DECISION **2020 NSUARB 152**
M08802

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE RAILWAY ACT

- and -

IN THE MATTER OF A COMPLAINT by **THE UNIACKE TRAILS ASSOCIATION** requesting that the Board revoke the **WINDSOR & HANTSPORT RAILWAY COMPANY'S** operating license for non-compliance with the conditions of that license

BEFORE:	Richard J. Melanson, LL.B., Member
COMPLAINANT:	**UNIACKE TRAILS ASSOCIATION** Paul Smith, President
RESPONDENT:	**THE WINDSOR & HANTSPORT RAILWAY COMPANY** Christopher C. Robinson, Q.C. Mark Blades
INTERVENORS:	**NOVA SCOTIA DEPARTMENT OF TRANSPORTATION AND INFRASTRUCTURE RENEWAL** Michael Pugsley, Q.C. Neil J. Kuranyi Sheldon Choo
	MUNICIPALITY OF THE DISTRICT OF EAST HANTS Marc Dunning
	REGIONAL MUNICIPALITY OF WINDSOR AND WEST HANTS Mark Phillips
HEARING DATE:	**September 30, 2020**
DECISION DATE:	**December 23, 2020**
DECISION:	**Motion requesting dismissal of the complaint based on standing issues is granted.**

1.0 INTRODUCTION

[1] The Windsor & Hantsport Railway Company (WHRC) is a railway company which is subject to the *Railways Act,* S.N.S. 1993, c. 11 (*RA*). Pursuant to s. 52A of the *RA,* a May 30, 1994, agreement between the Province of Nova Scotia and WHRC is deemed to be a license issued pursuant to the *RA* (Operating License).

[2] On October 3, 2018, the Nova Scotia Utility and Review Board received a letter dated September 28, 2018, from the Uniacke Trails Association (UTA). This letter outlined various alleged actions by WHRC which the UTA requested the Board investigate.

[3] The UTA alleged that WHRC had failed to comply with the *RA* and regulations enacted thereunder. The UTA also alleged violations of the terms of the Operating License.

[4] The UTA requested the following remedies:

- That the Board direct WHRC to immediately make application to abandon its railway line; and
- That WHRC's Operating License be suspended or revoked.

[5] The Board determined that the allegations contained in the UTA's September 28, 2018, correspondence could form the subject matter of a complaint pursuant to s. 39(1) of the *RA* and initiated an inquiry by requesting a response from WHRC.

[6] On January 31, 2019, following some failed attempts by the Board to communicate with WHRC, the company filed a response to the UTA's complaint (Response).

[7] WHRC's Response denied any contraventions of the *RA*, regulations, or the terms of its Operating License. It further challenged the UTA's standing to bring a complaint. As well, WHRC asserted the Board had no jurisdiction to address any part of the UTA's complaint, to the extent it was based upon the condition and repair of the Hantsport aboiteau, as that issue was pending before the Supreme Court of Nova Scotia.

[8] After a preliminary hearing with WHRC and the UTA to address the process to be followed in this matter, the Board issued a preliminary Hearing Order dated March 21, 2019. The Hearing Order established a process for public advertising of the matter; the possibility of intervention by interested parties; a process for the pre-filing of documentary and visual evidence; and, a process for issuing information requests (IRs) to parties who pre-filed evidence. The setting of a hearing date and a determination as to how such a hearing would proceed was deferred until the initial process was completed.

[9] The Nova Scotia Department of Transportation and Infrastructure Renewal (DTIR), the Municipality of the District of West Hants (West Hants) and the Municipality of the District of East Hants (East Hants) were granted intervenor status in this proceeding. DTIR administers significant parts of the *RA,* including safety inspections, on behalf of the responsible Minister. The railway in question runs through both West Hants and East Hants. The Board notes that, subsequent to West Hants' intervention, it was amalgamated with the Town of Windsor to form the Regional Municipality of Windsor and West Hants (RMWWH).

[10] IRs were issued by the Board, East Hants and the UTA. WHRC refused to answer certain IRs issued by the UTA and East Hants. These parties brought motions to

the Board for an order directing WHRC to provide responses to their IRs. The Board decided to address these motions though written submissions.

[11] With the issue of the IR responses pending, and given the nature of some of WHRC's objections, the Board convened a preliminary hearing. It established a process for addressing the standing of the UTA to bring the complaint, and to establish the parameters of the Board's jurisdiction, if any, with respect to the Hantsport aboiteau issue. The process included provision for oral argument.

[12] WHRC filed motions with respect to these issues on December 4, 2019, requesting that the complaint be dismissed for lack of standing or, alternatively, that the Board had no jurisdiction to hear issues which were pending before the Supreme Court of Nova Scotia. The UTA, East Hants and DTIR responded to the motion.

