Chapter 7

THE CANADIAN RAILROAD TRILOGY

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In 1967, Canada's troubadour, Gordon Lightfoot, recorded the "Canadian Railroad Trilogy," an epic song that describes the building of a nation through the building of a railroad. The trilogy is found in the past, the present, and the future. With respect to Mr. Lightfoot, we would like to borrow this theme to describe the unique, complex, and truly Canadian side of rail labour.

Past

From Traditional Rail Unions to the Industrial Giants: How the Face of Labour Has Changed in Canada's Railways

Twenty years ago, there were 14 different unions representing rail workers in Canada. They were predominantly traditional rail unions with their histories firmly entrenched in the industry. They often bargained together as a coalition although different bargaining agendas made their alliances dynamic at times. Canadian National Railways (CN) and Canadian Pacific Railroad (CP) bargained together as they had identical unions, similar collective agreements, and ostensibly similar interests.

Bargaining cycles were lengthy and it often took years before deals were reached. Because of these factors, rail strikes, when they occurred, tended to be national in scope, affecting both companies simultaneously. As the entire rail system was affected, back-to-work legislation was expected and enacted rapidly, ending Canada-wide strikes in 1950, 1973, 1987, and 1995. This changed in the last 10 years when back-to-work legislation came into effect, even though Canada's entire rail system was not affected. In 2007,

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the Conservative government introduced and passed legislation, which ended a strike/lockout between only CN and the United Transportation Union (UTU). Then, again in 2012, the Conservative government passed temporary legislation forcing an end to the strike by the Teamsters Canada Rail Conference (TCRC) running Trades, exclusively on CP.

As Bob Dylan had prophetically warned us, "The times they were a changing". The *Staggers Act* of 1980 deregulated the rail industry in the United States and, in 1987, the *National Transportation Act* took effect in Canada (followed by The North American Free Trade Agreement in 1994). The year 1986 was the last time CN and CP sat together at the bargaining table.

In 1989, all three Class 1 railways in Canada (CN, CP, and VIA) independently initiated action with Canada Labour Relations Board to consolidate smaller bargaining units under section 18 of the *Canada Labour Code*. Those proceedings were acrimonious and protracted, as the unions knew that the end result would be a loss of bargaining rights for many of their members. By 1994, seven formerly distinct Shopcraft[3] bargaining units had combined into one. The Brotherhood of Railway Carmen merged with the Canadian Auto Workers and the Autoworkers, the new kid on the block, soon represented all Shopcraft workers at CN, CP, and VIA, as well as the clerks at CN and VIA. The former Brotherhood of Railway and Airline Clerks (BRAC)/Transportation Communications Union merged with the United Steelworkers Union (USWA) who emerged as the bargaining agent for the clerks at CP.

The UTU and the Brotherhood of Locomotive Engineers (BLE) merged for a while as the Canadian Council of Railway Operating Unions (CCROU) for collective bargaining purposes. That merger did not last long at CN, though at CP they were still bargaining as the CCROU in the 2005 round of negotiations, in spite of the fact that in 2004, the BLE ratified a merger deal with the International Brotherhood of Teamsters and became the TCRC.

This merger occurred only a few months after the Canada Industrial Relations Board had certified the Teamsters Canada Rail Conference Maintenance of Way Employees Division as the legal bargaining unit for the former Brotherhood of Maintenance of Way Employees (BMWE) members at CP and virtually all Canadian shortlines, as well. Not long after this, at the end of a hard-fought battle for representation, the USWA won the right to

[3]Skilled Trades.

represent the former BMWE at CN. The Rail Canada Traffic Controllers representing dispatchers who had joined the BLE years previous, also became Teamsters in the last decade of the twentieth century.

To summarize, by 2007 all the traditional railroad craft unions had disappeared and were replaced by big industrial unions—Teamsters, Autoworkers and Steelworkers. Gone were the Carmen, Machinists, Boilermakers, Pipefitters, Sheetmetal Workers, the CBRT, BRAC, UTU, BMWE, BLE, and RCTC. Only the CN and CP Police Associations, and the IBEW Signals and Communications remained unaltered.

