



## Reasons for decision

Teamsters Canada Rail Conference,

*applicant,*

*and*

Canadian National Railway Company,

*employer,*

*and*

United Transportation Union,

*bargaining agent.*

Board File: 26166-C

CIRB/CCRI Decision No. **398**

December 27, 2007

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A panel of the Board composed of Mr. Warren R. Edmondson, Chairperson, Ms. Julie M. Durette, former Vice-Chairperson, Mr. Douglas G. Ruck, Q.C., Vice-Chairperson, and Messrs. Daniel Charbonneau and Patrick J. Heinke, Members, considered the above-cited application.

### **Counsel of Record**

Mr. James Shield, for the Teamsters Canada Rail Conference;

Mr. John A. Coleman, for the Canadian National Railway Company;

Mr. Brian Shell, for the United Transportation Union.

These reasons for decision were written by Ms. Julie M. Durette, former Vice-Chairperson.

## **I - Nature of the Application**

[1] The present matter concerns an application for certification filed on March 1, 2007, by the Teamsters Canada Rail Conference (the TCRC or the applicant), pursuant to section 24 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*). The TCRC is seeking to represent a unit of approximately 2800 employees working for the Canadian National Railway Company (CN or the employer), in Canada.

[2] This unit is currently represented by the United Transportation Union (the UTU or the bargaining agent). By order dated June 19, 2002 (order no. 8281-U), and confirmed on March 9, 2006 (order no. 9064-U), the UTU was certified as bargaining agent for a unit comprised of:

all conductors, baggagepersons, brakepersons, car retarder operators, yardpersons, yard operations employees, switchtenders, yardmasters and assistant yardmasters working for the Canadian National Railway Company lines in Canada.

[3] On August 14, 2007, the Board issued an interim decision dealing with certain preliminary issues (see *Canadian National Railway Company*, August 14, 2007 (CIRB LD 1645)). In that decision, the Board denied a request by Mr. Guy Ethier, on behalf of a number of UTU Local Chairpersons across Central and Eastern Canada, to intervene as interested party. The Board also denied a request by the TCRC for a representation vote to be conducted under seal, pending the Board's determination of the merits of the present application.

## **II - Facts and Background**

[4] In September 2006, CN and the UTU commenced collective bargaining to renew the collective agreement (four agreements) governing the terms and conditions of employment of the employees included in the above-described unit. The agreement expired on December 31, 2006.

[5] On February 10, 2007, the employees in the UTU bargaining unit commenced strike action against CN. On that same date, CN filed an illegal strike application pursuant to section 91 of the *Code*. The basis of CN's application was that the strike notice signed by the four UTU General Chairpersons on February 6, 2007, was not a valid strike notice under the terms of section 87.2(1) of the *Code* and that, consequently, any strike action was unlawful.

[6] On February 19, 2007, following a hearing on the matter, the Board, by way of an oral decision, dismissed CN's illegal strike application. The Board determined that the strike notice was valid and that the UTU members were legally on strike. The Board issued its written reasons for its decision on March 2, 2007 (see *Canadian National Railway Company*, [2007] CIRB no. 379).

[7] On February 23, 2007, back-to-work legislation, Bill-C46, *Railway Continuation Act, 2007*, 1st Sess. (royal assent April 18, 2007) (the *Railway Act*), was tabled in the House of Commons. The next day, the UTU and CN reached a tentative memorandum of settlement, subject to membership ratification. CN and the UTU also negotiated an agreement entitled "Interim Work Protocol pending resolution of the strike and the conclusion of collective agreements." Pursuant to the work protocol, the parties agreed that employees could return to work on an interim basis pending the completion of the ratification process by the UTU members. A significant number of UTU members returned to work during the ratification process.

[8] Further to a request by the UTU for information relating to the specific number of employees who had returned to work, CN filed a chart without employees' names, which indicated the number of employees in the bargaining unit who were on "strike absence" on each of the days from February 24 to March 1, 2007.

[9] The employer's chart indicates that 1246 employees were on strike absence on February 24, 2007, when the UTU and CN reached a tentative settlement. On that same day, the UTU issued the following directions to its members, in which it requested and encouraged them to return to work during the ratification process:

We are once again **requesting and encouraging** our membership to return to work during the ratification process. We believe this is our only opportunity to hopefully avoid the “BACK TO WORK LEGISLATION” introduced by the government.

[10] The next day, 1306 employees were on strike absence. In a letter to its membership dated February 26, 2007, the UTU again directed its members to discontinue any strike action, including picketing, during the ratification process and to return to work as soon as possible.

[11] On February 27, 2007, the back-to-work legislation was placed in abeyance pending the outcome of the ratification process. According to the employer’s chart, 823 employees were on strike absence on that day. The following day, the number of employees on strike absence was down to 325.

[12] On March 1, 2007, the day the TCRC filed the present certification application, 158 employees in the bargaining unit were on strike absence, which represented between 5 to 7 percent of the UTU membership.

[13] The above numbers provided by CN with respect to the number of employees on strike absence were not challenged by the UTU or the TCRC.

[14] On April 10, 2007, 79 percent of the UTU membership rejected the February 24, 2007, tentative settlement agreement reached between CN and the UTU.

[15] On April 18, 2007, Parliament passed back-to-work legislation, Bill C-46, entitled the *Railway Act*. It provided for an end to any strike action and imposed a Final Offer Selection process. It also extended the term of the collective agreement until such time as the arbitrator appointed to conduct the Final Offer Selection process issued his award or before, if the parties were able to reach an agreement during the Final Offer Selection process.

[16] On April 23, 2007, Mr. Andrew C.L. Sims, Q.C., was appointed arbitrator to conduct the Final Offer Selection process, pursuant to the *Railway Act*. He issued his Final Offer Selection Award on July 20, 2007.

### **III - Issues Raised**

[17] The parties' extensive submissions in the present application raise several issues, which are both of a procedural and of a substantive nature. The procedural issues include: 1) whether the Board should hold an oral hearing in the present matter; 2) whether the Board should first determine the issue of consent pursuant to section 24(3) of the *Code*, as a preliminary issue, prior to processing the present application; and 3) whether the Board should grant the requests by the UTU and CN for production of certain documents. The substantive issues include: 1) the effect, if any, of the *Railway Act* on the timeliness of the TCRC's application; 2) whether at the time of filing of the present application there was an ongoing strike; and if so, 3) whether the Board should grant the required consent pursuant to section 24(3) of the *Code*; and finally 4) the appropriateness of the bargaining unit applied for.

[18] The Board will deal with each of these issues in turn. In order to facilitate the understanding of the present decision, the Board will summarize the positions of the parties and set out its determination for each of these issues, under separate headings.

### **IV - Procedural Issues**

#### **A - The Need for an Oral Hearing**

##### **1 - Positions of the Parties**

[19] The TCRC takes the position that an oral hearing is not required to determine the issues in the present application and that the Board should, as per its general practice in a contested displacement application, order a representation vote.

