Court of King’s Bench of Alberta

Citation: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Lodge 146 v Melloy Industrial Services Inc., 2025 ABKB 334

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Date: 20250602
Docket: 2303 09368
Registry: Edmonton

Between:

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Lodge 146

Applicant

- and -

Melloy Industrial Services Inc. and Alberta Labour Relations Board

Respondents

Reasons for Judgment
of the
Honourable Justice Maureen J. McGuire

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[1] The Respondent, Melloy Industrial Services Inc., is an employer in Alberta. Melloy’s business is providing contracted services, including turnaround work, long term day-to-day maintenance work, and capital project work for other companies. The work is carried out at Melloy’s client’s worksites, by employees of Melloy, who include unionized tradespeople. Many of Melloy’s employees are members of either the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488 (the Plumbers and Pipefitters Union) or the International Brotherhood of Boilermakers, Ship Builders, Blacksmiths, Forgers & Helpers, Local Lodge 146 (the Boilermakers Union). Melloy also employs other employees.

[2] The Applicant, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Lodge 146, filed an unfair labour practice complaint after Melloy laid off three boilermakers (Cory Castor, Mike Fermaniuk & Jean-Claude Mallet) in April 2020. The layoffs followed a decision of Nutrien, Melloy's client and the three workers' worksite, to respond to the COVID-19 pandemic by changing shift schedules to create two shifts alternating a 7 day on/7 off schedule; a change that the Union did not agree to.

[3] Before the ALRB, the Applicant argued that:

i. the layoffs were in violation of s. 149(1)(a)(i) of the *Labour Relations Code*, RSA 2000, c L-1, as anti-union based terminations;

ii. the layoffs were prohibited by section 149(1)(c) of the *Code*, because they were used as a means to compel the employees to cease membership in the trade union;

iii. the requests made by the employer to the union to accept the new client-proposed shift pattern was effectively an imposition of altered terms or conditions of employment during the collective bargaining statutory freeze period and therefore violated s. 147(3) of the *Code*;

iv. the employer failed to bargain in good faith, contrary to s. 60 of the *Code*, by providing insufficient information with respect to the potential for layoffs;

v. the layoffs constituted an illegal lockout, contrary to s. 72 of the *Code;* and

vi. the manner in which the employees were laid off violated s. 148(1)(a) of the *Code*,

[4] The ALRB found no violations of the *Code* and dismissed the complaint with reasons reported at 2023 CanLII 34849.

[5] The Applicant then filed this application for judicial review, pursuant to s. 19 of the *Labour Relations Code*. At the hearing of the judicial review application, the Applicant argued the ALRB decision was unreasonable with respect to the failure to find violations under sections 149(1), 147(3), 60 and 72 of the *Code*. The section 148(1)(a) argument made before the ALRB was not pursued as part of the judicial review. This is understandable as this aspect of the ALRB decision was largely determined by factual findings.

[6] The parties agree that the standard of review applicable to this judicial review is reasonableness. Reasonableness is the presumptive standard of review whenever a court reviews administrative decisions: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 16. The *Labour Relations Code* does not alter that presumption, nor do the questions raised in this application require the application of a correctness standard of review.

[7] The background circumstances to the layoff of the three boilermakers included two significant factors. The first is that collective agreement that governed the relationship between Melloy and the Boilermakers Union was the National Maintenance Agreement (NMA). The NMA expired at the end of 2019, and a notice to bargain had been served October 4, 2019. As a result, the terms of employment continued to apply during the bargaining period pursuant to s.

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147(3) of the *Code*. There is no dispute that the bargaining period continued through April 2020 when these layoffs occurred.

[8] The second significant factor was the impact of the COVID-19 pandemic that affected all industry in Canada beginning in early 2020. In March 2020, Alberta had declared a state of public health emergency. Between late February and the end of April 2020, Melloy's clients were all responding to the challenges of the pandemic. The Nutrien worksite, where the three boilermakers had been working, took a conservative and organized approach, moving quickly to meet or exceed required health standards. Nutrien initially responded by delaying turnaround work and reducing the scope of work performed. Other of Melloy's client worksites responded in other ways. As a result of reductions and changes to workplaces, in a little more than two months, hundreds of Melloy's employees across Alberta were laid off. While Melloy previously would typically have around 1000 employees performing work for various clients, in the spring of 2020 they had only about 20.

