Federal Court Cour fédérale

Date: 20240125

Docket: T-608-18

Citation: 2024 FC 125

Ottawa, Ontario, January 25, 2024

PRESENT: Madam Justice McDonald

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

Plaintiff

and

CANADIAN PACIFIC RAILWAY COMPANY

Defendant

JUDGMENT AND REASONS

[1] These are the reasons on the penalty hearing following *Teamsters Canada Rail Conference v Canadian Pacific Railway Company*, 2023 FC 796 [Contempt decision] where Canadian Pacific Railway Company [CP] was found in contempt of Court for failing to comply with cease and desist provisions of a labour arbitration award filed with the Federal Court by Teamsters Canada Rail Conference [Teamsters].

[2] CP and Teamsters did not call any evidence at this penalty hearing.

I. Background

[3] In the Contempt decision, CP was found guilty of contempt of Court for failing to comply with Labour Arbitrator Graham Clarke's arbitration award of March 23, 2018 [Clarke Award] in relation to 22 incidents occurring between June 2018 and April 2019.

[4] The Clarke Award found CP in violation of the rest provisions of two collective agreements and issued a cease and desist order as follows:

> 222. The TCRC has further convinced the arbitrator to issue a cease and desist order given the high number of examples, even using CP's own numbers and explanations, when employees' right to be off duty within 10 hours has not been respected. This cease and desist order applies as well to those employees who are entitled to be in and off duty within 12 hours.

[5] On this penalty hearing, Teamsters requests the following:

a. that CP forthwith comply with the Award of Arbitrator Graham Clarke dated March 23, 2018 and the Court Order;

b. that CP must, within 30 days of the Court's penalty decision, demonstrate to the Court that it has purged its contempt and is in continuing compliance with the Clarke Award and Court Order;

c. should CP fail to establish that it has purged its contempt and is in continuing compliance with the Clarke Award and Court Order within that deadline, an additional fine of $100,000.00 per day shall be imposed until CP has demonstrated its continuing compliance to the Court's satisfaction;

d. in the event that CP does not purge its contempt and demonstrate its continuing compliance within the 30 day deadline, the Court shall set another appearance before this Court to address the imposition, if appropriate, of any further or escalating fines;

e. that CP be fined an amount of $250,000.00 for each of the established instances of contempt of Court, in keeping with the Court's principles that a fine should not be merely a "token amount" and that it should be sufficiently high to dissuade CP or others to flout the law if it is to their financial advantage to do so;

f. that CP be directed to pay the value of any fines ordered to a charity or charities of the Applicant's choosing, without any publication of such by CP; and,

g. that CP pay the Applicant's costs on a solicitor-client basis.

[6] Prior to the penalty hearing, the parties advised they had resolved the issue of costs awarded to Teamsters in the Contempt decision. Accordingly the only issue for determination is the appropriate penalty.

II. Issue

[7] The only issue is the penalty or sentence that should be imposed upon CP by reference to the following:

(i) general sentencing considerations;

(ii) specific and general deterrence;

(iii) aggravating and mitigating considerations; and

(iv) parity considerations.

III. Analysis

A. *General sentencing considerations*

[8] The starting point is Rule 472 of the *Federal Court Rules*, SOR/98-106 [Rules] which provides:

Penalty	**Peine**
472 Where a person is found to be in contempt, a judge may order that	472 Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :
(a) the person be imprisoned for a period of less than five years or until the person complies with the order;	a) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;
(b) the person be imprisoned for a period of less than five years if the person fails to comply with the order;	b) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;
(c) the person pay a fine;	c) qu'elle paie une amende;
(d) the person do or refrain from doing any act;	d) qu'elle accomplisse un acte ou s'abstienne de l'accomplir;
(e) in respect of a person referred to in rule 429, the person's property be sequestered; and	e) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429;
(f) the person pay costs.	f) qu'elle soit condamnée aux dépens.

[9] The primary purpose of sanctions or sentencing for civil contempt is coercive such that it is to ensure compliance with court orders (*Carey v Laiken*, 2015 SCC 17 at para 31).