[20] The UTU takes the position that the Board should conclude that the TCRC's application is untimely. In the event that the Board concludes that there was an ongoing strike and that the TCRC's application remained otherwise timely, the UTU submits that this is not a proper case for the Board to exercise its discretion to grant consent. The UTU wishes to lead evidence in support of its position

on the issue of consent and requests an oral hearing or at minimum a case management meeting with the Board. It submits that this is necessary because the issues in the present certification application are “novel and exceptional.” The UTU submits that a case management meeting would allow for a discussion regarding the proper approach to be adopted by the Board in determining the issues raised, including the question of whether it is appropriate for the Board to hear oral evidence.

[21] CN initially took the position that a preliminary hearing was necessary in order to present evidence on the question of the required consent, pursuant to section 24(3) of the *Code*, prior to the Board dealing with the merits of the application. However, in its latest submissions, CN states that it is anxious to have a resolution to these proceedings, so that the employer and the employees can move forward with a confirmed bargaining agent. It maintains that this is in the best interests of the employees and the employer and therefore requests that the application now be determined as soon as possible.

## **2 - Decision**

[22] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. This section was enacted in the 1999 most recent amendments to the *Code*. The Federal Court of Appeal has found in *Raymond et al. v. Syndicat des travailleurs et travailleuses des postes* (2004), 318 N.R. 319; and 2004 CLLC 220-020 (F.C.A., no. A-686-02), that as a result of this statutory amendment, the Board now has greater discretion as to whether to hold a hearing.

[23] The Board’s general practice in processing certification applications, even prior to the 1999 amendments to the *Code*, was not to hold oral hearings in certification applications. In fact, the Board’s administrative process for dealing with certification applications has been streamlined as a result of amendments to the *Code* back in 1978. Since then, the Board has significantly reduced the number of oral hearings it holds in applications for certification, because in most cases, the relevant facts can be placed before the Board by way of written submissions.

[24] In rare cases, there are issues that may necessitate a hearing, such as some applications that raise an issue relating to the constitutional jurisdiction of the Board. However, neither the complexity nor the unusual factual circumstances of a case necessarily trigger the need for a hearing, if the Board can deal with the issues on the basis of the written submissions alone (see *Bank of Montreal, Sherbrooke, Quebec* (1986), 68 di 67 (CLRB no. 604)). The Federal Court of Appeal has upheld this practice of the Board on several occasions since 1978 (see *Durham Transport Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local union 141* (1977), 21 N.R. 20 (F.C.A., no. A-553-77); *Greyhound Lines of Canada v. Canada (Labour Relations Board)* (1978), 24 N.R. 382 (F.C.A., no. A-324-78); and *C.S.P. Foods Ltd. v. Grain Services Union (CLC) et als*, [1979] F.C. 23; and (1978) 25 N.R. 91 (F.C.A., no. A-201-78)).

[25] More recently, in *Coastal Shipping Limited*, [2005] CIRB no. 309, the Board reiterated its general practice of not holding an oral hearing in applications for certification. With a view of ensuring administrative efficiency and expediting the certification process, the Board has recently implemented a new process whereby a schedule is established with specific time frames for the filing of the parties written submissions and documents and for the completion of the investigating officer's report to the Board. The Board then determines how best to proceed, depending on the specific circumstances of each case.

[26] In the present matter, as in all certification applications filed with the Board, upon receipt of the application, the Regional Director forwarded a letter to the parties explaining the certification process and reminding them that the Board is entitled to decide any matter before it without holding an oral hearing.

[27] When the UTU requested the Board to set aside its usual schedule and replace it with a litigation timetable to determine the issue of consent as a preliminary matter, the Board directed the parties to address this issue within their respective responses and replies and extended the time limit for the parties to file their submissions. The Board again reminded the parties that it could decide the matter without holding an oral hearing. Given the nature of the issues raised, the schedule for processing the application was modified to allow the parties to make full written submissions.

[28] It is not disputed that the circumstances surrounding the present application and some of the issues raised are somewhat unusual. However, for the most part, the relevant facts are not in dispute nor have the parties raised any significant issues of credibility. What is in dispute is the application of the facts to the issues and their relevance to the determination of the application. In this regard, the parties have clearly related their respective positions on all of the issues raised in their extensive written submissions, including the policy and labour relations purposes that would justify the Board granting consent pursuant to section 24(3) of the *Code*.

[29] In fact, given the nature of the issues raised in the present application, and to keep the Board up to date on the progress of the back-to-work legislation and the Final Offer Selection process, the Board has received and accepted more submissions from the parties than in a usual certification application. The Board also provided the parties with a further opportunity to complete their submissions on the issue of the effect of the *Railway Act*, after its review of the parties' submissions and the investigating officer's preliminary report.

[30] Having carefully considered the parties' submissions, the Board is of the view that it will not depart from its normal practice of not holding an oral hearing, despite the UTU's request for one and despite the unusual circumstances of the present application or the issues raised herein. The Board is satisfied that it can determine all of the issues on the basis of the written submissions of the parties.

## **B - Determining the Issue of Consent as a Preliminary Matter**

### **1 - Positions of the Parties**

[31] Both the UTU and CN argue that the processing of the TCRC's application for certification should be held in abeyance until the Board first determines whether it will grant consent pursuant to section 24(3) of the *Code*.

[32] CN takes the position that the issue of consent should be determined as a preliminary matter. It argues that there can be no valid application for certification, and therefore no processing of such application, until the issue of consent is determined by the Board.

[33] As well, both the UTU and CN objected to the Board's usual direction that CN produce employee lists to the TCRC, until the Board determines the issue of consent. According to the UTU, until the Board disposes of the issue of the required consent and determines whether the present application can proceed, it is premature to direct the production of any employee lists to the TCRC. Providing such lists, it argues, would be prejudicial in any future certification applications.

## **2 - Decision**

[34] Section 24(3) of the *Code* provides that an application for certification must not, except with the consent of the Board, be made during a strike or lockout. Nothing in the section, as written, requires that the Board determine the issue of consent, if applicable, as a preliminary matter separate from the other issues raised by the application.

[35] As a quasi-judicial tribunal, the Board is master of its own proceedings. As such, it enjoys great discretion and flexibility in the manner in which it chooses to process the different applications and complaints before it (see *Komo Construction Inc. v. Commission des relations de Travail du Québec*, [1968] S.C.R. 172; and *Cargill Limited*, [2003] CIRB no. 215; and 107 CLRBR (2d) 1). Consequently, even if a preliminary issue is raised, the Board can choose to decide all issues, including any preliminary ones, at the same time once the parties have had the opportunity to make full submissions.

[36] In the case at hand, the Board found it preferable to receive and review the full submissions of the parties in order to determine whether it would exercise its discretion to grant consent, should consent be required under the circumstances. It is worth noting that the question of whether there was an ongoing strike at the time the application was filed is a contested issue. In circumstances where there is no dispute that a strike is ongoing and that section 24(3) applies, it may be preferable from a procedural perspective, to determine the consent issue as a preliminary matter. This was not

the case in the present matter. The TCRC clearly submitted as its main position that there was no longer a strike at the relevant time and that the Board's consent pursuant to section 24(3) of the *Code* was not required. In addition, the UTU also raised as an issue the effect of the back-to-work legislation on the timeliness of the present application. It argues, as the Board will elaborate later in the present decision, that the *Railway Act* had the effect of rendering the application untimely.

[37] In the present matter, the Board saw fit to examine all of the parties' submissions, including those on the issue of consent pursuant to section 24(3) of the *Code*, as well as on the possible effect of the *Railway Act*, in order to have a better and more comprehensive understanding of all issues, prior to making any determinations.