The Resolution of Grievances: Discipline (as Well as Other Disputes) and the Evolution of the "Brown System"

In the 1890s, George Brown, a general superintendent on the Fall Brook Railway in upstate New York (now a part of CSX Transportation (CSX), did something that no one before had contemplated—he stopped suspending his workers for minor rules violations! At that time, discharge was routine and automatic for most violations, and minor offences were handled by suspensions ranging from 10 to 60 days, or longer. Workers were plentiful then and railroads tended to see them as disposable and easily replaced. However, railroad work was becoming more specialized and skilled workers were becoming harder to find. Society was changing as well, and what may have been acceptable once, was considered unconscionable now. For example, the following is an excerpt from the Tallahassee, Pensacola, and Georgia Railroad's Book of Rules that was supplied to all employees:

> Rule 11—Overseers must not strike a negro with any other weapon than a switch except in defense of their person. Where a negro requires correction, his hands must be tied by the overseer and he will whip him with an ordinary switch or strap not to exceed 39 lashes at one time nor more than 60 for one offense in one day, unless ordered to do so by the railway supervisor in his presence.

Fortunately, Brown knew that in a changing world railroads had to change as well. He saw the financial sense in retaining workers who the company had invested in and also realized the benefits of progressive discipline as a means to "turn around" some of the attitudes and behavioural problems when they arose. Employee engagement and loyalty with the company was, in his opinion, a "win/win situation," both financially and in the creation of a

safe and productive workplace. Employees, as well as companies, needed a stable, uniform protocol of behaviour that both sides could understand.

In devising his system, Brown emulated the criminal courts and introduced "suspended sentences" for lesser offences. For good workers, the matter was kept private to protect their reputation and self-esteem. He kept ledgers on each man (it was only men working on the railroads in those days) and had honest and candid conversations with them after any accident, incident, or "close shave." If the ledger got to be a full page, the employee was dismissed, but each knew in advance that the situation was getting more and more tenuous. Terminations were never a surprise—when the ledger got full, discharge was inevitable. In due course, the ledger was replaced by demerit marks (and, originally, merit marks) with the accumulation of 60 demerit marks leading to termination, regardless of the nature of the final incident.

This system, in an evolved form, is still in effect on the Class 1 roads in Canada, where it is portrayed as a "progressive discipline system," meant to be corrective and non-punitive in design. This system allows management leeway in how, and to what extent, disciplinary sanctions will be assessed in any given situation. Penalties range from verbal cautions and written reprimands to demerit marks in varying amounts, suspensions, restrictions and, ultimately, discharge. Of course, unions are free to challenge any disciplinary sanction, which they do when the discipline is deemed excessive in the case at hand. Further, the Canada Labour Code specifically empowers an arbitrator to modify any disciplinary penalty at his or her discretion, s. 60(2):

> Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or the arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

In most of the non-railroad sectors in Canada, discipline is typically imposed under a "three strikes and out" system, where a first offence draws a warning; the second offence gets a short suspension; and then, if the behaviour still continues; dismissal. However, like all things in life, this approach is not absolute, as each case is judged on its own set of facts, including mitigating circumstances.

With the generations of railroading behind us—almost all of it governed by collective bargaining—codified contract-administration practices, and tons of applicable case law, you may ask, Why are there still so many disputes? The answer to that question, as we see it, is rather complex and somewhat elusive (noting that discipline is far from the only issue that needs to be arbitrated).

Management wants freight to move quickly, safely, and as cheaply as possible. Management wants—and needs—trained and qualified employees to be at work, who are productive, engaged, attentive, and enthusiastic about their work. Given these managerial needs, suspending or firing workers can be counter-productive and hinders the employer's ability to do what it wants, and needs, to do. And, since qualified manpower is hard to find and difficult to replace, it is even stranger to have self-inflicted manpower shortages.

Railroads, like all large businesses, need rules, and they need them to be obeyed because without rules, a business cannot be effective and profitable, or even survive. Rules afford the necessary flexibility railroads need to increase productivity, but that quest can create hardship for its employees when they see management's demands for flexibility infringing on their rights under collective agreements. The resulting tension requires a very skilled balancing act between the parties, and when you throw into the mix archaic and/or ambiguous collective agreement language governing rights and working conditions, you have a recipe for disagreements and often-heated debate between them, not only at the bargaining table but in the day-to-day administration of the collective agreements.