[13] WHRC's motions were scheduled to be heard on February 28, 2020. On the eve of the hearing, the Board was made aware that amendments to the *RA* would be introduced in the Legislature on the date scheduled for the oral hearing. As the summary of topics to be addressed in the amendments appeared to potentially have some bearing on this matter, the Board agreed to a request by WHRC to adjourn the motions so the text of the amendments could be reviewed.

[14] Bill 236, A*n Act to Amend Chapter 11 of the Acts of 1993, the Railways Act,* S.N.S.2020, c.17 (Bill 236) received Royal Assent on March 10, 2020. It will take effect upon proclamation. Bill 236 has not yet been proclaimed.

[15] With the passage of time, the UTA requested that the adjourned hearing be reconvened. After receiving written arguments on the request, the Board agreed. A September 30, 2020, hearing date was established to hear oral arguments on WHRC's

motions. WHRC continued to submit right up to the hearing date that the matter should be held in abeyance until the proclamation of Bill 236. The Board did not agree and given the COVID-19 pandemic, oral submissions proceeded by way of a virtual hearing, as scheduled.

2.0 ISSUES

[16] The issues before the Board are:

1) Does the UTA have standing to bring the complaint?
2) If the answer to the first question is yes, given the Hantsport aboiteau matter pending before the Supreme Court of Nova Scotia, to what extent does the Board have jurisdiction to hear the complaint?

3.0 ISSUE ONE - UTA STANDING

1. Legal test

[17] Section 39(1) of the *RA* allows the Board to "… inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under this Act."

[18] There are no provisions in the *RA*, nor in any regulations enacted pursuant to the *RA,* which establish a procedure for the Board when it inquires into a complaint. For matters within its jurisdiction, the Board has the authority to establish rules of practice and procedure pursuant to s.19 of *Utility and Review Board Act*, S.N.S.1992, c.11 (*UARB Act*). The Board has established formal procedural rules for many of the mandates which it administers. No procedural rules have been established specifically related to the *RA*. In this case, the process to be followed was set out in the Hearing Order. While not specifically made applicable to the *RA*, the Board and the parties have generally been

guided by the *Board Regulatory Rules* enacted pursuant to s.12 of the *UARB Act*. As well, the *Utility and Review Board Regulations*, enacted pursuant to s.34 of the *UARB Act*, are applicable to all proceedings before the Board.

[19] There are no provisions in the *RA,* or in regulations enacted pursuant to the *RA*, which set out a test for standing to bring a complaint under s.39 (1) of the *RA*.

[20] In these circumstances, WHRC takes the position that the common law standing tests are applicable. In the civil litigation context, the common law has recognized parties may have private interest or public interest standing to appear before the courts.

[21] The common law tests, which involve balancing the preservation of judicial resources with access to justice, as discussed in *Delta Air Lines v. Lukacs*, 2018 SCC 2 (*Delta Air Lines*) and *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, can be summarized as follows:

- Private interest standing is available where a proposed party has a direct personal interest in the subject matter of a proceeding;
- Public interest standing is discretionary, and a court must consider the following three factors, in a cumulative, purposive and flexible manner, and not as technical requirements:

    (i) whether there is a serious justiciable issue raised. In this context a serious justiciable issue usually means an important or substantial constitutional question, including the constitutionality of administrative action;

(ii) whether the plaintiff is impacted by, or has a real stake or genuine interest in, the serious justiciable issue; and

(iii) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

[22] While submitting that the Supreme Court of Canada decision in *Delta Air Lines*, which will be discussed in more detail below, is not a case which determined standing, counsel for WHRC acknowledged that the public interest standing test cannot act as a complete bar to complaints.

[23] Sections 5 and 6 of the *Utility and Review Board Regulations*, allow for parties who have a "real and substantial interest" in Board proceedings to appear before the Board. WHRC submits that while not addressing who may initiate a Board proceeding, the provisions provide guidance to the Board with respect to standing.

[24] WHRC says the UTA does not meet the common law tests for private interest standing or public interest standing, even considered in light of the *Delta Air Lines* case. WHRC further submits the UTA does not have a real and substantial interest in the subject matter of this proceeding. WHRC advances the proposition that the UTA is bringing the complaint for the improper purpose of acquiring WHRC's railway corridor for public trails.

[25] DTIR and East Hants take the position that the statutory language related to complaints under the *Canadian Transportation Act*, S.C.1996, c.10 (*CTA*), which was considered in *Delta Air Lines*, is almost identical to s.39(1) of the *RA*. These parties submit that *Delta Air Lines* stands for the proposition that the Board has a discretion to hear complaints under the *RA* and need not be bound by the standing tests applied in

civil matters. In fact, both parties submit that the Board need not consider the complainant's standing at all when deciding whether to investigate a complaint.

[26] The UTA generally adopts the DTIR and East Hants submissions with respect to *Delta Air Lines* and appears to also argue that they should have public interest standing in any event.