[38] A similar approach was taken by the Board's predecessor, the Canada Labour Relations Board (CLRB), in *Air Canada* (1976), 18 di 66; and 77 CLLC 16,062 (CLRB no. 70), a matter in which the issue of consent was also raised under section 124(3) (now section 24(3)) of the *Code*:

... At the hearing of the application the Board did not treat the matter of timeliness as a preliminary matter and proceeded to hear the application. The facts revealed during the course of the hearing into the three cases have convinced the Board that a final determination by it of all issues in dispute might possibly resolve or alleviate the present industrial relations problems.

(pages 85; and 326)

### **C - Request for Production of Documents by the UTU**

[39] The UTU requested information from the employer pertaining to the number of bargaining unit employees who had returned to work on each of the days from February 24 to March 1, 2007, as well as the number of bargaining unit employees who were working in the week prior to the commencement of the strike. As stated earlier, in its submission of March 23, 2007, CN provided a chart establishing the number of employees at work, available for work, or on continuing strike absence prior to the commencement of the strike on February 10, 2007, and following the February 24 tentative memorandum of settlement up to March 1, 2007. Consequently, there is no need to address this particular request.

[40] The UTU also requested the production of information pertaining to the specific time periods during which the TCRC membership evidence was collected. The UTU is seeking the production from the TCRC, or the Board, of the cards/membership information in percentages obtained during four separate time periods. The UTU maintains that the fact the TCRC's membership evidence in support of its application for certification may have been collected during a lawful strike is relevant to the determination of whether the Board should grant consent and, consequently, entertain the TCRC's application. The UTU submits that the production of cards/membership evidence by percentages only for specific times would not reveal the identity of employees who have signed TCRC cards and would therefore not constitute disclosure of confidential information relating to employee wishes.

[41] The TCRC objects to the disclosure to the UTU of any particulars of its membership evidence. According to the TCRC, percentages of its membership evidence constitute sensitive and confidential information. It also submits that the dates selected by the UTU to determine the time periods during which the membership evidence was collected are based primarily on the activities of the former UTU General Chairpersons and are of no relevance to the Board in the context of the present application.

## **1 - Decision**

[42] By letter dated March 22, 2007, the Board addressed the UTU's request. The Board determined the following:

The information requested from the Board is information pertaining to the specific time periods during which the membership evidence was collected. ...

...

With respect to the information pertaining to the time the membership evidence was collected, the UTU asks for the percentage of cards dated within each of four separate time periods, and maintains it is relevant to the Board's exercise of discretion under section 24(3). However, as of yet, there is no precise formulation of the arguments to be presented nor any explanation as to how knowledge of the specific percentages requested will necessarily enhance such arguments. The Board does not see that the absence of the specific information requested will prevent the UTU from making any arguments it wishes to make on this issue, at this point in time.

...

**Following a review of the parties' submissions on the application, the Board will consider whether there is any need to hear or to order disclosure of any further evidence, or to receive any further submissions from the parties.**

(emphasis added)

[43] The UTU has filed detailed submissions explaining clearly its position on the issue of consent. That issue will be addressed later in the present decision. Although in its submissions, the UTU reiterated its request for the information pertaining to the membership evidence, the Board remains of the view that it is not necessary for the information requested to be produced in order to determine the issue of consent. The lack of information did not prevent the UTU from making submissions to the effect that membership evidence was collected during a lawful strike. Furthermore, there is nothing in the *Code* that prevents employees from signing membership cards during a strike or lockout.

[44] The Board finds that the information on membership support, although requested in percentages with no specific names of employees, is nonetheless information relating to employee wishes and should not be produced on that basis as well.

#### **D - Request for Production of Documents by CN**

[45] CN requested the TCRC, its General Committee components or representatives to produce all letters, emails or documents issued to UTU members by any or all of UTU former General Chairpersons Beatty, Boechler, LeBel and LeBlanc, as well as copies of all ballots cast regarding the strike mandate.

[46] CN also requested the production of all records of discussions between Mr. Rex Beatty and any other UTU representative between January 1, 2006, and March 29, 2007, in relation to the recruitment of Canadian UTU officials or members by the TCRC, as well as any offers of employment by the TCRC to UTU representatives and any payments made or promised. It further requested that the Board order the TCRC and the UTU to produce, among other things, transcripts of sworn testimony of Mr. Beatty and three other former General Chairpersons and any exhibits filed in the context of proceedings related to charges of dual unionism. In addition, CN requested that the

TCRC produce its constitution and by-laws, as well as any correspondence wherein arrangements for the representation of the UTU members by the TCRC are discussed or referenced.

[47] CN submits that the production of this information is necessary in order to show that Mr. Beatty deliberately intended to undermine the UTU as the bargaining agent through a planned unauthorized strike and thus fostered “allegiance” to the TCRC. It submits that, as a result, the Board should not be granting consent, as the will of the employees has been influenced by misrepresentation and veiled coercion and intimidation.

[48] CN also requested that the Board provide to the parties an analysis of what CN refers to as the “distinct Eastern versus Western regional results in the representative character of the applicant.” According to CN, this information is relevant to the determination of the appropriateness of the bargaining unit structure.

[49] The TCRC opposes CN’s production request. It questions the appropriateness of CN’s request in the context of a certification application and maintains that such information is irrelevant to the determination of its application.

## **1 - Decision**

[50] The Board is of the view that the essence of the information requested by CN relates to the UTU’s or the TCRC’s internal matters and is not relevant to the issues raised in the present application, including the issue of consent. As stated in *Canadian National Railway Company (379)*, *supra*, the Board does not normally intervene in internal union matters. The extent to which the Board may look at internal union documents when determining an application is always premised by the specific provisions of the *Code* under review. The information requested by CN is not relevant to determining an application such as this one where a union is seeking support of employees represented by an incumbent union. The fact that former UTU officials may be the instigators of, or supporting the TCRC’s application may explain why a displacement application has been filed, but it is not directly relevant to the determination of the application for certification, including the issue of consent.

[51] With respect to the information requested by CN to show that employees from the West may have taken a different position than employees from the East and its relevance to the appropriateness of the bargaining unit, again the Board is not convinced that this information is necessary or relevant to the determination of the present application. The Board will deal with the appropriateness of the bargaining unit later in the present decision.

## **V - Substantive Issues**

[52] This certification application raises several important substantive issues. The first issue is the impact of the *Railway Act* on the timeliness of this application. Section 24 indicates the open periods during which applications for certification can be filed with the Board. This application was timely when it was filed, because it was filed after the commencement of the last three months of the collective agreement. However, subsequent to its filing, Parliament passed the *Railway Act*. The UTU argues that the *Railway Act* retrospectively closed the open period, thereby ultimately rendering the application untimely. Accordingly, the Board must determine the impact of the *Railway Act* on the timeliness of this application. The second substantive issue that arises in this case is whether the present application was filed during a strike, because section 24(3) of the *Code* provides that the Board must grant consent for the filing of an application for certification during a strike or lockout. The third substantive issue is whether the Board should exercise its discretion and grant consent to this application, if the application was filed during a strike.