Unions believe that all employees are entitled to fair representation and are mandated to represent their members fully and to the best of their ability, in a fair and consistent manner. (Most union leaders would tell you they would do this even if not required by law.) In fulfilling their role, unions do not see themselves as the enemy of the employer; instead, they view themselves as management's conscience. If management overreacts in a given situation or interprets the collective agreement in a manner not consistent with the wording or the practice, unions are there to dispute and to resolve the matter. Just as the company will question an employee's behaviour, so, too, will the unions question management's behaviour. And just as unionized employees can make mistakes, so, too, can management. It is at these times when both sides are grateful for experienced and professional arbitrators to whom we

turn for guidance and to get us through our deadlocks, albeit we are not always happy with their decisions, but, nonetheless, we are relieved when they are made.

While work rules and interpretation thereof are important matters decided at arbitration, discipline is the most commonly arbitrated issue in the railroads. The hierarchy of these transportation giants is, and has always been, based on a military model. Strict adherence to regulations, as in the armed forces, makes up a large part of their structure. Thus, discipline goes hand in hand with a failure to adhere to rules and regulations, particularly so when it comes to safety violations, which both parties recognize must be addressed. Unionized employees know this is the employment situation going in—or soon learn it.

Management believes that when coaching, counselling, guiding, monitoring, and/or mentoring do not work, then discipline is the answer. While unions fundamentally agree with this approach, it is the degree to which "coaching, counselling, guiding, monitoring, and/or mentoring" have been provided, and the quantum of discipline that follows, where the parties most often disagree. The unions believe that, too often, companies resort to discipline over education as an easy way out, but that approach jeopardizes the good working environment both parties strive to achieve.

Most employees work their entire career without incurring any discipline, while others overachieve—and frightfully so. Railroads are large entities with thousands of employees and, like any large community, there are angels and demons, saints and sinners, good workers and not-so-good workers. Railroads are large social enterprises: they employ all types of individuals, both management and unionized, all with a multitude of idiosyncrasies, attitudes, lifestyles, shapes, and sizes. Clearly, it is a monumental task to keep everyone safe and productive, but it is a task that we must never stop trying to fulfil.

Unions defend their members when warranted—always have, always will. Employees do not begin their work day with a plan to violate a work rule, but it happens and rules do get breached. While both sides would agree that finding a root cause for misconduct and eliminating it is the best course of action, they can't always agree on the methods to accomplish that. According to unions, some managers over-react, target certain individuals, use excessive force, and are over-zealous and impatient. Management should be fair, reasonable, and consistent; they should understand the human condition and properly deal with honest or inadvert-

ent errors in judgment. Management counters that they have a business to run and that if they are not successful, no one has a job.

Rand Formula: Free Choice, But No Free-Riders!

In a uniquely Canadian way, the right-to-work question was asked and answered in 1946. Following a nasty strike by the UAW at the Ford plant in Windsor, Ontario, Justice Ivan Rand was asked to intervene. A key issue was the union's proposal for all employees to become members of the union and to pay dues. This proposal was sonorously objected to by the company on the grounds that it would violate an individual's freedom of association and his or her right to choose to join a union. Justice Rand issued a Solomonic award that basically "split the baby in half"; there would be no free-riders, all members of a bargaining unit would have to pay dues—or an identical amount to the bargaining agent—but employees would not be compelled to join the union. That solution has been accepted in Canada for more than 60 years because it sits well with us, as Canadians. We are a culture that has always paid its way. We may be polite and unassuming to some, but we pay our debts, take only what is owed to us, look after those less fortunate, work hard for what we deserve, and believe there is a viable solution to any problem … a solution that can be achieved peaceably and with benefits for all. (We also say "eh" a lot, but that's another story.)

Present

Right-to-Work Laws

With the emergence of right-to-work laws and the expansion of right-to-work states in the United States, there is emerging in certain quarters a concern that those right-to-work jurisdictions are attracting capital and jobs away from more "union friendly" jurisdictions. And, even our uniquely Canadian personality might be swayed by the promise of easy riches. We offer the following examples of how this controversy has recently played out.