[27] In *Delta Air Lines,* the Canada Transport Agency (Agency) had applied the public interest standing test in denying standing to the complainant. Section 37 of the *CTA* says:

> **37** The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

[28] The Supreme Court of Canada remitted the matter back to the Agency on the basis that the public interest standing test, as applied by the Agency, would be virtually impossible to meet. The Agency had essentially based its decision on the part of the public interest standing test related to "a serious justiciable issue." It found that a serious constitutional issue had not been raised. Given that the Agency regulated "private non-governmental actors", a complaint regarding the terms and conditions of carriers could never be a challenge to the constitutionality of legislation or administrative action.

[29] The Supreme Court of Canada also held that such a use of the public interest standing test would not be consistent with the scheme of the *CTA* and the broad remedial powers provided to the Agency. Therefore, the decision did not ultimately determine what standing test the Agency should apply. That said, the Supreme Court of Canada provided some guidance with respect to the various options the Agency could consider.

[30] MacLachlin, C.J.C., in the majority decision, stated:

> [14] In this case, the Agency had discretion under s. 37 of the Act to determine whether to hear Dr. Lukacs' complaint. The Agency did not advert to this discretion, however, and appeared to approach the standing question as if bound by the tests for standing as applied in civil courts. As such, it found that it would hear the complaint only if Dr. Lukacs could satisfy the test for either private interest standing or public interest standing.
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> ...
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> [25] In my view, this is not a case where merely supplementing the reasons can render the decision reasonable. The Agency clearly stated a test for public interest standing and applied that test. The Agency could have adapted the test so that the complainants under its legislative scheme could actually meet it. Of course, it could also have exercised its discretion without any reference to standing at all. But it did neither of these things. The reviewing court must not do them in the Agency's place for three principal reasons.
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> [30] I would agree with Abella J., however, that the Court of Appeal should not have held that standing rules could not be considered by the Agency in its reconsideration of the matter. The better approach is to send this matter back to the Agency for reconsideration in its entirety. In its order, the Court of Appeal stipulated that the Agency must reconsider the matter "otherwise than on the basis of standing" (para. 32). I would not structure the order so strictly so as to foreclose the possibility that the Agency could reasonably adapt the standing tests of civil courts in light of its statutory scheme. As my colleague observes, s. 25 of the Act confers on the Agency "all the powers, rights and privileges that are vested in a superior court" (para. 56) with respect to all matters within its jurisdiction. This language indicates the legislator's intention to give deference to the Agency's determination of its complaints process.
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> [31] Of course, there are numerous other ways that the Agency could exercise its discretion under s. 37 of the Act , including examining whether the complaint is in good faith, timely, vexatious, duplicative, or in line with the Agency's workload and prioritization of cases. The Agency may also wish to consider whether the claim raises a serious issue to be tried or, as Abella J. has done, whether the complaint is based on sufficient evidence. It is not for this Court to tell the Agency which of these methods is preferable. Deference requires that we let the Agency determine for itself how to use its discretion, provided it does so reasonably.

[31] As a starting point in this analysis, the Board did not address the standing of the UTA to bring a complaint when it decided to initiate an inquiry. Initially, in a letter dated June 13, 2018, and filed with the Board on June 26, 2018, the UTA requested that WHRC's Operating License "…be revoked as it is my opinion that this company does NOT intend to operate a railway in Nova Scotia." The letter addressed certain matters related to the *CTA*, including an alleged failure to follow that regulatory scheme with respect to the potential purchase, from Canadian National Railway Company (CN), of a

portion of the railway to which the Operating License is applicable. The letter also discussed the potential use of railway corridors to build public trails.

[32] The Board responded on July 11, 2018, stating in part:

> After receiving your correspondence, Board Member Melanson felt it advisable that the scope, and limits, of the Board's jurisdiction under the *Railways Act,* S.N.S. 1993, c. 11, as amended, be clarified in relation to the issues raised by your correspondence.
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> Firstly, the Board plays no role and has no jurisdiction to address any issues with respect to the potential sale of the portion of the rail line from Windsor Junction to the Town of Windsor, currently owned by Canadian National (CN), in relation to whether the process followed conforms with any legislation administered by the Canadian Transportation Agency, such as the *Canadian Transport Act,* S.C. 1996, c. 10, as amended, or regulations made under that Act.
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> Secondly, the Board does not make any determinations on whether it is in the public interest to have a railway corridor become a part of a public trail system.

[33] The July 11, 2018 letter went on to explain the Board's jurisdiction and stated:

> Therefore, in order to proceed further with this request for revocation, the Board would require further particulars as to what conduct on the part of the W&HRC is alleged to contravene the Act, regulations, or the terms and conditions of W&HRC's license.
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> It would be helpful to the Board if specific provisions of the Act, regulations, or terms and conditions of the license were referenced in relation to the alleged conduct.