[53] The Board will address each of these issues in order. For the reasons set out below, the Board concludes that:

- (a) the *Railway Act* did not close the open period; therefore this application is timely;
- (b) the application was filed during a strike; therefore the Board's consent is required;
- (c) consent should be granted.

## **A - Effect of the *Railway Act***

### **1 - Positions of the Parties**

[54] The UTU submits that the *Railway Act* has a retrospective effect. It contends that the open period for a union to apply for certification was affected by the coming into force of the Act. According to the UTU, the *Railway Act* had the effect of extending the term of the collective agreement between the UTU and CN until the date on which Arbitrator Sims issued his Final Offer Selection Award. The UTU submits that by not determining a specific date on which the new collective agreement would take effect or when the previous collective agreement would expire, Parliament created an uncertainty critical to the Board's jurisdiction to determine when "the open period commenced" and, consequently, the timeliness of the TCRC's application filed on March 1, 2007.

[55] The UTU submits that the open period commenced three months prior to the expiry of the extended collective agreement, and that in this case, the expiry date is the effective date of Arbitrator Sims' award (July 23, 2007). In other words, this date constitutes the expiry date of the extended collective agreement. The UTU submits that the TCRC's application was untimely, because it was filed on March 1, 2007, more than three months prior to the expiry date of the extended collective agreement.

[56] The UTU recognizes that there is a presumption against the retrospective application of the legislation. However, it maintains that this presumption can be and was rebutted given that Parliament's intention in the *Railway Act* was clearly to extend the former collective agreement for the *Code* to continue to apply and to bind the TCRC, in some manner. According to the UTU, Parliament held open the possibility that the Board could conclude that the TCRC's application was either timely or untimely. The UTU submits that by not setting a firm date for the commencement of the new collective agreement, Parliament sent the Board a clear message that it would be premature for it to determine the TCRC's application before Arbitrator Sims determined the commencement date of the new collective agreement and consequently, the expiry date of the extended collective agreement. Now that Arbitrator Sims has issued his award, the UTU contends

that the commencement date of the new collective agreement, and similarly the date of expiry of the extended collective agreement, has been set at July 23, 2007. This date, it argues, renders the TCRC's application untimely.

[57] Contrary to the UTU's position, the TCRC submits that the *Railway Act* has no effect on the timeliness of its application. It maintains that the *Railway Act* makes no reference to the right of a union to apply for certification or to the Board's power to grant an application. It also maintains that the UTU's argument, if accepted, would constitute a retroactive and not a retrospective application of the *Railway Act*, because it would in effect change the law and remove rights as they existed prior to the *Railway Act* being passed. This, argues the TCRC, was not the intention of Parliament and would be contrary to the basic rule of statutory interpretation that in the absence of clear legislative intent to the contrary, legislation should not be construed so as to give it a retroactive effect.

[58] According to the TCRC, the purpose of the *Railway Act* was simply to "provide for the resumption and continuation of railway operations" and to address the issues necessary to resume and continue railway operations at CN, but not to address the labour relations issues that arose out of the strike. Further, the TCRC submits that the scheme of the *Railway Act* confirms Parliament's intention not to affect the present application, because the definition of "union" was changed in Bill C-46, after the present application was filed, to include "any other trade union certified by the Canada Industrial Relations Board to represent the employees," thus ensuring that the railway operations at CN would continue in the event the present application was successful.

## **2 - Decision**

[59] The relevant provisions of the *Railway Act* provide as follows:

2.(1) The following definitions apply in this Act.

"collective agreement" means each of the 10 collective agreements 4.16, 4.2 and 4.3 between the employer and the union that expired on December 31, 2006 and the BC Rail agreement referred to in the protocol signed by representatives of the employer and the union on February 24, 2007, and includes any related arrangements between the employer and the union concerning terms and conditions of employment or benefits related to employment.

**“union” means the United Transportation Union, or any other trade union certified by the Canada Industrial Relations Board to represent the employees.**

...

3. On the coming into force of this Act,

(a) the employer shall resume without delay, or continue, as the case may be, operation of railway and subsidiary services; and

(b) every employee shall, when so required, resume without delay, or continue, as the case may be, the duties of that employee’s employment.

...

6.(1) The term of each collective agreement is extended to include the period beginning on January 1, 2007 and ending on the day on which new collective agreements between the employer and the union come into effect.

(2) Each collective agreement, as extended by subsection (1), is effective and binding on the parties to it during the period for which it is extended **despite anything in the collective agreement or in Part I of the *Canada Labour Code*. That Part applies in respect of the collective agreement, as extended, as if that period were the term of the collective agreement.**

7. During the term of each collective agreement, as extended by subsection 6(1),

(a) the employer shall not declare or cause a lockout against the union;

(b) no officer or representative of the union shall declare or authorize a strike against the employer; and

(c) no employee shall participate in a strike against the employer.

...

14.(1) The arbitrator’s decision constitutes new collective agreements between the employer and **the union** effective as of the day on which it is made despite anything in Part I of the *Canada Labour Code*. That Part applies in respect of the new collective agreements as if they had been entered into under that Part.

(emphasis added)

[60] It should be noted that the definition of “union” in Bill C-46 was changed and that the definition of that term in the *Railway Act*, assented to by Parliament on April 18, 2007, includes not only the UTU but also **“any other trade union certified by the Canada Industrial Relations Board to represent the employees”** (emphasis added).

[61] In his address to the Senate on April 18, 2007, the Minister of Labour explained why he recommended a change to the definition of “union”:

“The reason we decided to say “or any other trade union” is that the Teamsters are currently before the Canada Industrial Relations Board wanting to be recognized as the United Transportation Union’s representative. We don [sic] yet know what the Canada Industrial Relations Board will decide in this matter, but we want to ensure that the bill will apply regardless of which union speaks for the United Transportation Union. That is why we included the provision: for protection in any foreseeable situation.

...

The *Canada Labour Code* states that a raiding period is allowed. That is the issue currently before the Canada Industrial Relations Board, which must decide whether the Teamsters can be recognized as the United Transportation Union’s representative.

**We do not know what the outcome of this issue will be, but if this were to happen, they would be covered by Bill C-46. We must ensure that there are no lockouts or rotating strikes of any kind by any union. ...**

(Ontario Legislative Assembly, Legislative Debates (Hansard) 39<sup>th</sup> Parl., 1<sup>st</sup> Sess. (April 18, 2007), (2107) (J.P. Blackburn, Minister of Labour))”

(page 6; emphasis added)

[62] The objective of the *Railway Act* was clearly to “provide for the resumption and continuation of railway operations.” The above quote from the Minister of Labour suggests that Parliament’s intent was to ensure that there would not be any lockouts or strikes at CN in respect of this group of employees and that the Board’s determination of the TCRC’s certification application would not affect the objective of the *Act*.

[63] The *Railway Act* also had the effect of extending the term of the collective agreement between the parties until such time as a new collective agreement was reached or until Arbitrator Sims released his decision on the Final Offer Selection. This was done to ensure that the employees who were required to resume or continue work as a result of the back-to-work legislation would be governed by the same terms and conditions as they were prior to the strike, until such time as a new collective agreement came in force.

[64] For the reasons that follow, the Board rejects the UTU’s position. The Board is of the view that the *Railway Act* does not have the effect of rendering untimely an otherwise timely certification application.

