Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation,

respondent.

Board File: 28805-C
Neutral Citation: 2012 CIRB **627**
February 17, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Daniel Charbonneau and André Lecavalier, Members. The Board held a hearing limited to legal argument in Ottawa, Ontario, on September 20, 2011. The parties later provided further submissions in writing, the last of which was received on November 9, 2011.

Appearances

Mr. Gaston Nadeau, for the Canadian Union of Postal Workers;
Mr. John D. R. Craig, for the Canada Post Corporation.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I–Nature of the Application

[1] This case focusses on the parties' rights during a three-day period from May 30 to June 2, 2011. The main issue examines whether an employer can change employees' terms and conditions of employment after the statutory freeze has expired, without first giving a lockout notice.

[2] On June 10, 2011, the Board received a Complaint from the Canadian Union of Postal Workers (CUPW) alleging that Canada Post Corporation (CPC) had violated, *inter alia*, sections 50, 92 and 94 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*).

[3] CUPW alleged that following the expiration of the statutory freeze, and upon receipt of a strike notice, CPC's immediate change to employee working conditions constituted, *inter alia*, an illegal lockout.

[4] CPC filed its Response on June 27, 2011. In CPC's view, it had the right to change employees' terms and conditions of employment at any time after the statutory freeze ended on May 25, 2011. CPC argued that the exercise of its *Code* rights could not constitute a lockout, an unfair labour practice (ULP), or a violation of its obligation to bargain in good faith.

[5] The parties agreed on the material facts. As a result, on September 20, 2011, the Board held an oral hearing, which was limited to legal argument. After the hearing, the parties filed further written submissions, the last of which the Board received on November 9, 2011.

[6] While CPC presented its argument first at the oral hearing, there was no dispute that CUPW bore the burden of proof for its Complaint, other than for its allegations of a violation of section 94(3) of the *Code*.

[7] The Board has decided that the *Code* does not prevent an employer from changing the terms and conditions in the expired collective agreement once the statutory freeze has ended. However, since CUPW and CPC negotiated a bridging clause in their collective agreement, and its proper interpretation is the subject of a policy grievance, the Board will apply section 98(3) of the *Code* and

leave any further analysis to the arbitration process.

[8] While the parties are not bound, once the statutory freeze has ended, by the terms and conditions of employment in the expired collective agreement, this does not prevent an employer's or trade union's subsequent actions from constituting an unlawful strike or lockout. In the circumstances of this case, however, CPC's decision no longer to be bound by the terms of the expired collective agreement did not meet the requirements for an illegal lockout under the *Code*.

[9] The Board has also decided to apply section 98(3) of the *Code* and not determine CUPW's ULP complaints alleging violations of sections 94(1) and (3). Given that the parties negotiated a bridging clause, the Board is of the view that the essence of these matters will be resolved by an arbitrator's interpretation of that clause.

[10] Finally, the Board finds that CPC did not violate its obligation to bargain in good faith when it changed the terms and conditions of employment sometime after the expiration of the statutory freeze.

[11] These are the reasons for the Board's conclusions.

II–Facts

[12] CUPW represents a bargaining unit at CPC with approximately 48,000 employees. The collective agreement between CPC and CUPW had a term of May 3, 2007 to January 31, 2011.

[13] On October 4, 2010, CUPW served CPC with a notice to commence collective bargaining.

[14] On January 21, 2011, CUPW sent a Notice of Dispute and Request for Conciliation to Human Resources and Skills Development Canada (HRSDC).

[15] During collective bargaining, CPC and CUPW agreed to extend the mandate of the Conciliator, Mr. Jacques Lessard, until May 3, 2011.

[16] On or about May 12, 2011, CPC sent a letter to CUPW asking for a payment of $13,308,000.00 prior to May 20, 2011, in order to maintain in force the group benefit plans applicable to members of the bargaining unit. CPC's letter stated:

> Your union will be in a legal strike position as of May 25, 2011.
>
> Section 94(3)(d.1) of the *Canada Labour Code* provides for the continuation of various benefits while your group is in a legal strike position if the bargaining agent tenders premiums or payments sufficient to continue the plans.
>
> As a result, the Extended Health Care, Dental, Vision/Hearing, Disability and applicable life insurance plans will be continued upon payment by CUPW of an amount representing one month's premiums across the bargaining unit.
>
> This amount has been calculated to be $13,308,000 and must be tendered no later than 5 p.m. on May 20, 2011. If the duration extends beyond the initial one-month period, an additional amount will be required prior to the commencement of each subsequent month.
>
> In order that we can make the proper arrangements we ask that you inform us of your intention in this regard by no later than 17:00 hours Monday May 16, 2011.
>
> In the event that no payment is received by the above date, the benefit plans above will be suspended. All employees will be duly informed of your decision in this regard.

