



File OF-Surv-AMP-2015-005
10 March 2016

LETTER DECISION

Mr. Guy Jarvis
President
Enbridge Pipelines Inc.
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Mr. Robert Steedman
AMP Officer
National Energy Board
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Ms. Laura Estep
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Dear Messrs. Jarvis and Steedman and Ms. Estep:

**Enbridge Pipelines Inc. (Enbridge)
Review of AMP-005-2015 (Environment) Letter Decision
Pursuant to Section 21 of the *National Energy Board Act* (NEB Act)
National Energy Board (NEB or Board) Letter Decision**

BACKGROUND

In letter decisions released 5 February 2016, the Board ruled on the reviews of AMP-004-2015 and AMP-005-2015, which were requested by Enbridge pursuant to sections 144 and 147 of the NEB Act on 25 March 2015. In its respective decisions, the Board rescinded AMP-004-2015 and affirmed AMP-005-2015 but reduced the penalty from \$100,000 to \$76,000 (Letter Decision).

In its AMP-005-2015 review decision, the Board stated that in accordance with its process, it had received the AMP Officer's disclosure package (Disclosure) on 24 April 2015, and subsequent submissions from Enbridge on 25 May 2015 (Review Submission), and from the AMP Officer on 24 June 2015. The Board also noted that Enbridge did not file a reply to the AMP Officer's response submission, an opportunity afforded by the Board's procedural letter dated 10 April 2015.

Subsequent to releasing the decisions described above, the Board became aware that due to an administrative error, it was not aware that Enbridge had filed, on 24 July 2015, final reply submissions in respect of both AMP-004-2015 and AMP-005-2015 (Final Reply).

Consequently, and in accordance with section 21 of the NEB Act, the Board has decided on its own motion to review the Letter Decision. As AMP-004-2015 has already been rescinded, the Board considers any review of its decision with respect to that violation to be moot.

DISPOSITION

After reviewing the evidence on the record and the complete record of submissions by Enbridge and the AMP Officer, the Board remains of the view that Enbridge committed the violation as set out in the Notice of Violation for AMP-005-2015, and that the amount of the penalty was correctly reduced to \$76,000 in the Letter Decision. The Board also adopts the reasons set out in the Letter Decision and provides additional reasons regarding arguments not addressed in the Letter Decision.

ANALYSIS

Enbridge's Final Reply

In its Final Reply, Enbridge argues that as a matter of fairness and natural justice it must have the opportunity to know the case to be met so that it may address prejudicial evidence and bring forward additional evidence to prove its positions. According to Enbridge, the lack of complete disclosure by the AMP Officer creates significant uncertainty as to the precise documents that were relied upon and the omission of half of the Environmental Protection Plan (EPP) should be fatal to the AMP given that this violation is based on alleged breaches of that very document.

Enbridge submits that the Missing Records, as defined and attached to its Review Submission, provide direct and relevant evidence to the contrary of the majority of the AMP Officer's assertions and evidence. Enbridge also alleges that the July Inspection and the Inspection Officer Order (referred to as the Stop-Work Order in Enbridge's submissions) were procedurally unfair and a violation founded on a procedurally unfair process is a breach of procedural fairness.

Enbridge requested that the Board provide guidance regarding what could have been done, and what could be done in the future, to provide assistance to the Board in case a gravity value greater than "-2" is ascribed to the reasonable assistance to Board with respect to a violation.

In the Final Reply, Enbridge requested that the Board rescind the violation or, in the alternative, reduce the penalty to \$88,000.

Views of the Board

As noted in the above, the Board adopts the Letter Decision and its reasons. The Board also provides the following additional reasons regarding arguments not addressed in the Letter Decision.