[34] After making a number of inquiries of the Board and DTIR, the UTA formulated a complaint letter dated September 28, 2018. The Board would summarize the alleged contraventions of the *RA*, regulations and WHRC's Operating License as follows:

- The WHRC has effectively discontinued and abandoned service without following the process set out in the *RA* and the *Railway Discontinuance of Services and Abandonment Regulations;*
- WHRC has not provided proof of financial viability or the correct type of proof of insurance to the Board;

- WHRC has altered sections of its railway without following the process set out under the *RA* and *Railway Notifications and License Regulations*;
- As the preamble to the Operating License says it is for the purpose of operating a railway, the failure to so operate is a violation thereof;
- Certain specific violations with respect to safety inspection reports and safety standards under the Operating License; and
- A safety violation related to the Hantsport aboiteau.

[35] On October 5, 2018, the Board advised that it had determined that the UTA's correspondence constituted a complaint pursuant to s.39 of the *RA*. It initiated an inquiry by requesting a response from WHRC. Therefore, having determined the complaint met the technical requirements of the *RA*, the Board initially exercised its discretion to initiate an inquiry without considering the standing issue.

[36] The issue of standing had never previously been raised before the Board under the *RA*. Given there are only two railway companies governed by the *RA,* complaints pursuant to this Board mandate are very rare. The Board simply adapted some aspects of the complaints process it uses under the *Public Utilities Act,* R.S.N.S.1989, c. 380 (*PUA*), where standing is seldom an issue. That said, as the issue of standing is now squarely before the Board, with the benefit of a substantial record for context, together with full legal arguments, it must be addressed, regardless of the path initially undertaken as described above. It is important that standing issues be analyzed in a principled manner and not on an *ad hoc* basis.

[37] Despite counsel for WHRC's attempt to minimize the importance of *Delta Air Lines*, the case is clearly instructive, given the similarity of the legislative language in

the respective inquiry powers of the Agency and the Board. While there are other similarities between the two legislative schemes, there are also key differences. This is important, given that like an exercise in statutory interpretation, *Delta Air Lines* makes a direct link between the manner in which the Agency should address its discretion to hear a complaint and whether it is consistent with the overall statutory regime it is called upon to oversee.

[38] As discussed in *Delta Air Lines*, s. 25 of the *CTA* conferred upon the Agency the following powers:

> **25** The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

[39] Section 16 of the *UARB Act* indicates a Board member acting within her jurisdiction has all the powers, privileges and immunities of a commissioner appointed pursuant to the *Public Inquiries Act*, R.S.N.S.1989, c.372. Section 5 of the *Public Inquiries Act* says:

> 5 The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court.

[40] While the language related to Board members' powers, privileges and immunities is somewhat narrower than found in the *CTA*, the legislative scheme makes it clear that, like the Agency, the Board plays the primary role in determining its process. Combined with an almost identical statutory provision, the Board is satisfied that it has the discretion to consider standing issues on a basis other than the common law standing tests.

[41] Despite the comments in *Delta Air Lines* that the Agency could have proceeded with the complaint without considering the standing of the complainant at all, the Board is not persuaded by the arguments that it should exercise its discretion under the *RA* in this manner. *Delta Air Lines* noted that the Agency had the express power to initiate investigations on its own motion. This included the subject matter of Dr. Lukacs' complaint. If an investigation can be initiated without a complaint, traditional standing issues become less relevant.

[42] The Board has similar broad powers to investigate matters on its own motion in some mandates. These include s.19 of the *PUA* in relation to public utilities and s. 32(1) of the *Motor Carrier Act*, R.S.N.S. 1989, c.292, which is also a transportation industry licensing statute. That express power is absent from s.39 (1) and is not found elsewhere in the *RA*.

[43] While the Board would not completely exclude the possibility of having the discretion to initiate an inquiry on its own motion in certain situations, if that power exists, it should probably only be exercised in exceptional circumstances. In this regard, the Board generally agrees with WHRC that the inquiry process under s.39 (1) is complaints-driven.

[44] This is particularly the case where the Minister, who oversees many parts of the legislative scheme, including safety inspections and railway abandonment applications, has, pursuant to s.36 of the *RA*, the broad power, without the need for a complaint, "…to cause an investigation to be made relating to any matter or thing respecting a railway." This potential avenue for an investigation suggests the Board's

discretion under s.39(1) should not ordinarily be exercised so broadly as suggested by the UTA and the Intervenors.

[45] Turning to how the Board should exercise its discretion in this case, the Board finds that the private interest test is too restrictive for regulatory statutory regimes designed to protect not only customers of the railway but the public at large and to generally regulate railway corridors. That said, a party with a direct interest in the subject matter of a complaint within the Board's jurisdiction, which is the case in the vast majority of complaints brought to the Board under its various mandates, would ordinarily not raise any standing issues.