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[9] The three Boilermakers that are the subject of the Union's complaint had been consistently employed by Melloy and working at the Nutrien site for years. The usual long-term maintenance shift schedule had been four shifts of 10 hours from Mondays to Thursdays. In its attempt to lessen workers exposure to COVID-19, Nutrien decided in April 2020 to change to a "7-on, 7-off" shift schedule, and requested Melloy provide four crew members per shift, who would work Monday through Saturday for 12 hours, and 8 hours on Sunday, followed by seven days off. Of the shift of four crew members, one Plumber and Pipefitter member was required by Nutrien, as well as a welder. Welding was work that could be done by either a Plumber and Piperfitter, or by a Boilermaker. At the time, Melloy had three Plumber and Pipefitter Union employees and three Boilermaker Union employees (Castor, Fermaniuk and Mallet) working at Nutrien.

[10] The three Boilermakers were excellent employees, and had it not been for the manner of Nutrien's COVID-19 response it appears they would have continued there. Even with Nutrien's shift schedule change, the evidence was that likely Castor and Fermaniuk would have been retained as two of the reduced four-person crew members, had the NMA terms allowed it. However, the NMA did not allow that shift pattern and Union agreement was necessary if the Union members were to work that shift schedule without overtime pay, which Nutrien was not willing to pay. Without Union consent to the shift schedule change, Melloy decided to meet Nutrien's needs with Plumber and Pipefitter members filling the welding role. The three Boilermakers were laid off as there was no need for them. They were told the layoff was because the Union had not agreed to the change.

The s. 60 argument

[11] Section 60 of the *Labour Relations Code* requires the parties to bargain collectively in good faith. The Applicant argues that the ALRB decision is unreasonable in failing to find the employer failed to bargain in good faith by giving inadequate notice that layoffs would be the consequence of a failure to consent to the shift schedule change.

[12] The ALRB's ruling depended on the accepted evidence of Mitchell Soetaert, the General Manager for Melloy. The Board noted that Soetaert contacted the Union shortly after Nutrien made the request for the new shift pattern, and he also contacted the National Maintenance Council. The Board accepted that Soetaert communicated to the Union that Nutrien intended to

proceed with the new shift schedule whether or not Melloy agreed to accommodate it, and that if Melloy could not accommodate it, Nutrien would find another contractor who would. The Board accepted that, despite there being no express statement that the Union's failure to consent to the shift change would result in layoffs, that was the obvious implication. If Melloy could not provide what Nutrien asked for, then Melloy would not have work at Nutrien for the workers. Those workers then employed at the Nutrien site, by necessary implication would no longer have employment there after the shift schedule change took effect. The Board found the communication was adequate to enable the Union to understand the consequences, and that in the circumstances of that time period, the amount of notice provided was reasonable. As the Board explained, there appeared to be no need for further information from the Union's perspective at the time: "Changes were occurring rapidly in many workplaces. […] Further, and importantly, the Union did not request time to review and digest the information. […] Rather, Channon gave a firm, negative response to Melloy's request."

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[13] The Applicant argues that the ALRB decision in this respect departs from the clear meaning of s. 60 of the *Code* and the established jurisprudence. The Applicant does not, however, provide any authority in support of their argument that an advance express articulation of the consequence of a union decision is always necessary, and advance communication which makes that information obvious by implication is inadequate.

[14] The ALRB provided its explanation for its finding that the communications by the employer were adequate to meet the requirement of good faith. These reasons are not unreasonable. Further, the ALRB reasons show that the argument made by the Applicant before the Board, and the cases there relied upon, were considered. The ALRB's reasons explain why the Board did not find the cases analogous.

The s. 147(3) argument

[15] Section 147(3) of the *Code* prohibits an employer from changing the terms or conditions of employment during the bargaining period. There are exceptions. The employer may make changes in accordance with an established practice, or with the consent of the bargaining agent, or where the existing collective agreement permits it.

[16] The Applicant's argument before the Board was that, by laying off the workers when the Union did not consent to the shift schedule change, the employer was effectively imposing the requested change. The Board rejected that argument. The shift change was not imposed on any of the Boilermakers without consent. There was a request to consent. When that consent was not given, the situation existed wherein the employer had no work available to the workers under the previous shift schedule conditions. As a result of there being no work available to them, the layoffs were necessary. The existing collective agreement included a clause giving the employer the right to control crew sizes, and another clause providing a general management right to lay off employees.

[17] In finding against the Applicant on this issue, the ALRB referred to its own previous decision in ***CHCG v Metro-Calgary and Rural General Hospital District No. 93*,** [1993] Alta LRBR 616, adopting from the Ontario decision in ***Simpsons Limited*** (April 1985) 9 CLRBR 343, that employers are generally expected to respond to changing economic conditions, and for that reason it is reasonable for employees to expect an employer to respond to a significant

downturn in business with lay-offs that are proportional to the severity of the economic circumstances.