[65] For the purposes of the present decision, it is not necessary for the Board to analyze whether the position taken by the UTU should be qualified as seeking a retroactive or a retrospective application of the *Railway Act*. What is important is that the Board understands the UTU's position to be that the *Railway Act* changed the open period for the TCRC's application for certification, from what it otherwise would have been. Under the present circumstances, the UTU argues that the July 20, 2007, Sims award rendered the TCRC's application untimely.

[66] The UTU recognizes and the Board confirms that established rules in regard to the general application of statutes provide that statutes are not to be construed to have either a retroactive or retrospective operation or to impair existing rights, unless such a construction is expressly or by necessary implication required by the language of the Act (see Elmer A. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworth & Co. (Canada), Ltd., 1983)).

[67] Section 67(2) of the *Code* provides that parties to a collective agreement can agree to revise any provisions of a collective agreement other than its term. In conformity with that section, Board decisions clearly establish that the parties' agreement to extend the term of a collective agreement cannot be used to circumvent the open period during which a third party can apply for certification or revocation. (For recent decisions, see *Robert Bowman, Michael J. Rowberry, Larry Schmeltz et al.* (2007), as yet unreported CIRB decision no. 380; and *Jazz Air Limited Partnership, carrying on business as Air Canada Jazz*, June 8, 2006 (CIRB LD 1435).)

[68] At the time the TCRC's application for certification was filed, Bill C-46 had only reached First Reading stage in the House of Commons and was put on hold pending the ratification of a tentative settlement reached between CN and the UTU. The *Railway Act* came into force on April 19, 2007, after the tentative settlement reached between CN and the UTU was rejected by 79 percent of the membership (April 10, 2007) and after the TCRC's application for certification was filed (March 1, 2007). Consequently, had the Board been in a position to determine the TCRC's application on the date it was filed or at anytime prior to the *Railway Act* coming into force, the effect of the Act would not have been an issue.

[69] One of the objectives of the *Code* is to support freedom of association and free collective bargaining. This forms the basis of effective industrial relations and the determination of good working conditions and sound labour-management relations.

[70] Following the Final Offer Selection process established under the *Railway Act*, Arbitrator Sims issued his award on July 20, 2007. Pursuant to section 14 of the *Railway Act*, Arbitrator Sims' decision constituted the new collective agreement. It would be binding on the TCRC, in the event the Board grants the present certification application.

[71] There is nothing in the *Railway Act* that would suggest that Parliament intended to retroactively or retrospectively close the open period when it extended the term of the collective agreement. On the contrary, the Act extended the definition of "union" and left it open to the Board to decide whether it should grant the TCRC's application for certification. The purpose of the *Railway Act* was to ensure the continuation of railway services and not to circumvent the open periods provided under the *Code*.

[72] In the Board's view, it was not Parliament's intent in passing the *Railway Act* to defeat the rights of third parties, under the *Code*, to file applications for certification, by artificially closing the open period, depending on the date that the appointed arbitrator would render his award. If it was Parliament's intent to affect other rights under the *Code*, including the right of the TCRC to apply for certification, the Act could have clearly stated so.

[73] For the above reasons, the Board is of the view that the *Railway Act* did not have the effect of retrospectively or retroactively closing the open period for the filing of the TCRC's certification application.

## **B - Was the TCRC's Application Filed During a Strike?**

[74] Section 24(3) provides as follows:

24.(3) An application for certification under subsection (2) in respect of a unit must not, except with the consent of the Board, be made during a strike or lockout that is not prohibited by this Part and that involves employees in the unit.

[75] The TCRC's certification application was filed with the Board on March 1, 2007. If there was a lawful strike ongoing at the time, then the Board must consider whether it is appropriate to grant its consent to the making of the application.

### **1 - Positions of the Parties**

[76] The TCRC submits that on February 26, 2007, CN reported that the employees on strike had returned to work, which resulted in CN's operations returning to normal. According to the TCRC, when it filed its certification application on March 1, 2007, there was no longer an ongoing strike at CN. It argues that the UTU and CN agreed that there would be no strike activity between the date of the signing of the Interim Work Protocol (February 24, 2007) and the date the results of the ratification vote were known (April 10, 2007). The TCRC contends that the UTU members and Local Chairpersons were instructed to immediately discontinue strike action and return to work during the ratification period. As a result, the TCRC submits that the employer cannot claim to have suffered economic pressure that was caused by strike activity.

[77] Both the UTU and CN take the position that on March 1, 2007, there was still an ongoing strike since some employees had not returned to work. They assert that the Board must first give consent before the TCRC's certification application can be processed.

[78] More specifically, the UTU maintains that the strike started on February 10, 2007, and was still ongoing while the tentative agreement was being negotiated and the ratification process was underway. The UTU submits that it anticipated and announced that strike action would resume on April 10, 2007, should the Interim Work Protocol not be ratified, and that therefore the strike never

ended. The UTU maintains that the day prior to the present displacement application being filed, 325 employees remained engaged in a withdrawal of services, which amounted to approximately 14 percent of the bargaining unit, while the balance participated in the union's effort to resolve the strike through the ratification process and resumed duties on an interim basis until the results of the ratification vote were known.

[79] The UTU maintains that the open period to apply for certification or revocation commenced on October 1, 2006, three months before the December 31, 2006, expiry of the collective agreement. The open period continued up to and including February 9, 2007. On February 10, 2007—the date the legal strike against CN started—the open period closed. It submits that the open period remained closed up to and including March 1, 2007, subject to the Board granting consent to file the application for certification during a legal strike, pursuant to section 24(3) of the *Code*.

[80] CN adds that the words “during a strike” in section 24(3) of the *Code* must be analyzed from the perspective of whether the employer is still under the pressure of exposure to operational and economic uncertainties of strike activity. According to CN, the parties were in a state of strike on March 1, 2007, irrespective of whether most of the employees had returned to work, and this state of strike could only end with the conclusion of a collective agreement.

## **2 - Decision**

[81] The Board is of the view that for the purposes of section 24(3) of the *Code*, the words “during a strike” must be given a liberal and broad interpretation rather than a narrow restrictive one. This better ensures that the objectives of section 24(3) of the *Code* are met.

[82] In *Air Canada, supra*, the CLRB had to determine, among other issues, whether a displacement application had been filed during the first six months of a strike or lockout. The Board was seized of two unfair labour practice complaints and a displacement application filed on July 21, 1976, by the International Association of Machinists and Aerospace Workers (the IAM). The Canadian Air Line Employees Association (CALEA) was the bargaining agent for the group of employees in question. The Board found that at the time of the application, the employer, Air Canada, had been

engaged in a legal lockout of its employees since June 17, 1976. This lockout had been preceded by a legal strike by the bargaining agent, which the Board found had started on December 2, 1975, and continued until June 11, 1976. The Board looked at the intention of the then section 124(3) of the *Code*, which required Board consent for a certification application filed during the first six months of a strike or lockout:

... The intention of the section would appear to be to provide a six-month period during which each party to collective bargaining could, respectively, take advantage of its right to engage in economic sanction against the other without being subjected to the additional pressures which would be caused through the intervention of a second would-be bargaining agent. The Board is not inclined to interpret section 124(3) so as to deny to the members of the bargaining unit the right to seek alternative representation for a period longer than that provided therein. The words “strike or lock-out” must be read conjunctively and as expressing equivalence. In the Board’s opinion these words are referring to a state of economic warfare which might legally occur at a certain point and not to the weapons peculiarly available to one party or the other. ...