[46] As the regulated railways under the *RA* are private companies, the public interest standing test, to the extent it focuses on constitutional issues, is not appropriate. As well, while the "real and substantial interest" test discussed above provides guidance, the extent of the complainant's interest in the matter must be balanced with the seriousness and importance of the issue raised. The main concern is to avoid having complaints from parties who have an insufficient interest in the subject matter, or parties with an improper purpose, who may have limited ability or incentive to assist the process. Administrative efficiency must also be considered, including whether there is a clearly more effective way to address the issue.

[47] The Board considers the following elements gleaned from *Delta Air Lines* should be considered in this case:

- The importance of the issues raised in the context of the Board's role in the *RA* regulatory regime and its prioritization of matters under all its mandates arising from 40 different statutes;

- The degree to which the UTA has a genuine interest, or a real and substantial interest, in a legal sense, in the subject matter of the complaint, including whether the complaint is brought for an improper purpose;
- Whether the complaint is timely, vexatious, frivolous, or duplicative; and
- Whether there is a more efficient and effective way to have the matter addressed.

[48] Not all of the above factors are implicated in every standing analysis. In the matter before the Board, as the alleged conduct giving rise to the complaint is ongoing, the Board does not consider issues of timeliness arise. As well, the issues raised give rise to real, and in many ways, novel, legal considerations. They are not vexatious or frivolous. The issue of duplication forms part of the analysis on effectiveness and efficiency.

[49] In assessing the relevant factors, the Board must be mindful of the scope of its role under the *RA*. Section 2 of the *RA* says its overarching purpose is "…to ensure the safe operation of railways in the Province." The Minister has retained many of the powers required to achieve that purpose, including inspection powers and duties. The Board employs no safety inspection personnel. The Minister also has responsibility for the approval of railway rules. The Operating License, incorporated by reference in the *RA*, sets out direct inspection and safety reporting requirements with the Province. While s 52A makes the Operating License subject to the *RA*, it contains an arbitration provision related to dispute resolution.

[50] In addition to the broad investigative powers previously discussed, there is a complaints process directly to the Minister, pursuant to s.35 of the *RA*, with respect to safety and state of repair issues which can result in an inspection being ordered. As well,

that provision allows the Minister to initiate inspections if it is considered necessary. Upon receipt of the results of the inspection, the Minister can make certain orders restricting the operation of the railway and requiring repairs.

[51] The Minister has the power to make emergency directives to address safety issues pursuant to s.37 of the *RA*. As noted during the hearing, the Minister also has the power to initiate an inquiry pursuant to s. 38 of the *RA*. That said, such an inquiry must be held "in accordance with the regulations…" There are currently no regulations governing the conduct of such an inquiry.

[52] The Board's primary functions under the *RA* are with respect to initial licensing under ss. 16 and 17, including whether an applicant has met the prescribed safety standards, obtained the prescribed insurance and has shown proof of financial viability to provide the applied for railway service. With respect to safety standards, s.18 requires an inspection from a railway inspector.

[53] The Board is also responsible for approval of licensing amendments and renewals. Of note, the Board has never received an application for a license to operate a railway service. In the case of the two operating licenses in existence under the *RA,* agreements with the Province were expressly incorporated by reference and deemed to be operating licenses issued under this legislation.

[54] As an adjunct to the complaints process described above, s. 21 provides the Board with the authority to suspend or revoke a license for failure to adhere to the *RA*, regulations enacted under the *RA*, or its operating license. While not every complaint will necessarily implicate s.21 of the *RA*, principles of fairness and natural justice require that a railway company have a fair opportunity to respond before any such action is taken.

[55] By virtue of s.26 of the *RA*, the Board also has the power to order or waive reasonable accommodations with respect to the receiving, loading, carriage, delivery and unloading of freight and address interconnection issues pursuant to s.30.

[56] Section 41 of the *RA* relates to discontinuance of service, which is prohibited unless the railway company provides notice and a reasonable discontinuance plan, as approved by the Board. The discontinuance process is set out in *Railway Discontinuance of Services and Abandonment Regulations*. The focus of these regulations is to ensure adequate notice and a proper discontinuance plan to allow rail service customers to transition to another mode of transportation.

[57] If the Board approves the notice period and discontinuance plan proposed by the railway company, and no other railway company applies to operate the line within the prescribed time, it triggers a process which can ultimately lead to abandonment of the railway line. No abandonment can take place without ministerial approval. Pursuant to s.44 of the *RA,* once an abandonment plan is approved, the Province ultimately may have the right, but not the obligation, to acquire the railway line.

[58] While not directly impacting the analysis, the Board notes s. 44 of the *RA* is confusing, as it speaks in terms of the Board approving an abandonment plan. Section 42 of the *RA*, and the *Railway Discontinuance of Services and Abandonment Regulations*, make it clear the abandonment plan must be submitted to the Minister for approval. As well, the *Railway Discontinuance of Services and Abandonment Regulations* allow for a process where both the Province, and the municipalities through which the railway runs, can offer to purchase the railway line if no company steps in to acquire and

operate it after discontinuance. Section 44 of the *RA* only provides this right to the Province.