[17] CUPW contested CPC's May 12, 2011 letter and CPC's interpretation of the *Code*:

> I acknowledge receipt of your letter dated May 12, 2011 regarding our members' benefit plans. CUPW totally disagrees with your interpretation of the Corporation's rights and obligations in this situation.
>
> First of all, I would like to draw your attention to the fact that Section 94(3)(d.1) of the *Canada Labour Code* applies to employers and prohibits the unfair labour practice described therein. This provision does not outline the working conditions that are applicable while the Union is in a legal strike position. Therefore, your interpretation is wrong at the outset.
>
> CUPW believes that all working conditions outlined in the collective agreement continue to apply after it obtains the right to strike for as long as there is no strike action or lock-out, unless the employer and the bargaining agent agree otherwise.
>
> As long as there is no strike or lock-out, the benefit plans must continue to apply under the same conditions as before.
>
> We consider your letter of May 12 as notification that the Corporation intends to unilaterally amend the working conditions in the absence of a strike or lock-out. Such action would be totally illegal.

[18] On May 18, 2011, CPC responded to CUPW and advised that working conditions for members of the CUPW's bargaining unit would change, but only if CUPW issued a strike notice:

> This letter addresses the issue of a settlement in the current negotiations not being reached and your bargaining unit acquiring the legal right to strike and Canada Post acquiring the legal right to lockout.
>
> Although we would prefer a settlement and remain hopeful that one can be reached, we must be cognizant of the status of the collective agreement. The purpose of this letter is to set out the new terms and conditions of employment that will apply upon conclusion of the extension of the collective agreement.
>
> In the event that a notice of a work disruption, which complies with section 87.2 of the *Canada Labour Code*, is provided, the terms of the current collective agreement between Canada Post and CUPW will no longer apply. In such a case, but no earlier than May 25, 2011, the terms and conditions of employment of all CUPW-represented employees (urban) will revert to the statutory minimum conditions established by Part III of the *Canada Labour Code*, with the exception of the following:
>
> PAY
>
> An employee will be paid for time worked at the rate of pay to which he/she was entitled on the day prior to the date upon which the provisions of the collective agreement ceased to apply.
>
> BENEFITS
>
> Under the law, benefits can be maintained if the Union pays for them. CUPW has not indicated whether it will pay to continue benefits. Therefore, the following benefits will be suspended unless payment is received before or upon receipt of notice:
>
> - Extended Healthcare Plan (EHCP)
> - Dental
> - Vision/Hearing
> - Disability Insurance (DI)
> - Life Insurance
> - Adoption and maternity sub-plan benefits.
>
> VACATION LEAVE
>
> Vacation leave that was approved and started before notice is given will be honoured until any strike activity occurs.
>
> All new vacation leave requests will be subject to Director-level approval and one week's notice.
>
> One **any** local or national strike activity occurs, all vacation leave will be cancelled for all employees.
>
> SICK LEAVE
>
> Certified sick leave and sick leave without pay that began before notice is given will be honoured, subject to the availability of credits, until any strike activity occurs.
>
> New sick leave requests will be subject to management approval and will require a medical certificate.

> Once **any** local or national strike activity occurs, sick leave will no longer be paid for any employee.
>
> I.O.D. LEAVE
>
> Until advised otherwise, injury-on-duty leave will continue where an employee was on such leave prior to notice being given. Upon notice being given, an employee who works and claims an injury-on-duty shall be entitled to only those benefits as determined in accordance with applicable workers' compensation legislation.
>
> PENSION
>
> Employees will not accumulate pensionable time while they are not working due to any strike activity.
>
> UNION DUES
>
> Union dues will not be collected once notice is given and will not be deducted again until the effective date of a new collective agreement or such earlier time as may be determined.
>
> STAFFING REQUIREMENTS
>
> The Corporation will staff to workload to meet customer requirements.
>
> (bold in original, our underlining)

[19] Both CUPW and CPC agree that the *Code*'s statutory freeze ended on May 25, 2011, though they differ on the resulting legal consequences. On May 30, 2011, CUPW delivered a strike notice to CPC in accordance with section 87.2 of the *Code*:

> This is to inform you that the Canadian Union of Postal Workers will exercise its right to strike in the urban operations bargaining unit on Thursday, June 2, 2011 at 11:59 p.m. EDT. This notice is provided under section 87.2 of the *Canada Labour Code*.
>
> As required under Section 7 of the *Canada Industrial Relations Regulation*s [*sic*], the following information is also provided:
>
> 1. The number of employees in the bargaining unit is approximately 48,000;
>
> 2. This notice is a first notice under subsection 87.2(1) of the *Code*;
>
> 3. The Canadian Union of Postal Workers is located at 377 Bank St., Ottawa, Ontario K2P 1Y3.
>
> A copy of this notice will be provided to the Minister of Labour today.