In the last federal election in Canada (2011), a large public sector union is alleged to have supported Separatist candidates in Quebec to the dismay of some federalist union members. A Federal Member of Parliament has publicly stated his constituents are upset that their dues' dollars are being used directly or

indirectly to support a political position (separation from the rest of Canada) they find repugnant. This Member of Parliament is currently seeking support for a right-to-work bill for employees in the federal sector in Canada. Also, the provincial government in Saskatchewan ran with a right-to-work plank in its election platform. Yet again, Conservative opposition members in Ontario are saying that Ontario needs right-to-work laws in order to keep jobs from moving to right-to-work jurisdictions south of the border.

Unions see this as a "smoke and mirror" show that attempts to break organized labour, and they see themselves as the only entity fighting in an effective manner for liveable wages, benefits, and a safe working environment. Wage and benefit reductions, as well as lax safety regulations, are what drive corporations to ship jobs overseas. The elimination of jobs here, of course, reduces the consumer base and will eventually destroy the middle class. At least that's the perspective of labour.

The battle lines are being drawn. Some employers complain about an uneven playing field and having to compete against factories in right-to-work states. Unions are digging in to protect their, and the memberships', interests against this threat. At this point, there is no jurisdiction in Canada that has anything close to right-to-work laws and no actual legislation has been tabled so far, but there are clouds on the horizon and the drumbeats are getting louder on both sides of this great divide.

Arbitral Jurisdiction Expansion

Arbitrators under the Canada Labour Code have seen their jurisdiction expand following *Re Weber v. Ontario Hydro*[4] and *Re Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*.[5] Significantly, the result of these two Supreme Court of Canada decisions is that arbitrators are not only expected, but they are required to consider and apply not only the provisions of collective agreements, but also statutes such as Human Rights Acts, Labour Standards legislation, and Employment Equity and Employment Standards law in determining grievances. The Cana-

[4][1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583, 24 O.R. (3d) 358n, 82 O.A.C. 321, 30 Admin. L.R. (2d) 1, 12 C.C.E.L. (2d) 1, 24 C.C.L.T. (2d) 217, 95 C.L.L.C. ¶ 210–027, 30 C.R.R. (2d) 1, 183 N.R. 241.

[5][2001] 54 O.R. (3d) 321, 147 O.A.C. 183, 10 C.C.E.L. (3d) 290, 40 C.H.R.R. D/190, 2002 C.L.L.C. ¶ 210–005, (C.A.) affd [2003] 2 S.C.R. 157, 230 D.L.R. (4th) 257, 67 O.R. (3d) 256n, 177 O.A.C. 235, 7 Admin. L.R. (4th) 177, 31 C.C.E.L. (3d) 1, 47 C.H.R.R. D/182, 2003 C.L.L.C. ¶ 220–062, 308 N.R. 271, 125 A.C.W.S. (3d) 85, 2003 SCC 42.

dian model is evolving to a point where the labour arbitrators are dealing more and more with issues arising out of the broader employment context and not just those strictly within the confines of the collective agreement. Another notable arbitral trend is that arbitrators have begun assessing punitive and exemplary damages (reluctantly, and so far, rarely) for tortious conduct, in line with the Supreme Court's decision in *Vorvis v. Insurance Corporation of British Columbia*.[6]

This expansion of arbitral jurisdiction has brought with it a consequence; even though their awards are generally protected by strong privative clauses,[7] those awards are now subject to review on two different standards, depending on whether or not the question is one of interpretation and application of collective agreement provisions, or interpretation of law. The Supreme Court in *Re New Brunswick (Board of Management) v. Dunsmuir* (2008)[8] has redefined and clarified the standard of review for administrative tribunals.

"Standard of review" refers to the scrutiny that an appellate court applies in reviewing decisions of an administrative or statutory tribunal, such as a labour board or arbitration board. Before *Dunsmuir,* there were three standards of review:

- Correctness, where the court accorded no deference to the administrative tribunal and had to determine whether the tribunal got the correct answer in law;
- Patent unreasonableness, where courts gave great deference to the decisions of the tribunals based on the tribunals' expertise in that aspect of the law; and
- Reasonableness simpliciter, which was a point somewhere between the other two standards, and where the appellate courts

[6] [1989] 1 S.C.R. 1085 (1989).