[59] The Board has jurisdiction with respect to certain construction or alterations associated with a railway line pursuant to the *Railway Notification and Licence Regulations.* It also has some jurisdiction with respect to private crossing fees over railway lines pursuant to the *Private Railway Crossing Fees Regulations*, which regulations are not implicated in the complaint.

[60] The UTA's complaint raises a number of issues. The standing analysis, keeping in mind the above-described legislative scheme, is not uniform with respect to these various issues. They can be divided into the following themes:

- Safety issues;
- Discontinuance and abandonment process issues;
- Notifications related to railway construction and alterations;
- Filing requirements with respect to financial viability and insurance; and,
- Failure to operate in accordance with the Operating License.

a) Safety

[61] Safety is the most important objective of regulation pursuant to the *RA*. That said, safety concerns are tempered by the fact that no trains are currently running on the railway line in question. As well, with the possible exception of the Hantsport aboiteau matter, which is being addressed in another process, the types of safety concerns raised do not appear to require immediate action, given the current status of the railway operations.

[62] The degree to which a complainant must have an interest in the subject matter of the proceeding is a flexible concept. The Board has always been liberal in its application of the "real and substantial interest" test in relation to intervention or participation in matters before it.

[63] The Board allowed numerous public interest groups, including political parties, to participate in discontinuance proceedings involving the *Cape Breton & Central Nova Scotia Railway Limited,* 2015 NSUARB 6. In fact, with the possible exception of planning matters, where a restricted appellate jurisdiction is exercised, and the legislation outlines which parties should ordinarily be allowed to participate, occasions where the Board has denied standing are somewhat rare. An example would be M06208, which was an application to dissolve the Town of Bridgetown, where a public interest group had no significant connection to the subject matter of that proceeding.

[64] In this case, the UTA has no direct interest in the operation of railways. It is not a railway customer, or someone in the supply chain serviced by the railway. The UTA does not own property impacted by WHRC's railway operations. Its mandate does not relate to railway safety and it has raised no expertise in this area.

[65] While the UTA may have a general interest in the proper functioning of the legislative scheme, its primary purpose in raising these issues appears to be to bring to a head what it sees as a non-operating railway company which has not followed the proper procedures for discontinuance and abandonment, with the hope that the railway corridor will eventually be bought by the Province for use as public trails.

[66] A general concern for the proper operation of a legislative scheme is not sufficient to ground standing in this case, particularly where there is a more effective and

efficient mechanism to address safety issues, even in the absence of railway customers, by a party which does have a mandate to address safety issues.

[67] As discussed above, the Minister has access to railway inspectors who should be able to assess the seriousness and immediacy of safety issues. There is a process under the *RA* to address any safety concerns. The process would also allow the Minister to objectively assess whether the circumstances which give rise to any safety issues, including the conduct of the railway company, warrant seeking disciplinary action through the complaints process.

[68] Absent parties who are directly impacted by the operation of a railway, or who might otherwise have a railway safety mandate, this would appear to be the most effective way to bring forward safety complaints. It would alleviate certain issues which have arisen in this proceeding, where the UTA, which, as the complainant, is ostensibly responsible for leading the complaints process, has on occasion indicated a lack of resources in its submissions. It would also provide for the party with access to expertise and the most documentation to lead the process.

[69] For the foregoing reasons, the Board finds the UTA does not have standing to bring the safety related complaints before the Board.

b) Discontinuance and abandonment

[70] The Board has long been aware that the WHRC has not been operating trains over its railway lines because its last customers ceased to utilize its services. All the parties before the Board have also long been aware of this state of affairs. The fact is that the scheme of the *RA*, including the discontinuance provisions, contemplate an active railway.

[71] The Board had not, in the past, advised either WHRC or DTIR that it considered the discontinuance process had been triggered, where trains were no longer running because the railway company no longer had any customers. The issue has been brought into focus before the Board, where parties have cited certain cases before the CTA which discuss temporary discontinuance and *de facto* discontinuance. The Board notes that the discontinuance regime, and applicable legal tests, are different under the *RA* and the federal legislation.

[72] While adherence to the legislative scheme is undoubtedly an important issue, the main purpose of the discontinuance regime under the *RA* and regulations is to provide adequate notice to those who use the railway service, to a maximum of 12 months, and to provide a discontinuance plan.

[73] The purpose of the discontinuance plan was explained by the Board as follows:

> In the Board's view, the discontinuance provisions of the *Act* are there to permit customers to make reasonable alternate arrangements during the period of discontinuance which will be in place once the discontinuance period ends to allow them to receive the goods they require.
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> [2015 NSUARB 6, para.124]

[74] Therefore, the primary purpose of the discontinuance provisions is not to trigger an eventual abandonment application, over which the Board has no jurisdiction. Given the history behind the creation of provincial legislation to encourage short-run provincial railways to replace CN's inter-provincial railway operations in the face of abandonment, an interpretation of the *RA* which promotes the continued existence of railway corridors appears to be a reasonable approach.