(pages 84-85; and 326)

[83] The CLRB determined that the term “strike” refers to a “state of economic warfare” that occurs over a certain period of time and not to the “weapons available to one party or the other.”

[84] In *Comstock International Ltd.*, [1987] Alta.L.R.B.R. 228, the Alberta Labour Relations Board (ALRB) determined whether consent was still required when less than all of the bargaining unit in question was affected by a strike or lockout. It found that consent was still required:

The question therefore is whether s.34(4) and s.42(4) require consent when less than all of the bargaining unit in question are affected by a strike or lockout. In our view the requirement for consent still applies. The purpose of the section is to allow the board to prevent, in appropriate circumstances, the disruptive effects of organizing efforts or decertification attempts when a work stoppage is in progress. The underlying reasons for the consent requirement apply regardless of whether the whole or just part of a bargaining unit is undergoing a strike or lockout. **The fact that only part of a unit is affected may well influence the Board in deciding whether or not to grant its consent, but consent is still required.**

(pages 230-231; emphasis added)

[85] Even if all the employees had returned to work for the period of time between the signing of the tentative settlement and the ratification vote, this does not mean that the economic warfare had ended or that the “window of opportunity” to file an application for certification or revocation was reopened. This issue was addressed by the Ontario Labour Relations Board, within the context of

a revocation application, in *Alcohol and Gaming Commission of Ontario*, [2000] OLRB Rep. January/February 1.

10. Furthermore, the Board seriously doubts that any “window of opportunity” to file an application for termination of bargaining rights would have opened in the period of time between the signing of the memorandum of agreement and the ratification vote even if *all* of the employees had gone back to work during the interim. Unions often take down their picket lines and ask employees to return to work after they have signed a memorandum of agreement as an act of good faith and to increase the likelihood of successful ratification. It shows that the union is standing behind the agreement. However, the parties know that if employees fail to ratify the agreement the strike may continue. The employees in such circumstances would not be commencing a *new* strike with the six month prohibition in section 67(3)(a) starting to run all over again. A lifting of the picket line and the return to work in such situation is temporary unless the agreement is ratified and does not constitute an end to the strike for the purpose of making a termination application timely.

(page 3)

[86] The same applies in the context of a displacement application. The employees ultimately decided not to ratify the tentative agreement between the UTU and CN. Strike or lockout action resumed as soon as the membership rejected the tentative agreement on April 10, 2007. This also constitutes evidence of the ongoing “state of economic warfare.”

[87] In addition, the fact that Bill C-46 eventually came into force suggests that there was still a strike ongoing at the time the certification application was filed, even though most employees had returned to work during the ratification process. The bill was introduced in the House of Commons on February 23, 2007 (prior to the filing of this certification application) and came into force on April 19, 2007 (nine days after the ratification vote). If the strike had ended prior to the filing of the application for certification, the bill would not have been necessary.

[88] Based on the above, the Board is of the view that although most employees had in fact returned to work by March 1, 2007, and later during the ratification process, certain employees, albeit in relatively small numbers, were still on strike, despite the UTU directing them back to work. More importantly, the “economic warfare” was still ongoing. The UTU made it clear to its membership that the strike would recommence if the tentative agreement was not ratified.

## **C - Should the Board Grant Consent?**

[89] Having found that a strike was ongoing at the time the TCRC filed its certification application, the Board must now decide, pursuant to section 24(3) of the *Code*, whether to grant its consent to the present application.

### **1 - Positions of the Parties**

[90] The TCRC submits that, in the event the Board finds that a strike was ongoing at the time of the filing of its application, the Board should nonetheless allow its application to proceed pursuant to section 24(3) of the *Code*. It maintains that were the Board to grant consent, it would be consistent with Board jurisprudence to promote the practice and protection of sound labour relations and would be in the best interests of the affected employees. The TCRC explains that section 24(3) of the *Code* was created to ensure that no employee hired during a lawful strike could initiate an application to displace a bargaining agent during a strike. When that section was enacted, there was a prohibition against any certification or revocation application in the first six months of the strike or lockout. The TCRC further explains that section 24(3) of the *Code* was amended following the recommendations by the Sims Task Force that the six-month prohibition be removed so that the section not result in valid applications being more difficult to process. The TCRC submits that since the amendment to section 24(3) of the *Code*, a union can apply for certification from day one of a strike.

[91] The TCRC submits that the Board ought to consent to this certification application, because it is in the interests of employees. According to the TCRC, the employees have chosen to replace their certified bargaining agent, because the UTU's continuing internal strife prevents it from carrying out its duties as the certified bargaining agent and has also weakened its bargaining position, rendering it dysfunctional. The existing situation, argues the TCRC, directly affects the employees in the bargaining unit. The TCRC contends that problems began on February 6, 2007, when the UTU International gave notice that the strike was unauthorized and that the bargaining unit members would have to "fend for themselves" and would not receive any strike pay. According to the TCRC, the UTU International's position that the strike was illegal and its consequent removal from office of the duly elected chairpersons who were on the bargaining committee undermined the leverage the

employees had hoped to achieve by going out on strike. The TCRC further submits that the UTU acted contrary to the interests of its members when it aggressively recommended that they ratify the tentative settlement agreement. It argues that the level of trust in the UTU has eroded to the point where a number of unfair labour practice complaints have been filed against the UTU.

[92] The UTU submits that this is not a proper case for the Board to exercise its discretion to grant the required consent pursuant to section 24(3) of the *Code*. It explains that section 24(3) provides for a blanket prohibition against displacement applications during a strike or lockout, “except with consent of the Board.” According to the UTU, the purpose of this section is to allow the Board to ensure that during a “difficult period,” displacement applications will not “destabilize bargaining”; however, such applications may be permitted when they are “clearly voluntary and appropriate.” The UTU contends that in removing the six-month prohibition contained in section 24(3), the Sims Task Force was not extending an invitation to the Board to exercise such discretion, but was merely expanding the tools available to the Board in the proper case and eliminating the artificiality of the six-month prohibition.

[93] The UTU contends that following the negotiation of the February 24, 2007, Interim Work Protocol, the UTU continued to function effectively. The UTU alleges that a difference of opinion within the trade union as to the appropriate strategy to be used when faced with the considerable bargaining strength of CN and with the threat of back-to-work legislation does not render a trade union dysfunctional, as stated by the TCRC. In any event, the UTU submits that the allegations of disorganization, internal strife or dysfunction do not serve as a basis for the Board to exercise its discretion to allow the present certification application to proceed while the incumbent bargaining agent is on strike.

[94] The UTU further submits that the Board should look closely at the fact that membership support for the TCRC’s certification application was collected during an ongoing lawful strike, much of it during the period following February 19, 2007, when the four General Chairpersons and three Vice-General Chairpersons were removed from office and their membership revoked. The UTU submits that in this context, the Board cannot be satisfied that the TCRC membership evidence submitted indicates support for the TCRC. It contends that in the period following

February 19, 2007, TCRC membership cards were signed as a demonstration of support, not for the TCRC, but for the suspended General Chairpersons and Vice-General Chairpersons.