[7] Privative clauses are legislative provisions enacted in some Canadian jurisdictions that limit or oust the power of the courts to review the decision of an arbitrator or other administrative tribunal; ordinarily, the effect of such a provision is to exclude judicial intervention unless there has been jurisdictional error or a denial of a fair hearing by the arbitrator or tribunal involved. Jeffrey Sack & Ethan Poskanzer, Labour Law Terms, A Dictionary of Canadian Labour Law 118 (Toronto, Ontario: Lancaster House 1984).

[8] 372 N.R. 1, 69 Admin L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. Dunsmuir v. New Brunswick [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. Dunsmuir v. New Brunswick) 2008 C.L.L.C. ¶ 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. Dunsmuir v. New Brunswick) 170 L.A.C. (4th) 1, (sub nom. Dunsmuir v. New Brunswick) 291 D.L.R. (4th) 577, 2008 Carswell 124, 2008 Carswell NB 125, 2008 SCC9, 64 C.C.E.L. (3d) 1, (sub nom. Dunsmuir v. New Brunswick) 95 L.C.R. 65, [2008] S.C.J. NO.9, [2008] A.C.S. No. 9 (S.C.C.).

showed some, but not total, deference to the expertise of the tribunals.

Dunsmuir changed the above three-pronged approach to a two-pronged approach. The Supreme Court determined there should be only "two standards of review, those of correctness and reasonableness". The court explained the reasonableness standard under this approach in the following terms at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. … In judicial review, reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

This new approach requires the reviewing court to consider: the presence or absence of a privative clause (labour arbitrations are covered by a strong privative clause in Canada); the purpose of the tribunal as determined by interpretation of enabling legislation; the nature of the question before the court; and, the expertise of the tribunal. (Arbitrators are deemed to be "experts" in the domain of collective agreement interpretations). In simple layman terms, what this means is that if a party is not content with a decision and they seek judicial review of the arbitration award, it must convince the court the arbitrator got a question of law incorrect, or, if their request for review relates to something other than a strict application of law, they must prove the arbitrator's decision was unable to pass a test of reasonableness.

Canadian Railway Office of Arbitration and Disputes Resolutions: Efficiency, Expertise, and Encompassing

Unlike the U.S. model under the Railway Labor Act, where the cost of arbitrators is generally borne by the National Mediation Board, in Canada, most of the railway unions and the major railways have established the Canadian Railway Office of Arbitration and Disputes Resolution (the Office, or CROA), which has handled more than 90 percent of all railway arbitrations over the past 49 years.

The Office is controlled by an Administrative Committee composed of senior officers of the Teamsters Canada Rail Conference

Running Trades and Maintenance of Way divisions, the Canadian Autoworkers Union, and the Steelworkers, as well as representatives of CN and CP. The cost of renting and running the office, the fees of the arbitrators, and their expenses are split among the railways and the unions on a 50/50 basis. The railways apportion their costs to the individual employer-users of the Office on a case-by-case accounting basis. The Unions divide their share equally. To date, all decisions related to the operation of CROA have been made on a consensus basis by the members of the administrative committee.

In the 49 years of the Office's existence, there have been a total of six different arbitrators who have heard cases (with a seventh joining in the fall of 2013). Those six have heard in excess of 4,200 cases, and former president of the NAA, Michel Picher, alone, has adjudicated more than 2,000 of those disputes. This process is an unmatched model of stability, and it has given employers and unions a knowledgeable, consistent forum since 1965. The complexity of railway operations, the jargon, and the work rules make it difficult for a neophyte to understand what transpired in any given incident, and all parties have benefited from the longevity of our arbitrators. This experience favours long tenure; the parties do not relish the thought of "breaking in new talent," given the steep learning curve required in railway arbitration.