[75] In any event, the significance of any alleged failure to initiate a discontinuance proceeding is lessened where there are no customers to give notice to or

who require alternate arrangements as part of a discontinuance plan. It is in this context that the flexible approach to the “real and substantial interest” test must be considered.

[76] Whether or not discontinuance has occurred raises issues of fact and mixed fact and law. This is different than the inspector expertise issues raised by railway safety concerns. In considering the interest of the UTA in the subject matter of the complaint, the Board is led to the same conclusion as to the primary aim of the UTA. It is to achieve a result where the Province, or the municipalities through which the railways run, are in a position to purchase WHRC’s railway line pursuant to the abandonment provisions of the regulations. The hope is that these lands can be converted to public trails after such an acquisition.

[77] One could argue that the actions of WHRC, in apparently converting some portions of its railway lines for use as public trails, as the photographic evidence tends to illustrate, has opened the door to the UTA being able to claim it has a genuine interest in this proceeding. On balance, the Board is not persuaded this is the case. In the first place, this potential outcome is not related to the discontinuance process. Abandonment would be required. In the Board’s opinion, the object of the abandonment provisions is to initially allow for the preservation of the railway corridor for railway usage. The provisions which allow, but do not obligate, the Province or municipalities to purchase the railway corridor, only come into play if there is no expression of interest by a railway operator. Therefore, in the Board’s view, the UTA has only a speculative interest in the subject matter of the proceeding related to discontinuance an abandonment which is insufficient to ground standing to bring a complaint.

[78] In the Board's view, if it is alleged the WHRC has failed to follow the discontinuance/abandonment process, because it no longer has customers and has used its assets for other than railway purposes, a party with a more direct interest would be required.

[79] Such a party does exist. DTIR, representing the Minister, no doubt has standing to initiate a complaint, or to cause a matter to be investigated. DTIR can represent the public interest at large and balance the object of promoting railways in the province with other considerations. DTIR also has all the required information to decide whether a complaint is warranted.

[80] In the final analysis, the Board would not describe the UTA's interest and purpose as improper, in the pejorative sense of the word. Rather, from a legal standpoint, it is not sufficiently tied to the objects and purposes of the *RA* to ground the UTA's status as a complainant.

c) Notifications related to railway construction and alterations

[81] The *Railway Notification and Licence Regulations* require that the Board be notified of certain railway construction alterations. The types of construction and alterations subject to the requirement can be summarized as follows:

- The acquisition of additional land from adjacent owners for the realignment of any existing railway line;
- Constructing or altering any crossing of a public road;
- Constructing or altering any crossing of a railway line with any other railway line;
- Constructing or altering any tunnel or railway bridge over 3 meters in length.

[82] The wording of the regulations does not make it entirely clear whether the construction and alterations must be approved by the Board. That said, it is clear that the listed types of construction and alterations were intended to address safety issues. They would ordinarily contemplate a railroad which is currently providing a service to customers.

[83] It is alleged some of the changes to the railway relate to covering the line where it intersects with public roads. This is the type of alteration or construction addressed in the regulations. In direct answers to UARB IRs-6 and 7, WHRC indicated this was not the case. The Board does not have to make a final determination on the issue, given its standing analysis based on the purpose of the provisions.

[84] The same analysis discussed above with respect to the UTA's lack of a real and substantial interest in the subject matter of this component of the complaint is engaged. The notification provisions relate to safety and the proper operation of the railway. The UTA does not have a sufficient nexus with these issues to be granted standing as a complainant.

[85] The Board notes that the facts surrounding the railway construction and alterations, which appear related to providing public trails while the railway is not in use, are readily ascertainable through inspection. If such inspections by DTIR reveal a contravention of the regulations, it is always open for the Minister to bring a complaint, after having made an initial assessment as to whether such a course of conduct is warranted.

d) Filing Requirements re financial viability and proof of insurance

[86] The Board will now address the portion of the complaint related to alleged failures to file the proper proof of insurance and proof of financial viability. The regulations suggest financial statements might fulfill the proof of financial viability obligation. In relative terms, these are not the most pressing issues where the company is not running railway cars.

[87] The Board has been aware of the form of insurance filed by WHRC for some time. It has been satisfied it provides adequate coverage for third party liability in the circumstances WHRC currently finds itself in. It would not be appropriate for the Board to pursue disciplinary action at the request of a stranger to the railway operations, without any public safety mandate, to address an issue where the Board itself has not raised concerns with WHRC in the past. Rather, the Board will review the matter to see if changes to the insurance filings are needed.