[95] CN agrees with the UTU's position that consent should be denied. It maintains that the mandatory nature of the words "must not be made" in section 24(3) establishes that the legislator wanted to emphasize that the granting of consent should be exceptional. CN argues that a displacement application filed in the precarious time leading to the conclusion of a ratified collective agreement under the aura of a strike can be extremely detrimental to labour relations stability and the constructive settlement of disputes. It contends that the former General Chairpersons, who are alleged to be responsible for the certification application by the TCRC, have interfered with the will of the employees through methods of misrepresentation, coercion and intimidation. Therefore, CN submits that the Board should not be manipulated into granting consent in such circumstances.

## **2 - Decision**

[96] The Board's power to grant consent to a certification application filed during a strike or lockout is a discretionary one. In making such a determination, the Board will assess the facts of each case according to the objectives of the *Code*, namely the promotion of free collective bargaining and sound and stable labour-management relations. It is important to note that section 24(3) does not prevent employees in a bargaining unit from wanting to change union representation during a strike or lockout. However, in such circumstances, the Board's consent is required.

[97] Section 124(3) (now section 24(3)) of the *Code* provided that Board consent was required for a certification application filed during the first six months of a strike or lockout. In *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995) (the Sims Report), the Task Force recommended and Parliament accepted, in the January 1, 1999, amendments to the *Code*, that this section be modified to delete the reference to six months so that Board consent would be required no matter how long the industrial action lasted:

### **Certification or Decertification during a Strike or Lockout**

Section 24(3) of the *Code* prohibits the filing of an application for certification or decertification during the first six months of a strike or lockout without the consent of the Board. Similar prohibitions exist in various provinces. **The six month time frame sometimes encourages posturing during bargaining in the hope that decertification will ensue after six months of stalled negotiations. This time frame is artificial and we recommend that it be replaced with a general requirement for Board consent when industrial action is ongoing.**

**By making this recommendation, we are not suggesting that valid applications should be any more difficult to process. There are circumstances where such applications are clearly voluntary and appropriate. This section simply provides a check, during a difficult period, on those applications that may destabilize bargaining and lack the necessary voluntary support.**

(page 135; emphasis added)

[98] This Board has seldom had to make a determination under section 24(3) of the *Code* and there exist no reported decisions that deal with what may be appropriate circumstances in which to grant consent to allow a certification application to proceed during strike or lockout action since that section was amended.

[99] Some provincial labour boards, including the ALRB, have dealt with the issue of consent in the context of a displacement or a revocation application during a strike or lockout. The facts of the present matter are somewhat unique, however, given that the back-to-work legislation put an end to the industrial action and established a binding final selection process. Nonetheless, a review of other boards' decisions on the purposes for requiring Board consent is of some assistance.

[100] In *Steelworkers Local 5885 v. Home Hardware et al. (#2)*, [1991] Alta.L.R.B.R 577, a voluntarily recognized employee association was engaged in a dispute with an employer who had lawfully locked out its employees. A union sought consent for a “friendly” raid during the lockout. The employer opposed the union’s application for consent on the basis that it would be prejudicial, if granted. The Alberta *Labour Relations Code* contains a provision similar to section 24(3) of the *Code*. The ALRB denied consent on the following basis:

After considering the arguments regarding the Steelworkers’ application for consent to apply for certification at Home, the Board has decided not to grant that consent. We believe that granting consent in this case could result in substantial prejudice to the Employer and unduly interfere with collective bargaining. **We agree that there should be a proper labour relations purpose to be served through exercising our discretion to grant consent under section 35.** On balance, we are not persuaded that there is a valid reason in the circumstances to approve the Steelworkers’ application.

We accept that the employees are currently being represented in collective bargaining by a certain Steelworker personnel acting on behalf of the Association. The Steelworkers did not dissent from Home's statements that bargaining was proceeding nor were there any reported difficulties associated with the bargaining. The Steelworkers now appear to be quite heavily involved in this bargaining dispute and committed to it. It is thus understandable that they wish to obtain a more established role in the relationship.

Nevertheless, no argument was advanced that the Steelworkers are encountering any difficulties in collective bargaining as a result of their role. Mr. Ponting asserted that Home is bargaining with the Steelworkers at the bargaining table so that does not seem to be a problem. The Steelworkers' basic argument seems to be one of principle which is that the employees in this case, have an absolute right to select the Steelworkers to apply for certification.

**We disagree with that proposition. The consent requirement in section 35 denies that position and requires the Board to exercise its discretion in granting or refusing the request for consent. Labour relations considerations guide the board in making those decisions. In our judgment, the facts in this case do not justify granting consent.**

(pages 581-582; emphasis added)

[101] In *Canadian Union of Public Employees, Local 3775 and Trailmobile Canada A Division of Gemala Industries Ltd.*, [1995] M.L.B.D. No. 7 (QL), the Manitoba Labour Board (MLB) granted consent in a context of a displacement application. Almost two years into a lockout, the Canadian Union of Public Employees filed an application to displace the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) as bargaining agent. Section 35(5) of the Manitoba *Labour Relations Act* prohibits the filing of a displacement application within the first six months of a strike or lockout, and thereafter, only with the consent of the board. The MLB found that:

... The purpose of section 35 as a whole is to insulate the collective bargaining relationship, and in particular, the incumbent union, from external pressures during certain periods, particularly those when that relationship may be most fragile and the union most vulnerable to raids from rival unions. **Subsection 35(5) is that part of this legislative scheme intended to help stabilize an incumbent union during the especially volatile situation of a strike or lockout.** Here, where the incumbent union is acquiescing in the application, consent should normally follow as a matter of course. ...

(QL; emphasis added)

[102] As stated in the Sims Report and as confirmed in the decisions cited above, the requirement for consent in a section 24(3) situation "simply provides a check [by the Board], during a difficult period, on those applications that may destabilize bargaining and lack the necessary voluntary support" (page 135). In other words, it allows the Board to balance the competing labour relations

issues involved between an employer and a union during a challenge to the union's representation and bars unnecessary labour disruptions in the workplace during a volatile time. It prevents undue interference with the collective bargaining process at a time when the incumbent union is particularly vulnerable. During that time, the Board will normally only interfere with the collective bargaining process and grant consent when compelling circumstances exist and when a proper labour relations purpose is to be served.

[103] The circumstances in this case are unusual. On March 1, 2007, the date the TCRC's application was filed with the Board, the great majority of the employees had returned to work during the ratification process of the tentative agreement reached between CN and the UTU. That agreement was signed on February 24, 2007. The back-to-work legislation, which had been tabled in Parliament on February 23, 2007, contained a Final Offer Selection process for the resolution of the matters remaining in dispute between the parties and directed the Minister of Labour to appoint the final offer selection arbitrator.

[104] It is not contested that at the time of filing of the TCRC's application, there existed internal union problems. These internal union problems have persisted. This is evidenced by the continuing number of unfair labour practice complaints filed with the Board, since the filing of the TCRC's application for certification. The essence of these unfair labour practice complaints filed by members against the UTU or CN is rooted in the persisting internal union dispute surrounding the former UTU General Chairpersons.