[10] The applicable principles for a court to consider on sentencing were helpfully outlined in *Tremaine v Canada (Human Rights Commission),* 2014 FCA 192 at paragraphs 19-26, which I summarize as follows:

- in cases of civil contempt the usual principles of sentencing developed in relation to criminal contempt apply;

- the sentencing judge must consider the range of sentences for similar offences set out in prior jurisprudence and adjust the sentence depending on the objectives of sentencing and any aggravating and mitigating factors applicable to the case at hand;

- the importance of specific and general deterrence for preserving public confidence in the administration of justice, while maintaining proportionality in sentencing;

- aggravating and mitigating factors can be considered in imposing a fine and/or prison sentence for contempt. For instance, courts are instructed to consider the gravity of the contempt in the context of the case at hand, with regard to the administration of justice…. This includes both "the objective gravity of the contemptuous conduct [and] the subjective gravity of the conduct (i.e. whether the conduct was a technical breach or a flagrant act with full knowledge of its unlawfulness)" …. Some jurisprudence has referred to the gravity of the offence as an "aggravating factor" …. However, in other cases courts have simply noted that the gravity of the offence must be considered, thus suggesting that if the gravity is on the lower end of the scale, this may also serve as a neutral or mitigating factor;

- other mitigating factors to consider are whether this is a first offence… and whether the offender has apologized, accepted responsibility, or made good faith attempts to comply; and

- on the other hand, where the offender has repeatedly breached court orders or has refused to apologize or take steps to comply with the order, these may be considered aggravating factors. [Citations omitted.]

[11] With these principles in mind, I will now turn to consider the appropriate penalty in relation to the facts and circumstances of this case. There are a number of factors to be considered when fashioning the appropriate penalty, including deterrence, aggravating and mitigating factors, and parity considerations. I will address these below.

B. *Specific and general deterrence*

[12] The principle of deterrence includes the importance of maintaining public confidence in the administration of justice and proportionality in sentencing.

[13] In the labour arbitration context specifically, the recent decision of Justice Gleeson in *Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333) v Viterra Inc.*, 2023 FC 766 (CanLII) [*Viterra*] is instructive. He notes at paragraphs 53-54:

> [53] The Respondent's non-compliance with the arbitrator's Award arises within the context of the federal labour law regime under the Code. Arbitration has been recognized as a "fundamental cornerstone of modern labour relations" (*BCT, Local 446 v McKenzie's Sales Ltd*, (1993) 124 NSR (2d) 135, 1993 CarswellNS 236 (Westlaw) at paras 47–48, citing *St Anne-*

> *Nackawic Pulp & Paper Co Ltd v Canadian Paper Workers Union, Local 219* (1986) 28 DLR (4th) 1).
>
> [54] The jurisprudence cited in the paragraph above confirms a significant public policy interest in employers and unions respecting and complying with arbitral awards. I find this to be particularly relevant in this case for two reasons. First, Part III of the Code, where the maximum hours of work provisions are found, has been described as a "safety net of minimum requirements for employees (*Bank of Montreal v Li*, 2020 FCA 22 at para 43). Secondly, the Respondent's non-compliance with the legislated requirements arises in a workplace that has the potential to expose employees and infrastructure, and possibly the public, to significant risks if safety guidelines and procedures were overlooked or not followed.

[14] This case also arises in the labour arbitration context, therefore, Teamsters urges the Court to adopt a similar approach to that taken in *Viterra.*

[15] Teamsters argues that deterrence should be a significant factor in the penalty assessed against CP. It argues that CP should be fined $250,000.00 for each of the 22 incidents, totalling $5.5 million. It argues this fine is appropriate and proportionate when considered against CP's 2021 net income of $2.852 billion.

[16] Similar to *Viterra*, Teamsters also argues that CP should be required to prove that it has purged its contempt and face a fine of $100,000.00 per day until compliance with this Court's Order is achieved.

[17] CP argues against a fine submitting that it has been publicly penalized through negative media reports. Alternatively, it argues that any fine should be a modest global amount and not calculated in relation to the 22 incidents. It suggests a fine in the amount of $200,000.00 be

payable to a charity. It also objects to an ongoing *per diem* fine, arguing there is no evidence of ongoing contravention of the Clarke Award, and any such allegation would require further adjudication.

[18] In considering the positions taken by Teamsters and CP, the issue of proportionality is important.

[19] Teamsters alleges that CP has continued to act in contravention of the Clarke Award, however this is not a case where ongoing contravention is easily determined. In the Contempt decision, I did not find that every "over hours incident" was an incident of contempt. The only conduct relevant for penalty consideration relates to the 22 incidents.