[88] With respect to proof of financial viability, given how WHRC's licensing occurred, the Board has never requested this type of information. It would similarly be inappropriate at this stage to grant standing to the UTA, which is not impacted directly or indirectly by WHRC's financial viability, to maintain a complaint seeking a disciplinary penalty for this alleged transgression. The Board will review the legislative requirements and determine what, if anything, should be obtained from WHRC in this regard.

e) Failure to operate in accordance with the Operating License

[89] This component of the complaint is founded on three essential aspects: the alleged failure to operate a railway; the alleged failure to provide inspection reports and other documentation, and meet the safety standards, set out in the Operating License;

and, the expiration of a leasing agreement with CN over a portion of the railway line covered by the Operating License.

[90] All the component elements of this portion of the complaint really relate to issues of safety and whether in fact WHRC is operating a railway, or intends to operate a railway (or is even capable of operating a railway with respect to the CN portion of the line). Therefore, the same basic analysis discussed above with respect to safety, discontinuance and abandonment are raised. In the Board's opinion, the UTA is simply not the proper party to make a complaint in relation to these matters.

4.0 GIVEN THE HANTSPORT ABOITEAU MATTER PENDING BEFORE THE SUPREME COURT OF NOVA SCOTIA, TO WHAT EXTENT DOES THE BOARD HAVE JURISDICTION TO HEAR THE COMPLAINT?

[91] As the Board has granted WHRC's motion based on standing issues, this issue need not be addressed. This in no way is meant to endorse the submissions of WHRC with respect to the interplay between ss. 22 and s.23 of the *UARB Act ,* which WHRC says preclude the Board from proceeding where an issue of law or mixed fact and law relevant to the determination of a matter before it is before the courts. As raised by the Board during the hearing, the *UARB Act* applies to all the Board's mandates. The limitations on the Board's ability to proceed with its various mandates, often involving ongoing regulatory oversight, or similar legal issues in various proceedings, would be severely impaired if WHRC argument were accepted.

[92] In order to avoid duplication and the possibility of inconsistent results, the Board has usually held matters in abeyance if there are related proceedings before the courts. An example appears in the record in this proceeding with respect to the Hanstport aboiteau, where an impacted party had raised the issue with the Board. That said, the

most reasonable interpretation of ss.22 and 23 of the *UARB Act* is that it provides the Board with discretion to proceed, if the circumstances warrant, even where such related matters are being considered by the courts.

5.0 CONCLUSION

[93] The Board is mindful that considerable effort has been expended to date as part of this proceeding. Nevertheless, it has been convinced that the UTA is not the proper party to bring a complaint with respect to the issues raised before it. This proceeding should therefore not continue based on the UTA's complaint.

[94] The remedy which has been requested, if granted, would effectively terminate WHRC's ability to operate a railway and could ultimately lead to the forced sale to the Province. These are significant potential repercussions. It is important that WHRC be fully aware of the case it must meet. If these remedies are to be sought, and the Board makes no comment on whether they will be, or should be, the Board is of the view the process should be led by a party with a real and substantial interest, in the legal sense, in the outcome of the proceeding.

[95] In the Board's opinion, it is not sufficient that DTIR, for example, which has such an interest, is an Intervenor in the process. There are potential procedural and fairness issues, related to the ability of WHRC to respond to the case it has to meet, which could arise where the complaint is not framed by such a party.

[96] After reviewing the totality of the record, which was very helpful in providing context, and the very able legal arguments of the participants, the Board finds as follows:

- While not completely precluding the possibility that the Board could initiate a complaints process on its own pursuant to s.39 of the *RA*, the legislation primarily contemplates a complaints-driven process;
- The applicable standing test the Board has developed in this proceeding for complaints under the *RA* has the following elements;

  i) The importance of the issues raised in the context of the Board's role in the *RA* regulatory regime and its prioritization of matters under all its mandates arising from 40 different statutes;

  ii) The degree to which the complainant has a genuine interest, or a real and substantial interest, in a legal sense, in the subject matter of the complaint, including whether the complaint is brought for an improper purpose;

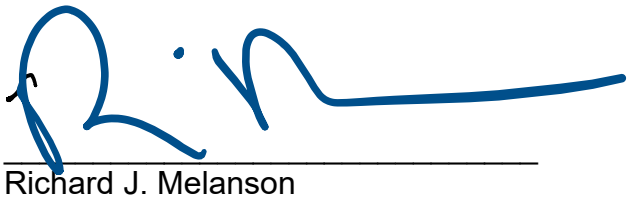
  iii) Whether the complaint is timely, vexatious, frivolous, or duplicative; and

  iv) Whether there is a more efficient and effective way to have the matter addressed.

[97] Taking all of the above into consideration, the Board finds the UTA does not have a sufficient nexus with the subject matter of the complaint to establish standing, when analyzed in the context of the legislative framework, the relative importance of the issues, and more effective and efficient alternative processes.

[98] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 23 day of December, 2020.



Richard J. Melanson