Incomplete Disclosure

Before addressing Enbridge's submissions regarding incomplete disclosure, and for clarity, the Board would like to note that there are two distinct burdens of proof that the AMP Officer must meet. The first one is established by section 139 of the NEB Act, which gives discretion to the AMP Officer to issue a notice of violation (NOV), if he believes on reasonable grounds that a person has committed a violation. The second burden of proof (on a balance of probabilities) is set out in section 148 of the NEB Act and it is applicable on review of the facts of the violation applicable to this review.

The Supreme Court of Canada stated in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at para 114, with regard to reasonable grounds to believe:

“The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)*, 2000 F.C.J. 1615 (F.C.T.D.).”

The Board notes that the all of the EPP commitments alleged by the AMP Officer to have been breached by Enbridge are found in Part 1 of the EPP, which was submitted by the AMP Officer in the Disclosure. The Disclosure also included the Inspection Report dated 9 July 2014, and related information. The Board finds that there is no uncertainty as to the documents the AMP relied upon. The Board is of the view that the information included in the Disclosure is compelling and credible, and provided an objective basis for the AMP Officer’s belief that the violation occurred when he issued the NOV. As provided in the Letter Decision, the Board also found on a balance of probabilities that Enbridge committed the violation.

The Board does not agree with Enbridge that the information not included in the Disclosure is fatal to the AMP. The review of AMP 005-2015 provided an opportunity for Enbridge to file additional information relating to the AMP for the Board’s consideration. As part of its Review Submission, Enbridge submitted Part 2 of the EPP and additional information which was considered by the Board. Enbridge did not provide any specific examples of how the omission of Part 2 of the EPP in the initial Disclosure deprived Enbridge of any opportunity to address prejudicial evidence with respect to the violation.

Breaches of Procedural Fairness

As noted above, Enbridge argues that the July Inspection and the Inspection Officer Order were procedurally unfair and a violation founded on a procedurally unfair process is a breach of procedural fairness. The Board will address both points.

The Board is of the view that the violation is supported by the information gathered during the July Inspection, including the Inspection Report and related photographs.

In relation to the July Inspection process being unfair, the Board notes that inspections (such as the July Inspection) are conducted by Board Inspectors in accordance with sections 49, 50 and 51 of the NEB Act. The Board is not persuaded that the Inspectors failed to follow the appropriate process in performing the July Inspection.

Having found that the violation is supported by the July Inspection evidence, the Board is of the view that the Inspection Officer Order process is not relevant to the question of whether the violation was committed. However, the Board will provide the following comments on the Inspection Officer Order process. The Inspection Officer Order was issued based on the Inspector’s observations and evidence gathered during the July Inspection. The Inspection Officer Order was issued by the Inspector pursuant to section 51.1 of the NEB Act. Section 51.2 of the NEB Act provides for a review process of Inspection Officer Orders before the Board. Enbridge did exercise the right to a review of the Inspection Officer Order, which review request was withdrawn after the Inspector lifted the Inspection Officer Order because Enbridge met the conditions in it. It follows that Enbridge was provided with the opportunity to challenge the

Inspection Officer Order in accordance with the NEB Act. The Board is not persuaded by Enbridge that the Inspection Officer Order was a result of an unfair process.

With respect to the reasonable assistance to the Board, the Board maintains the view that the gravity value ascribed in the Letter Decision is appropriate. In its earlier review, the Board agreed, in part, with Enbridge's submissions, and reduced this factor to "0". The Board notes that Criterion five (5) in the *Administrative Monetary Penalties Regulations (National Energy Board)* states the following:

"Whether the person provided all reasonable assistance to the Board with respect to the violation"

In the Board's view, a gravity value of "-2" may be reserved for cases where a company has taken extraordinary measures in providing all reasonable assistance to the Board. What would constitute all reasonable assistance to warrant a gravity value of "-2" is a fact-specific determination that will depend on the circumstances of each case. Predicting any future application of this factor in a vacuum and without specific facts is a very difficult, if not an impossible task.

[REDACTED]

C.P. Watson
Presiding Member

[REDACTED]

R.R. Wallace
Member

[REDACTED]

D. Hamilton
Member