[20] To be clear, I am not prepared to assess a penalty in relation to any post-contempt conduct. Allegations that the Clarke Award continues to be contravened would require a separate assessment. I agree with CP that any other acts of alleged compliance or non-compliance would require further adjudication. This is not a case where every "over hours incident" is *prima facie* evidence of contempt of Court (*Society of Composers, Authors and Music Publishers of Canada v Trillion Investment Corp,* 1999 CanLII 7690 at para 9*; CE International Resources Holdings LLC v Yeap,* 2013 BCSC 186 at para 47; *Chiang (Trustee of) v Chiang,* 2009 ONCA 3).

[21] Further, considering the size and scope of CP's operations with over 250,000 crew starts at the relevant time, a total of 22 "over hours incidents" is minimal. That is not to say that the acts of contempt are not serious, and are not deserving of penalty; but on a proportional basis

relative to CP's operations as a whole, the magnitude of the incidents of contempt are at the low end. I acknowledge Teamsters' position that it chose to move forward with 38 incidents of contempt despite their claim of more incidents in the past and on a continuing basis. However, the record before the Court was only in relation to 38 incidents of which 22 were found to be in contravention of the Clarke Award and, therefore, in breach of a Court Order.

C. *Aggravating and mitigating considerations*

[22] Aggravating and mitigating factors for consideration include the gravity or seriousness of the offences including the nature of the acts, the effect of the acts, and their duration.

[23] The cease and desist order by Arbitrator Clarke was a result of the breach of the collective agreement negotiated between the parties. There is a public policy factor in favour of ensuring that employers and unions comply with arbitral awards. This weighs in favor of a finding that the 22 incidents of contempt are serious.

[24] However, a detailed consideration of the individual incidents demonstrates that some of the "over hours incidents" were of a short duration of time. For example, incidents 15 and 16 were 10 minutes or less (Contempt decision at para 99). Thus as it relates to the gravity of the conduct, I find that it is at the low end. I would also add that although the rest provisions are inherently safety driven provisions, there was no evidence of risk to the crew or risk to the public in relation to any of the 22 incidents.

[25] Further, there is no evidence of deliberate conduct on the part of CP management or employees. Nor is there any evidence that the incidents were premediated or the result of a plan

to flout the Court Order. Rather, the "over hours incidents" arose as a result of CP operational failures.

[26] As a mitigating factor, CP asserts this is the first finding of contempt made against the company in its 142 years history. In the Contempt decision, I accepted that CP made efforts to comply (Contempt decision at paras 58, 62).

[27] As a further indication of their intention to comply with the collective agreement, in its submissions for the penalty hearing, CP undertakes the following:

> The fundamental reality is that CP cannot legislate perfection by its employees in complying with company policies, including with respect to the unequivocal direction requiring compliance with the Award and Order. Nevertheless, CP remains fully committed to doing what it can to ensure that its employees comply with the Award and Order. To that end, CP is committed to undertaking the following efforts in addition to those it has already implemented:
>
> (a) Issuing further communications from senior CP executives to CP employees involved in managing crew tours of duty to continually re-emphasize the expectations of CP's directing minds that compliance with the Award and Order is mandatory and that crews must be relieved in a timely manner each and every time. These communications have already begun to be issued and CP is committed to making further regular communications on a quarterly basis (or, should the Court direct, some other timeline the Court deems appropriate).
>
> (b) Create an updated training program explaining the relevant collective agreement provisions, the terms of the Award and Order, and the findings made by this Court in the Trial Decision. This updated training program will be mandatory for all current CP employees involved in managing crew tours of duty regardless of seniority or tenure, as well as for all such new CP employees hired in the future as part of their orientation training.

(c) Enhancing the disciplinary process to be applied to CP employees involved in managing crew tours of duty (regardless of seniority) to ensure the process is applied uniformly across the organization and in a manner that appropriately factors in CP's obligations to ensure discipline is appropriate and reinforces CP's commitment to compliance with the Order going forward.

[28] While an apology can be a mitigating factor, CP takes the position that an apology is inappropriate as it has filed an appeal of the Contempt decision. CP relies upon the cases where courts have recognized it would be unfair to weigh a failure to express remorse against an offender who appealed the finding of guilt (*R v Laroche*, 2011 QCCA 1892 at paras 64-65; *Kamali-Mafroujaki v Ontario (Registrar, Motor Vehicle Dealers Act, 2002*), 2015 ONSC 3989*)*. While the personal liberties at risk in the cases relied upon by CP are not entirely comparable to this case, I view the lack of apology by CP as a neutral factor in the sentencing considerations.