[18] The ALRB decision accepted that the collective agreement gave the employer the ability to lay off employees, and that the employer in this situation had just and reasonable cause to lay off the boilermakers given Nutrien's demand for workers only who were able to accept their new 7-on, 7-off shift schedule.

[19] The Applicant argues that the effect of the ALRB decision is to create a new exception to s. 147(3) allowing employers to make changes to conditions of employment unilaterally in "emergent situations such as the COVID-19 pandemic".

[20] The ALRB decision does not create an unwritten exception to s. 147(3). The decision falls squarely within the existing exception, s. 147(3)(c). The Board found that the layoffs were in accordance with the collective agreement in effect with respect to the bargaining agent, and fully explained its reasoning in this respect. The Board's decision is not unreasonable.

[21] The Applicant argues that, because the employer sought consent for the change, the employer was therefore obligated to accept the Union's position and refuse to consent to Nutrien's proposal to change the shift schedule. Instead, Melloy accepted the change, and replaced the Boilermaker workers with Plumber and Pipefitter workers who were willing to consent. The Applicant also points out that it would not have been a change of employment terms or conditions if Melloy imposed the new shift schedule on the workers, but paid them the overtime they would then be entitled to in accordance with the collective agreement. It was Nutrien who was refusing to pay overtime, but Nutrien was not the employer. Melloy's contractual relations with its clients are irrelevant to the obligations owed to the Union employees, it is argued. Melloy could have negotiated its arrangement with Nutrien in such a way as to allow Melloy to pay the overtime. Or Melloy could have subsidized the overtime, because that is a financial decision within Melloy's own operational control.

[22] While the ALRB decision does not directly deal with the suggestion that Melloy ought to have subsidized the overtime pay, that does not make the decision unreasonable. While subsidizing the overtime might have been an option that could have been considered at the time, the collective agreement does not restrict the general management right to lay off employees in this way. The *Code* does not suggest that s. 147(3)(c) is an exception of last resort. All that is required is that, during the bargaining period, the employer may not make changes that are not permitted by the existing agreement. The ALRB found that the layoffs were legitimately within the scope of the existing agreement and that conclusion is not made unreasonable by the suggestion that there were other alternatives that could have been considered.

The s. 72 argument

[23] The Applicant argued before the ALRB that the layoffs of the three workers were effectively employer lockouts, and as such were unlawful lockouts in violation of s. 72 of the *Code*. There was no dispute that the employer was not in a position to commence a legal lockout. Therefore, the decision on this issue turned on whether the layoffs were a lockout disguised as a layoff.

[24] There is no disagreement about the applicable law, or that the ALRB referred to the applicable law. A layoff can be a lockout if the subjective purpose of the layoff is to compel

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employees to accept terms or conditions of employment: ***HSAA v Peace Regional Emergency Medical Services*****,** [1998] Alta LRBR 460 at para 39.

[25] The Board decision on this issue was a factual one. The Board found no evidence that there was a subjective purpose of attempting to compel employees to accept the change to the terms or conditions of employment. There was no evidence the employer was using the three layoffs to compel the Union to change their position on approval of the 7-on, 7-off shift pattern. The employer made the inquiry and accepted the Union's response.

[26] A layoff cannot be a lockout if there is no work available to be done by the employees under the existing collective agreement. Melloy had no work for the three employees. Their previous positions of working four ten-hour days per week at the Nutrien site no longer existed because Melloy's client, Nutrien, no longer wanted Melloy to provide that. Nutrien wanted two reduced crews on a 7-on, 7-off rotation. Melloy considered the Boilermaker workers, but without the Union's consent this was not employment available for these employees. When the Boilermaker Union did not consent, the reduced 7-on, 7-off shift was staffed by other employees, leaving no work for the three Boilermakers to do. This was the reason for the layoff.

[27] The Applicant argues that the ALRB's decision sets a precedent for employers who want to compel changes to conditions of employment: "an employer can ask the union to change terms and conditions of employment and if the union says no, it can lay off the employees and hire other employees to do the work that those employees were doing. […] a classic description of an illegal lockout." (Applicant's Brief, para 57)

[28] The ALRB's decision does not set such a precedent. In this case, Melloy did not make a decision to change the shift pattern of workers at Nutrien's worksite. Melloy's business is providing workers as needed by the clients. When the client, Nutrien, needed workers, including Boilermakers, to fill a 4x10 hour shift pattern, that is what Melloy provided, and the Boilermakers were employed to meet that need of the client. When Nutrien no longer wanted that, the work came to an end. With the hundreds of layoffs happening across Alberta in that period, Melloy simply had no work for them. Melloy was not hiring other employees to do the work of the Boilermakers. The evidence was that the workers on the reduced crew did not do boilermaker work. The reduced crew did require a welder, but welding is not a skill exclusive to Boilermakers. Either Boilermakers or Plumbers and Pipefitters could weld. So the Applicant is incorrect in saying that the employer laid off Boilermakers and hired others to do the work those employees were doing. No Boilermaker work was anticipated in the short-term, and if such work was necessary, Boilermakers would be brought in to work according to the schedule in the collective agreement (ALRB decision, para 61).

