Canada Industrial Relations Board Conseil canadien des relations industrielles

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Our File: 28234-C

Document No.: 281752

October 1, 2010

2010 CIRB LD **2437**

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Attention: Mr. James K.A. Hayes
Ms. Amanda Pask

Dear Sirs/Madams:

In the matter of the *Canada Labour Code* (*Part I–Industrial Relations*) and an application for review filed pursuant to section 18.1 and an application for a declaration of sale of business pursuant to sections 44, 45 and 46 filed by Aveos Fleet Performance Inc. and Air Canada, applicants; International Association of Machinists and Aerospace Workers and International Association of Machinists and Aerospace Workers, Transportation District 140, respondents. (28234-C)

In the context of the Canada Industrial Relations Board (the Board)'s proceedings in the above-cited matter, the International Association of Machinists and Aerospace Workers (the IAM) and the International Association of Machinists and Aerospace Workers, Transportation District 140 (IAM 140) (collectively, the union) requested disclosure of certain documents pursuant to section 21 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*). As the parties were unable to reach agreement on the disclosure of these documents, the Board heard the parties with respect to the request in Toronto, Ontario, on September 29, 2010.

I–Background

The background to the application for a declaration of sale of business and orders consequential to the sale, filed jointly by Aveos Fleet Performance Inc. (Aveos) and Air Canada (collectively, the employers), is well known to the parties and need not be repeated here save for a brief summary. The employers filed a joint application pursuant to sections 18.1, 44, 45 and 46 of

the *Code*, seeking, among other things, a declaration of a sale of Air Canada's Maintenance, Repair and Overhaul (MRO) business to Aveos and the severance of the Technical Maintenance and Operational Support Unit (TMOS) and Clerical bargaining units.

The employers have provided a number of documents on the specifics of the restructuring to the union pursuant to a Memorandum of Agreement (MOA) signed on January 8, 2009 (the January MOA) and a supplementary MOA signed on June 8, 2009 (the June MOA), which are subject to a non-disclosure agreement (NDA) between the parties. In addition to that material, the union requests that the Board order the employers to provide:

1. A complete copy of Aveos's current business plan or plans;

2. Copies of all documents provided to Aveos's lenders to date, including but not limited to the business plans and consultant reports created in the course of the restructuring; and

3. Information concerning the basis of the consolidated financial reports that have been provided, as requested by the IAM's expert advisors, in order to assess the viability of Aveos's restructuring plan, specifically:

   i. Unconsolidated financial statements and outstanding information as set out in the expert's list of outstanding questions;

   ii. Details of the assumptions used by Aveos to calculate the pension deficiency numbers that appear on Aveos's document "Pension Deficiency and Payments," requested by the IAM's actuary; and

   iii. Potentially, unredacted copies of certain of the exhibits previously provided to the union.

The union contends that it is entitled to the production of these documents on three grounds:

1. The employers are required to provide these documents under the terms of paragraph 4a of the June MOA;

2. The documents are relevant to the resolution of a dispute as to whether a precondition to the filing of this application to the Board contained in the June MOA, namely that Aveos has adopted a viable plan of restructuring, has been met; and

3. The documents are relevant to the merits of the employers' application that is now before the Board.

The union argues that, based on what it presently knows about the terms of Aveos's restructuring plan and its financial condition, the plan is likely not viable. Based on the documents produced to date, the union has concluded that Aveos is utterly dependent upon Air Canada. It suggests that, if the Board reaches the same conclusion, it could not find that the bargaining units requested in the employers' application are appropriate for collective bargaining.

The union contends that it requires the additional disclosure that it has requested for the purpose of satisfying itself that Aveos's restructuring plan is viable. It argues that, pursuant to section 16(*f*.1) of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*), the Board has broad powers to order production of any document that is arguably relevant to the issues raised in a proceeding before it. The union alleges that there are three issues that the Board must decide:

1. Whether the employers have met the obligations they agreed to as preconditions for the filing of the section 44 application;

2. Whether Aveos has successfully adopted a viable plan to restructure, as required by the June MOA; and

3. Whether the Board should release Aveos from the existing common employer declaration and certification orders.

The union argues that the circumstances now are quite different than those that were known to it when the January MOA was negotiated. It claims that Aveos's viability going forward is highly relevant to these proceedings, as the Board has clear jurisdiction and an obligation to deal with the future consequences of a sale of business. Thus, the union argues, the requested documents are arguably relevant and production should be ordered.

Aveos, supported by Air Canada, argues that the union has not contested that a sale of business has taken place, and thus that the Board's decision regarding disclosure should be based solely on the issues before it, namely those raised in the employers' joint application. Aveos argues

that the disclosure obligations it accepted in the MOA do not mean that the union has a right to every document in the employers' possession. It agrees that it had two contractual obligations under the June MOA:

> 1. To successfully adopt a viable plan to restructure its business and communicate the specifics of the restructuring to the union and the union's advisors before the employers filed this joint application with the Board–which the employer claims has been done; and
>
> 2. To provide ongoing disclosure to the IAM leadership and their advisors concerning the financial situation of Aveos and the terms of all agreements between Air Canada and Aveos until the close of the "extension period" (April 1, 2011)–which the employer admits is an ongoing obligation that it has and continues to meet.