Whether it is an overtime claim for a track gang or a train crew missing a signal, the CROA arbitrator hears it all and sorts it out. Previously, about 15 to 20 cases were heard in any given month. That has changed as we have begun to utilize an Informal Expedited Hearing Process, which provides for a "super expedited" arbitration process of minor disputes, in which as many as 20 or more additional cases can be heard along with the other formal cases. A formal case at CROA is expected to take about 90 minutes from start to finish and the expedited process calls for about 15 minutes a case. Expedited decisions are given immediately and normal decisions are rendered within a week (occasionally, it takes a month, but those are extremely rare). Though the expedited decisions are considered "without prejudice or precedent" and are not registered, they do greatly reduce the case load. Using this process, the TCRC, Maintenance of Way Employees Division, and CP (the first to utilize it) have settled hundreds of matters over the past five years.

Human Rights and the Nature of Family Status: The Story So Far

In the Canadian federal sector, employers are governed by the *Canada Human Rights Act*, a 36-year-old law that prohibits discrimination based on race, national or ethnic origin, color, religion, age, sex, sexual orientation, marital status, family status, disability, or conviction for an offence for which a pardon has been granted. Surprisingly, it is only in the past few years that the question of family status has emerged as a point of contention. A little more surprising is that the term "family status" is not defined in the statute.

The case law has, to this point, followed two paths in determining what family status means. The British Columbia Court of Appeal in *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*[9] said, at paragraph 39, that "a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or family duty or obligation of the employee." That Court found there needed to be more than a simple conflict between work and normal parenting obligations in order to establish a *prima facie* case of discrimination on the basis of "family status." The facts in *Campbell River* showed that a change in a mother's work hours was going to affect her ability to care for a disabled child. The Court found a *prima facie* case was established, that the employer discriminated against the complainant, but the issue was sent back to arbitration to determine whether or not the employer had met its duty to accommodate her to the point of "undue hardship," as required under Human Rights legislation.

The Canada Human Rights Tribunal under the Canadian Human Rights Act, established a lower standard to be met by a complainant in *Hoyt v. Canadian National Railway,*[10] which standard was endorsed by the Federal Court of Canada in *Johnstone v. Canada (Attorney General).*[11] In *Johnstone,* the Federal Court of Canada said that *Campbell River* was too stringent, and held that discrimination based on family status should be analyzed in the same manner as other claims of discrimination. The Court found fault in *Campbell River,* finding that the decision erroneously established a hierarchy of grounds of discrimination, in effect, render-

[9]2004 BCCA 260, [2004] BCJ No. 922.
[10][2006] CHRD No 33.
[11]2007 FC 36, [2007] FCJ No. 43; affirmed 2008 FCA 101, [2008] FCT No 427 (Fed CA).

ing family status less important than the other protected grounds of discrimination. In particular, the requirement that the complainant must establish a "serious interference" with family status, as indicated in *Campbell River,* placed family status in that inferior position. The Tribunal declined to apply the *Campbell River* test, but still found, at paragraph 109, that Ms. Seeley and the others faced a "serious interference with [their] parental duties and obligations" when they were forced to work in Vancouver. In *Seeley,* it was found that childcare is a fundamental parental responsibility protected by the Canada Human Rights Act on the grounds of "family status." Thus, if a complainant can establish a prima facie case of family status discrimination, the onus then shifts to the employer to show that a bona fide occupation requirement (BFOR) exists in order to justify its decision.

The Supreme Court of Canada had previously decided there was a three-part test to determine the legitimacy of a BFOR defence in *Re British Columbia (Public Service Commission) v. B.C.G.S.E.U.*[12] That test, considered on a balance of probabilities, is addressed in *Meiorin* at paragraphs 54 and 55:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

The *Seeley* decision focused on the last part of *Meiorin*, i.e., whether the work rule was reasonable and necessary to accomplish its purpose, and, that the employer cannot find other reasonable ways and means to accommodate the employees to the point of undue hardship. The Tribunal found that allowing the complainants/grievors four months longer than contemplated by their collective agreement to report for work in Vancouver was insufficient accommodation on the part of CN. The Tribunal

[12] [1999] 3 SCR 3 (*Meiorin*).

chastised CN in finding that this accommodation was "not in any way a meaningful response to the Complainant's request," or to her family situation (paragraph 145). The Tribunal stated that in order to satisfy its obligations to accommodate Seeley, CN had to demonstrate that it had "considered and reasonably rejected any accommodation that would have accommodated the needs of the Complainant" (paragraph 156).

