising post-application, whether done so deliberately for that purpose of not (Decision at paragraph 20).

[9] Alternatively, the Union has argued that PCL remains in federal jurisdiction despite its restructuring because PCL and Cantrail are a single enterprise. Moreover, PCL's operations are essential to the core of Cantrail's operations, not only in terms of Cantrail's reliance on PCL's service and maintenance facilities, but also in terms of physical integration, financial dependence and integration of labour relations management (*ibidem* at paragraphs 21 and 23).

[10] The Union notes that PCL owns and controls Cantrail; both companies carry on the same business. This scenario, it submits, points to a classic case of "double-breasting" where two related companies carry on business and offer services in the same market or industry.

[11] Finally, the Union submits that PCL "farms out" work to Cantrail, which amounts to "contracting-in" with a wholly-owned subsidiary, evidencing the labour relations harm that is created by permitting Cantrail to operate as a non-union enterprise. PCL is said to have no incentive to develop its own fleet to meet the true requirement of its business or any future business while it farms out its overload work to Cantrail (*ibidem* at paragraph 27). Another example of labour relations harm that could be avoided by a single employer declaration, according to the Union, is the fact that the management of PCL decides which of PCL or Cantrail will bid on the work that becomes available directing significant work opportunities to its non-union operation.

[12] Finally, the Union submitted that the evidence supports a finding that there has been a partial sale of the extra-provincial business from PCL to Cantrail, such that the Union should benefit from the succession rights provisions contained in sections 44-46 of the Code.

The Board's decision

[13] The Board considered first the argument advanced by the Union that PCL and Cantrail, while notionally distinct, in fact formed a "single, indivisible, functionally integrated federal undertaking" subject to federal jurisdiction under the legal doctrine of undivided jurisdiction. The

Board held that there was "little or no evidence that the companies are functionally integrated" (*ibidem* at paragraph 69).

[14] The Board considered next whether PCL was integral or essential to Cantrail holding that there was "no intermingling at the operational level": both companies maintaining separate workplaces and workforces (*ibidem* at paragraph 74). As for PCL providing maintenance and repair services to Cantrail, the Board found that these services were not sufficient to justify a finding that PCL was essential to Cantrail (*ibidem* at paragraph 81). The Board found that PCL offered the same services to other bus companies, also for a fee. On the facts before it, the Board held that this aspect of PCL's business, although important to Cantrail, was not dedicated exclusively or even primarily to Cantrail's operations (*ibidem* at paragraph 76).

[15] As well, the Board disposed of the farming-out issue by saying that it was unable to find any physical or operational connection between PCL and Cantrail that would suggest that Cantrail was dependent on PCL for its work (*ibidem* at paragraph 85). Finally, on the facts of the case the Board was unable to find that PCL's discontinuance of its inter-provincial work constituted a sale of the inter-provincial portion of PCL's business to Cantrail (*ibidem* at paragraph 94).

[16] The Board's ultimate conclusion on the jurisdictional issue reads as follows:

> [86] Considering all of these factors, the Board is unable to find that the effective performance of Cantrail's operations is dependent upon the services of PCL. Accordingly, it is unable to conclude that PCL is integral to Cantrail's operations and thus within federal jurisdiction. As a result, the Board has determined that it does not have jurisdiction over PCL.

[17] Having so concluded, the Board determined that the Union's unfair labour practice complaint was moot and declined to rule on it.

Analysis

a) The standard of review

[18] The parties agree that whether this matter falls within federal jurisdiction is a question of law to be examined on a standard of correctness. This said, the findings of fact on which the Board based its decision are entitled to deference despite their constitutional significance (*TurnAround Couriers Inc. v. Canadian Union of Postal Workers*, 2012 FCA 36 at paragraphs 22-23; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53 at paragraph 26). Deference is also due to the Board's interpretation and application of its home statute (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708).

b) The jurisdiction of the Board

[19] The Union's main argument is that the Board should have examined the jurisdictional issue as of the date of the complaint that is before PCL ceased its extra-provincial operations. It cites several cases in support of its argument that the "Board's approach frustrates the remedial purpose of the legislation by allowing a remedial gap due to changes made by the employer to it business

between when the dispute arose and when it was adjudicated" (applicant's memorandum of fact and law at paragraph 75).

[20] None of the cited cases discuss the jurisdictional issue at hand. Many of them concern the succession provisions of the Code, which the Courts have determined are to be given a broad and expansive interpretation that overlooks the strict legal form of a particular business transaction in order to reflect a labour law trend that points toward greater protection of bargaining rights (see *International Assn. of Machinists and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc.*, 2007 ABCA 319 at paragraphs 54-55). This principle is not contested. It seems to us, however, that applying it to the question of jurisdiction is extending this case law beyond the principle that it stands for.

[21] We agree with the Board that the jurisdictional issue is a threshold question. The Board could not proceed with the application without asking itself whether or not it had the constitutional authority to make an order affecting PCL. The facts of the case as they stood in front of the Board when the question arose could not be ignored.

[22] As mentioned above, the Union's alternate position has been that, in any event, the Board has jurisdiction in this matter: PCL and Cantrail are a single enterprise because they are under common management and control and also because PCL's operations are essential to the core of Cantrail's operations. For this proposition, the Union relies on the case of *Westcoast Energy Inc. v. Canada (National Energy Board*), [1998] 1 S.C.R. 322, in which the Supreme Court held that related undertakings may come within federal jurisdiction in one of two ways: (a) if they constitute

a single federal work or undertaking, or (2) if one of the entities can " be properly viewed as integral to an existing federal work or undertaking " (at paragraph 45).

[23] Said differently, in any case in which the constitutional jurisdiction of the Board is challenged, three questions must be answered affirmatively before the Board can properly seize itself of the matter. Those questions are:

a. Is there a federal work undertaking or business involved in the case;
b. If so, is the work in question done upon or in connection with the operation of the federal work, undertaking or business; and
c. If so, can the employees in question be characterized as doing that work- is this work a major or insignificant part of their total working time?

(see *Marathon Realty Company Ltd*. (1977), 25 di 387, (CLRB Decision No. 117); See also *Northern Telecom Limited v*. *Communication Workers of Canada*, [1980] 1 S.C.R. 115; *Allcap Baggage Services Inc.*, (1990), 79 di 181 (CLRB Decision No. 778); *Arrow Transfer Co. Ltd.*, [1974] 1 Can. L.R.B.R. 29).

[24] In the case before us, there is no dispute that Cantrail remains subject to federal jurisdiction for labour relations purposes. As a result there remained for the Board to decide the single employer issue and that of PCL's functional integration into Cantrail's operations.

[25] In our view, the Board instructed itself correctly with respect to the applicable law and applied the correct analytical framework to the questions at issue. The Board's decision is comprehensive and well-reasoned. On the evidence, it was open to the Board to conclude as it did and we have found no errors of principle or of fact warranting our intervention. As a result, the Board correctly declined jurisdiction and, on that basis, was right to dismiss the application for a declaration of single employer and the unfair labour practice complaint filed by the Union.

[26] Consequently, the application for judicial review will be dismissed with costs.

"Pierre Blais"
Chief Justice

"M. Nadon"
J.A.

"Johanne Trudel"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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