Aveos points out that any alleged violation of the June MOA can be enforced through the arbitration process contained in the January MOA. It also argues that the only sanction for insufficient disclosure under the June MOA would be a prohibition on the filing of this application to the Board, but that the arbitrator selected by the parties to deal with issues arising from the implementation of the MOAs, Mr. Martin Teplitsky, expressly authorized the employers to make the application in a decision rendered June 15, 2010.

The employers state that their application raises only two issues for the Board:

> 1. Has there been a sale of business–which it says the union has not contested and indeed expressly acknowledged in the January MOA; and
>
> 2. How the consequences of the sale are to be addressed.

The employers state that the content of the employers' application, including the orders requested therein, were negotiated with the union at the time of the January MOA. They state that the purpose of the January and June MOAs was to deal with the consequences of the sale, and that the June MOA was intended by the parties to set time lines for the administrative steps to be followed to bring the January MOA into effect.

The employers argue that there is no precedent for the degree of disclosure that has been requested by the union, and that it has already provided disclosure in excess of that which it is

obligated to provide. Aveos argues that the employer is under no obligation to compile documents that do not exist or to answer further questions from the union's experts. Aveos submits that its viability as a going concern is not a condition for the exercise of the Board's authority under the *Code*, as no one can guarantee that either Aveos or Air Canada will be in existence indefinitely. Air Canada suggests that the future viability of Aveos is a "red herring" raised by the union to delay implementation of the MOA, which contains a number of time sensitive provisions. It argues that Aveos's restructuring has occurred and that although the union may no longer like the deal that it made, the parties' arbitrator has told them that it is time to bring closure.

The employers argue that, as a result of the MOA, the employees will have the choice of which of the two employers they will work for, and the union has all of the information that it requires in order to advise the members as to their options.

II–Analysis and Decision of the Majority

The Board understands and appreciates the union's significant concerns regarding the future viability of Aveos and its desire for reassurance in the form of additional details of the company's current and future plans. The Board thanks union counsel for the substantial effort put forth in support of the merits of its position. However, the union has recourse through the arbitration process contained in the January MOA for any alleged failure by the employers to provide it with documents to which it is entitled under the June MOA. Accordingly, the Board will not deal with the first two grounds put forward by the union, which relate to the employers' alleged obligations under the MOA, and at this time will only concern itself with the request as it relates to the application now before the Board pursuant to section 44 of the *Code*.

In order to determine what further documents are arguably relevant to the Board's proceeding and should be ordered disclosed, the parties agree that it is necessary to properly frame the issues before the Board. However, they have a fundamental disagreement as to what that frame should be. Regardless of how the parties have framed the issues, the Board sees the issue as whether a sale of business has occurred, and what orders are appropriate to deal with the consequences of any such

sale, including whether to sever the existing bargaining units.

The Board has consistently held that the consequences of a sale of business occur automatically, without the intervention of the Board. When a "sale of business" application is made to the Board, it is normally for the purpose of amending certificates to reflect and confirm these consequences. However, where there are disputes, section 46 of the *Code* authorizes the Board to determine, among other things, whether or not a business has been sold and the identity of the purchaser. When a sale has occurred, section 45 of the *Code* gives the Board the discretion to determine whether the employees affected constitute one or more units appropriate for collective bargaining. Applications under section 44 of the *Code* that involve a review of the structure of the bargaining units bring into play the provisions of sections 18.1(2) to (4) of the *Code*, which give the Board the necessary powers to determine questions that arise, including the amendment of bargaining unit descriptions and certification orders.

In its written submissions, the union stated that, based on the documents produced to date, it has concluded that Aveos is utterly dependent upon Air Canada. The union's current request for further production is for the purpose of satisfying itself that Aveos's restructuring plan is viable, which it contends is necessary for it to respond to the employers' application. With the greatest of respect for the arguments advanced by the union, it has not convinced the Board that the documents it is seeking are required for the purposes of the application now before the Board. The delay that would result from the additional disclosure request outweighs the probative value of the documents in the circumstances of this proceeding.

In the Board's opinion, the union currently has all of the documents that it requires to adequately respond to the merits of the employers' application, including those necessary to support any arguments it may wish to make regarding the viability of the business. Accordingly, the request for the production of additional documents at this time is dismissed. The hearing scheduled for October 4–6, 2010 will proceed.

This is a decision of the majority of the Board

Elizabeth MacPherson
Chairperson

Patrick J. Heinke
Member

Dissenting Opinion of Member Daniel Charbonneau

I have given considerable thought to the majority decision and, with due respect to my colleagues, I do not concur with their conclusion; therefore, I must dissent.

The Board has to assess the competing interests of the parties and has to be mindful of the prejudice that may be caused by ordering or not the production of the requested documents.

As explained in *Air Canada et al.*, 1999 CIRB 3, the Board must, amongst other things, weigh the probative value of the production against the labour relations interest in disposing of the case.

I am of the view that the disclosure of the requested documents in this case would serve sound labour relations.

In light of the fact that the IAM was not informed by Aveos of the financial difficulties it was facing when both parties negotiated and signed the January 2009 MOA and that the documents requested are necessary in support of the IAM's position on the merits of the employers' application, I would therefore grant the application for disclosure.

Daniel Charbonneau
Member

c.c.: Mr. Peter Suchanek (CIRB - Toronto)