CN had argued it would have encountered undue hardship if it had accommodated Ms. Seeley's requests, because the huge majority of its employees are parents, and to accommodate Seeley *et al.* would have meant giving them "super seniority" because they were parents. However, the Tribunal found that CN had presented no evidence of other requests for accommodation (paragraph 170). The Tribunal also indicated that undue hardship must be determined by examining each individual request for accommodation (paragraph 171). The Tribunal rejected the "floodgates" argument, *viz.*, allowing Seeley *et al.* to escape their collective agreement obligations would precipitate countless others (paragraph 172). The Tribunal rejected CN's BFOR defence and found that Seeley and her co-workers had been discriminated against on the basis of family status. These cases are currently proceeding through the appellate courts and the final outcomes may be years away.

Future

Human Rights and the Nature of Family Status, Part 2: Stormy Waters Ahead?

The effect of the above family status cases on labour relations has not yet been fully felt. But, it is safe to say that these decisions confront existing seniority systems and will lead to workplace challenges, especially in continuous operations, such as railways, airlines, and other workplaces where shifts are outside the Monday-to-Friday, 9-to-5 structure. The nature of those operations and their critical impact on virtually all of us, even if we do not work in such businesses, is something that has not yet been worked through. Will *Seeley* and *Johnstone* lead to super seniority for working mothers? What is reasonable accommodation? Can and should employers force people without children to off-shifts to accommo-

date single moms or dads? Does having offspring in child care mean that you get preferred shifts? What about the notion of individual choice—when someone chooses to work in an occupation that is itinerant, such as a train conductor or locomotive engineer, or an airline pilot—where they have to be away from home as part of the job? Will employers have to completely reorganize their work processes and historical assignment scheduling and seniority systems? We can make no prediction other than to say it will be an interesting and animated controversy before these questions are resolved with any finality.

Right-to-Work: Is It Coming to Canada?

The short answer is, "Not right now." The questions that arise, though, are of great interest to labour-relations professionals. There is no doubt that jobs are flowing to right-to-work jurisdictions to the detriment of employees and unions in traditional jurisdictions. Unquestionable union strongholds like Michigan have adopted right-to-work laws, ostensibly to become more competitive. Unions are adamantly opposed, calling the laws anti-union and enacted for the sole purpose of weakening the union movement, thereby decimating the middle class. When you take money out of the pockets of one family, you put it in someone else's. The unions see the chasm between employer and employee growing wider by leaps and bounds.

Regardless of motivation, the impact of these laws is real and consistent. In the majority of right-to-work jurisdictions, union density is averaging less than 5 percent, whereas in traditional states, union density is almost twice as high, or more. It also must be noted that in right-to-work states, unemployment is highest, average income is lowest, and, access to healthcare, even for children, is right at the bottom. The competition for capital between right-to-work and more union dense jurisdictions is real and on-going. State governments are putting together enticing packages to lure manufacturers into their jurisdictions, and view the influx of jobs (even lower paying, non-union jobs) as beneficial to their local economies.

Unions in Canada, led by the Canadian Labour Congress, have mounted strong and vocal opposition to right-to-work proponents. Unions have seen what it does, and they are not keen on reliving the experiences of their brothers and sisters south of the

border. Unions argue that this is all a self-defeating downward spiral to low wages and lower standards of living.

Some pundits blame the unions for killing the golden calf. They argue that union power has been wielded disproportionately in heavy industries over the years in the so-called "rust belt states," and has artificially inflated wages and benefits to a point where it is no longer sustainable or viable to manufacture goods in direct competition with right-to-work states or off-shore suppliers. However, these pundits fail to mention that while unemployment rises and employees' (even unionized) wages are dropping, corporate profits are at an all-time high. (As you can see, there are two sides to every coin). The pundits can say what they will, but the bottom line is that without a middle class, no free and democratic society can survive.

So where do we go from here? Perhaps an answer can be found if we go back to the turn of the twentieth century when Henry Ford, not generally regarded as a friend of the working class, figured out that if his employees could not earn a decent living, they could not afford to buy his products and his market would disappear. Regardless of whether you are a *laissez-faire* capitalist or more of a social democrat, if the people who buy your products earn less, they cannot buy more, if any, of your goods.