[105] Subsequent to the filing of the TCRC's application, 79 percent of the membership rejected the tentative agreement, and therefore some work disruption resumed until the back-to-work legislation finally came into force on April 19, 2007. The back-to-work legislation can be considered an artificial interference with the normal collective bargaining process. The parties failed to reach a new collective agreement and were therefore subject to the arbitration process imposed by the legislation. The arbitrator issued a Final Offer Selection Award that constituted the new collective agreement between CN and the UTU.

[106] The parties were given an opportunity to make full submissions on the impact that the back-to-work legislation had on the TCRC's certification application. It is not in dispute that, as a result of the legislation, Arbitrator Sims issued his Final Offer Selection Award on July 20, 2007. Under section 14 of the *Railway Act*, "[t]he arbitrator's decision constitutes new collective agreements between the employer and the union." Pursuant to the modified definition of "union" as discussed above, the new collective agreement will be binding on any other union certified by the Board to represent the employees currently represented by the UTU.

[107] Approximately seven weeks after the TCRC's certification application was filed with the Board, the back-to-work legislation came into force. The impact of the back-to-work legislation on the parties' dispute is particularly significant. The legislation ordered the employees to continue the duties of their employment. As a result of the operation of the various provisions of the legislation, the arbitrator—and not the parties—determined the content of the new collective agreement. Accordingly, because of Parliament's intervention, the strike ended on April 19, 2007, and the parties had a new collective agreement effective July 23, 2007.

[108] It is in the context of these unusual circumstances that the Board must determine whether the objectives of the *Code*, namely the promotion of free collective bargaining and sound and stable labour-management relations, would be met by granting consent in this case. The Board is of the view that granting consent in the present situation would not destabilize the ongoing bargaining that section 24(3) of the *Code* is meant to protect. The back-to-work legislation imposed, effective July 23, 2007, a new collective agreement. Allowing the certification application to proceed now would not undo the bargaining that took place or jeopardize the delicate balance that exists between a union and an employer during a strike or lockout. The back-to-work legislation ended the otherwise lawful strike as of April 19, 2007, the date the legislation came into force.

[109] In the Board's view, when one looks at all the circumstances surrounding this application, there are compelling labour relations reasons and consequently a labour relations purpose to be served for the Board to grant consent. The employees are back at work and the collective agreement is in place. The agreements are binding on CN and the UTU and would also be binding on the TCRC if it were certified as the bargaining agent. Therefore, the employees can make an informed choice

on whether they wish to continue to be represented by the UTU or wish to be represented by the TCRC. Granting consent in the present certification application would allow the employees in the bargaining unit to determine which union they choose to represent them as their bargaining agent without compromising the collective agreement put in place through the Sims process. It would at the same time encourage and foster sound and stable industrial relations as opposed to generate continuous complaints within this bargaining unit.

[110] The UTU argues that the TCRC membership cards are unreliable because they were signed at a time when they were really as a show of support for the former UTU General Chairpersons rather than as a show of support for the TCRC. When assessing membership support in a certification application, including in the context of a displacement application, the Board does not consider whether the choice of employees, to support one union rather than another, is the correct one. The Board's role is to ensure that membership evidence meets the requirements set under the *Code* and that it was not obtained by fraud or duress. Employees' reasons for wanting to be represented by a union or for wanting to change union representation often vary and are often multi-based.

[111] For all these reasons, in light of the compelling circumstances and the labour relations considerations of this case, the Board has decided to grant consent. While the issues raised in this application are unusual, the impact of this decision is straightforward. The employees in the bargaining unit are being given an opportunity to decide which union they would like to represent them.

## **D - Appropriateness of the Bargaining Unit**

### **1 - Positions of the Parties**

[112] CN submits that the current single national bargaining unit is not an appropriate unit for bargaining. It maintains that the events surrounding the last round of bargaining confirm that the current structure is not only inappropriate, but also detrimental to sound labour relations. It submits that more recently, the Board has been more open to reviewing bargaining units, despite its practice

not to change the existing bargaining structure, in displacement applications. Finally, CN argues that whatever may have been the basis for the Board's decision in *Canadian National Railway Company*, November 24, 2006 (CIRB LD 1530), in which it dismissed CN's section 18.1 review application, the labour relations facts arising from the last round of negotiations have showed that the current bargaining unit structure is not appropriate.

[113] The TCRC maintains that the issue raised concerning the appropriateness of the bargaining unit is yet another attempt by CN to obtain, through the present application, the change in the bargaining unit structure that it failed to obtain from the Board in its previous section 18.1 application.

[114] The UTU opposes CN's request and reminds that the parties do not yet have the benefit of the Board's reasons for its November 24, 2006, decision in *Canadian National Railway Company, supra*. It reiterates its request for the Board to address some issues in a preliminary manner, given the serious and novel issues raised in the present displacement application. Finally, the UTU questions whether the employees who may have given support to the TCRC were advised at the time by the TCRC that CN would take this position or of the possibility of a reorganization of the bargaining unit structure.

## **2 - Decision**

[115] As stated in the parties' positions, the issue of the appropriateness of the bargaining unit has previously been the subject of a review application filed by CN, pursuant to section 18.1 of the *Code* (Board file no. 25621-C). In its application, CN took the position that the existing single bargaining unit should be restructured into three regional units in order to more properly reflect its operational and labour relations realities. CN is taking the same position in the present application in regard to the appropriateness of the existing single national bargaining unit.

[116] In its November 24, 2006, decision in *Canadian National Railway Company, supra*, the Board dismissed CN's application with reasons to follow. The Board is not prepared to revisit the issue of the bargaining unit structure in the context of the present displacement application.

[117] Given that the Board is not prepared to review or to find that the existing bargaining unit is not appropriate, it is not necessary for the Board to address the issue raised by CN or the UTU regarding the TCRC membership evidence.

### **E - Employee List**

[118] As stated above, because of its position on the consent issue, CN did not provide all of the documents as requested by the Board. Now that the Board has determined the issues raised in the present application, the investigating officer must complete his report to the Board concerning the membership evidence. To that end, the Board directs CN to provide the Board and the other parties, no later than **January 15, 2008**, with the following information:

- (a) An alphabetical list showing the full name, classification/position title, home address and telephone number of all concerned employees, **including** managerial and supervisory personnel, as of March 1, 2007, which is the date the application was filed.
- (b) A second alphabetical list showing the same information as that requested in (a) above, **without** addresses and telephone numbers.
- (c) A clear indication on each list of all casual or part-time employees.
- (d) A record of the weekly hours worked by any casual or part-time employee for the three-month period preceding the date on which the application was filed.
- (e) An organizational chart showing as of March 1, 2007, the relationship of the employees in the proposed bargaining unit to the other employees and the lines of authority between management, supervisors, and subordinate employees.

[119] Following its review of the investigation officer's final report, the Board will issue further directions in regard to a representation vote.

## VI - Conclusion

[120] For the above reasons, the Board finds that the *Railway Act* did not close the open period for the TCRC to file its application; at the time of filing of its application for certification on March 1, 2007, a legal strike was still ongoing. Under the circumstances, consent is granted.

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

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Warren R. Edmondson  
Chairperson

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Julie M. Durette  
Vice-Chairperson (former)

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Douglas G. Ruck, Q.C.  
Vice-Chairperson

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Daniel Charbonneau  
Member

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Patrick J. Heinke  
Member