[29] Teamsters argues that CP has failed to purge its contempt. However CP argues that it is impossible to do so as the incidents happened in the past. I agree with CP and I fail to see what steps could be taken by CP now to remedy the specific 22 instances where contempt was found.

[30] In relation to the profit motive, there is no evidence that the 22 incidents generated any profit for CP. Although CP argues that "over hours incidents" result in a loss of efficiency and productivity and, therefore, a reduction of profits for CP - there is, likewise, no evidence in support of this position.

[31] Finally, Teamsters asks the Court to consider it an aggravating factor that none of CP's directing minds attended the Contempt hearing or this penalty hearing. It relies upon *James*

Fisher and Sons Plc v Pegasus Lines Ltd SA, [2002] FCJ No 865 at paragraph 24 and 25 where the court noted:

> [24] At the hearing on April 25, 2002, the Court also raised Mr. Karathanos's failure to attend. On his behalf, Mr. Sproule argued that attendance is not required by the *Federal Court Rules* nor was it clearly prescribed by the Order of Justice Pinard who wrote "I therefore order that James Karathanos appear..." but did not say "personally appear". Indeed, other judges of this Court have expressed the same concern given the quasi-criminal nature of contempt proceedings which may give rise to the possibility of incarceration; nevertheless, it is also clear that individual defendants have been found guilty of civil contempt even though they did not appear for their hearings: *Society of Composers, Authors and Music Publishes of Canada* v. *Timberlea Investments Ltd.* (1998), 152 F.T.R. 198, *Society of Composers, Authors and Music Publishers of Canada* v. *946945 Ontario Inc.*, [1999] F.C.J. No. 287 (T.D.).
>
> [25] Regardless, Mr. Karathanos' counsel is arguing semantics and, as I see it, is faced with a clear Order from Justice Pinard. Mr. Karathanos' absence at the hearing before me can only be considered as a further aggravating factor and further evidence of his total disrespect for Orders of this Court and, in my mind, is relevant to the penalty that I will impose.

[32] In this case, I do not view the lack of a personal appearance of a “directing mind” of CP as an aggravating factor.

[33] Further, I cannot find that CP is a repeat offender.

D. *Parity considerations*

[34] Teamsters relies on *Viterra* to argue that a similar sentencing approach should be adopted in this case; namely, a significant monetary fine and ongoing oversight by the Court.

[35] While I accept that *Viterra* is a comparable case in the sense that it arises in the labour arbitration context and there was a finding that the employer was in contempt of an arbitration award, there are differences in the cases. In *Viterra*, the Court found the employer's conduct of non-compliance continued (*Viterra* at para 48). The acts of non-compliance in *Viterra* were easily identified—no work over 10 hours. The same cannot be said for this case. Here, a number of factors must be assessed before it is possible to find that post-contempt conduct constitutes continuous breach of the Order.

[36] Accordingly, while the sentencing principles from *Viterra* are applicable, the facts differ.

[37] Otherwise, there are no other factually comparable cases.

IV. Conclusion

[38] The imposition of a sentence or penalty is fundamentally a discretionary exercise.

[39] In my view, the seriousness of the contempt is at the low end and I would not characterize CP's conduct as defiant or egregious. In these circumstances, I decline to assess an incident-based fine as that does not reflect the operational reality in which the incidents of contempt arose. For example, 10 incidents occurred on the same date and arose from an error that had a cascading impact and gave rise to multiple incidents (Contempt decision at paras 91-95).

[40] There is neither evidence that any of the 22 incidents generated any profits for CP nor is there any suggestion that there was any premeditation involved.

[41] As the primary purpose of sentencing is compliance, I find it reasonable to impose a fine on CP. I accept the recommendation of CP that a fine in the amount of $200,000.00 is reasonable in the circumstances of this case.

[42] Finally, at the hearing, the parties agreed that any fine imposed by the Court would be paid to Canada's Children's Hospital Foundations.

V. Costs

[43] Teamsters is entitled to its costs on the penalty hearing.

JUDGMENT IN T-608-18

THIS COURT'S JUDGMENT is that:

1. Canadian Pacific Railway Company is fined the amount of $200,000.00 and such amount shall be paid to Canada's Children's Hospital Foundations.

2. Teamsters is entitled to its costs on this penalty hearing.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-608-18
STYLE OF CAUSE:	TEAMSTERS CANADA RAIL CONFERENCE v CANADIAN PACIFIC RAILWAY COMPANY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 2, 2023
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	JANUARY 25, 2024

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