Higher labour costs make technology seem like a more viable investment, the return-on-investment is better and machines never join unions. In relation to the march of technology, a learned colleague of mine has said, "The stone age didn't end because they ran out of stones". All parties realize that as industrialization marches on, jobs will be lost, but jobs will also be created.

Will Canadian jurisdictions head down the path of right-to-work? Only time will tell, but the ride between here and the final outcome will, most assuredly, be bumpy. As most of you are aware, railroads are exempt from right-to-work in the United States, and right to work has not been able to get a federal foothold in the United States. We believe it is safe to predict that if right-to-work comes to Canada, it is more likely to arrive provincially long before it hits the federal jurisdiction. But as we stated earlier, right-to-work is not something that has been palatable to the uniquely Canadian persona up to now, and let's hope that it remains that way.

Demographic Shift: The New, Younger Face of Railways, and How Will Three Generations Ever Get Along in the Workplace?

So here we are—the demographic shift is fully underway. In the last three years or so, the railways have replaced more than 7,000 employees. That trend is expected to continue for the next five years or so before it slows down. Between 1,500 and 2,000 baby boomers are expected to retire from CN and CP each year over the next four or so years. The "average railroad employee" demographic has become much more diverse and way younger. In some bargaining units, employees with less than five years service are now in the majority. In others, they represent a sizable and growing minority. We now have three distinct generational cohorts at work: the retiring Baby Boomers being replaced by the maturing Gen X, being followed by the Gen Y, the rebound generation. Sociologists and demographers tell us that although they may have similarities, they are different in how they perceive work.

Generalizations about human behaviour are dangerous, but still helpful. The Boomers are reaching the end of their careers, they have huge seniority, and in the case of rail workers, they are eligible for unreduced pensions as early as age 55. Historically, a majority of employees retire at the earliest opportunity, followed by another large cohort retiring after they have 35 years of service in order to maximize their pension benefits. The Boomers have paid their dues, waited a long time to get to the top of the seniority list and, frankly, are not keen on sharing the benefits of their longevity. They have earned the right to a day shift with weekends off. They now work to reach retirement and, when they retire, they move on to pursue the things that work has kept them from. Part-time work is not of interest, even post-retirement.

The Gen X employees are the minority. They entered the work force in relatively small numbers. Those hired in the early 1990s faced downsizing, and ups and downs at the beginning of their careers, but now they see stability and opportunity as the Boomers retire. Gen Xers are getting to the top of the seniority lists about 15 years faster than their predecessors did. Soon, the senior employees will have 20 years on average, as compared to 30 or more among the Boomers.

As railroads roll into the twenty-first century, with technology rapidly advancing and new techniques and stratagems coming into

play, we are also welcoming a whole new generation of railroaders as the Baby Boomers leave us. These Gen Yers will be coming in with different expectations and new priorities; and adaption, by all parties, will be the name of the game. One thing is for certain, though, they will bring with them new challenges and new demands, and, as did the generations that preceded us, we will have to tailor new Memoranda of Settlements to accommodate them.

So, why do we care as labour relations practitioners? Primarily, because we want our members and employees to be content at work; employers invest heavily in training and do not want skilled employees leaving. Unions want to build solidarity and camaraderie, cohesion in unity.

This brings us back to where we began our talk, a time of uncertainty and change … and we believe we will face it as our forbearers did, with logic, intelligence, and humanity. We will make mistakes and we will correct them, and, most assuredly, we will carry on.

In closing, all we can say is that labour issues, like all things in life, are born in conflict. And, like the trilogy of the railroads, there is a triumvirate of rail labour. There are the parties that stand on either side of any issue in dispute—the Railroads and the Unions. They will make their stand, and they will discuss, debate, and even argue. But, when these parties cannot agree, there are those who come in to hear both sides and to weigh those arguments, seasoned with case law, jurisprudence, and common sense, and they render a decision. We are bound together, we three: the Unions, the Railroads, and the Arbitrators. Not for better or worse, nor for rich or poor … but for fairness … and we can't ask for much better than that.