[29] The ALRB's conclusion that the layoffs were not a lockout contrary to s. 72 of the *Code* was a reasonable conclusion on the evidence,

The s. 149(1) argument

[30] In its brief, the Applicant argues the ALRB's decision with respect to s. 149(1)(a) was unreasonable. In oral argument the Applicant also argued that the decision with respect to s. 149(1)(c) was unreasonable.

[31] Section 149 of the *Code* prohibits specific conduct by an employer for an anti-union purpose. The Applicant argues that s. 149, unlike s. 72, does not take into account the subjective

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intention of the employer. The ALRB decision explains why this is incorrect. The Board, relying on the extensive overview of the relevant jurisprudence set out in ***Devine et al v Alberta Bingo Supplies Ltd*.,** [1999] Alta LRBR 251, highlighted that while anti-union animus does not have to be the sole or dominant motive behind a termination to violate s. 149(1)(a), an anti-union animus must be an influencing factor. The employer's motivation is what makes a termination contrary to s. 149(1)(a) or not.

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[32] The ALRB recognized the employer onus, and reviewed the evidence in that context. The Board accepted that the employer's witnesses provided a reasonable and credible explanation for the layoffs, which was free from any anti-union animus.

[33] This was a factual conclusion on the evidence, and the Applicant does not allege any misapprehension of the evidence. The Applicant simply suggests that despite the evidence to the contrary, the fact that the layoffs followed a refusal of the Union to consent to an employer request is enough to impute an anti-union animus.

[34] The Board reached a conclusion that was reasonable on the evidence. It is not the role of this Court on judicial review of that decision to reverse the factual finding of the Board.

[35] In its response, the Respondent points out that not only was there an absence of evidence of any anti-union animus. But there was evidence on the record that not all Boilermakers were laid off. Boilermakers who worked as planners were accommodated under Nutrien's new 7-on, 7-off plan. They were able to do some work from home, and so they continued to be employed by Melloy at Nutrien by working an alternating one week at home with one week in the office, consistent with Nutrien's objective of limiting the risk of COVID-19 exposure by keeping reduced numbers of workers on site in seven-day rotation crews. While not relied upon by the ALRB in its reasons for rejecting the Applicant's s. 149(1)(a) argument, this fact further supports that there was no general anti-union animus by the employer.

[36] The Applicant's s. 149(1)(c) argument argues that the employer conduct amounted to dismissal to compel the employees to cease to be members of the Union. The Board found that this allegation was not supported by the evidence. The Board found there was no evidence of any anti-union motive for the layoffs, and there was no evidence that the employer sought to compel the employees to cease to be members, officers, or representatives of the Union. The Applicant does not point to any such evidence in the record.

[37] As already stated above, it is not the role of this Court on judicial review of the Board's decision to reverse the Board's factual findings based upon the evidence heard by the Board.

[38] The ALRB found there was no bad faith reason for the layoffs. The layoffs happened because the pandemic conditions led almost universally at this time to reductions in workforce. Decisions were made by Nutrien to reduce and restructure its operations for the health safety of workers at its site. As a consequence of Nutrien's decision, Melloy had decisions to make about crew composition. The Boilermakers were not employees available to meet the new crew composition need. The collective agreement provided that the employer had the ability to decrease the number of workers on a crew, and the right to lay-off employees. The employer was not acting outside the scope of the collective agreement and was not violating the provisions of the *Code*.

Conclusion

[39] Having considered both the conclusions of the ALRB, and the reasoning of the Board in reaching those conclusions, I find the decision of the ALRB to be reasonable. The Board's written decision demonstrates a rational chain of analysis in relation to the issues raised, based upon the evidence heard.

[40] The application for judicial review is dismissed.

Heard on the 12th day of December, 2024.
Dated at the City of Edmonton, Alberta this 2nd day of June, 2025.

Maureen J. McGuire
J.C.K.B.A.

Appearances:

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Thomas W.R. Ross, K.C., and Samantha Nault
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Terri Susan Zurbrigg
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