[20] Upon receipt of CUPW's strike notice, CPC announced, effective immediately, that it was amending CUPW members' working conditions as previously described in its May 18, 2011 letter.

[21] On May 31, 2011, CUPW advised CPC that it considered the change to working conditions to be unlawful under the *Code*:

> In my letter of May 16, 2011, I clearly stated that the Corporation does not have the right to amend working conditions for as long as there is no strike action or lockout.
>
> Your announcement yesterday that our members' working conditions were amended effective immediately is totally illegal, particularly since the Corporation has not yet obtained the right to lockout.
>
> Should the Corporation fail to rectify the situation immediately by reinstating the working conditions of our members and advising them accordingly, CUPW will take appropriate action.
>
> (emphasis added)

[22] CUPW alleged that CPC could not impose less favourable working conditions without its consent. CUPW argued that CPC's unilateral altering of employee working conditions constituted an illegal lockout contrary to section 92 of the *Code*, a ULP under sections 94(1) and (3), as well as a violation of its obligation to negotiate in good faith under section 50(a).

[23] In CUPW's view, since no strike action occurred until June 2, 2011 at 11:59 p.m., and since CPC had not earlier provided a lockout notice in conformity with section 87.2(2) of the *Code*, CPC had engaged in an unlawful lockout commencing on May 30, 2011. This unlawful lockout would have continued until June 2, 2011 at 11:59 p.m. when CUPW lawfully commenced its strike.

[24] CPC countered that it was entitled to alter the terms and conditions of employment on May 30, 2011, since the statutory freeze in section 50(b) of the *Code* had expired on May 25, 2011.

[25] In the alternative, CPC argued that, even if the change to working conditions constituted a lockout, which it denied, then its May 18, 2011 letter to CUPW had satisfied the section 87.2(2) notice requirements.

[26] In the further alternative, CPC argued that, even if the May 18, 2011 letter did not constitute a proper lockout notice, at best there was a technical violation of the *Code* which ceased as soon as CUPW began its strike at 23:59 on June 2, 2011. CPC submitted that CUPW had produced no evidence that members of the bargaining unit had suffered any harm.

[27] CPC further disputed that its actions could constitute a ULP, in part since the ULP provisions already contemplated the impact of the end of the freeze on employee insurance plans (sections 94(3)(*d.1*) and (*d.2*)).

[28] In its Reply, CUPW raised the parties' bridging clause, found at article 43.02 of their collective agreement:

> 43.02 Extension of Collective Agreement
>
> The present collective agreement shall remain in full force and effect until the signing of a new collective agreement or until the requirements of section 89(1) of the *Canada Labour Code* have been met.
>
> (emphasis added)

[29] CUPW has filed a national policy grievance alleging CPC violated this bridging clause. An arbitrator will decide on the proper interpretation of this clause.

III–Issues

[30] Based upon the pleadings, as well as the parties' oral arguments, this case raises five inter-related issues:

> 1. Can an employer change employees' terms and conditions of employment following the expiration of the statutory freeze, but without serving a lockout notice?
>
> 2. If an employer has the right to change terms and conditions of employment after the expiry of the freeze, can the extent of the changes meet the definition of a lockout?
>
> 3. Did CPC's May 18, 2011 letter to CUPW constitute a valid lockout notice?
>
> 4. Did CPC's change to terms and conditions of employment after the end of the statutory freeze constitute a ULP under sections 94(1) and (3) of the *Code*? and
>
> 5. Did CPC's change to the terms and conditions of employment constitute a failure to bargain in good faith?

IV–Analysis and Decision

1. Can an employer change employees' terms and conditions of employment following the expiration of the statutory freeze, but without serving a lockout notice?

[31] CPC and CUPW have a fundamental disagreement over their legal rights when the section 50(b) statutory freeze ends. The significant changes to the *Code* in 1999 are no doubt one of the underlying reasons for this difference in view. The parties' bridging clause in their collective agreement is also a relevant factor.

A. Relevant *Code* Provisions

[32] Section 50(*b*) of the *Code* establishes a statutory freeze which commences once notice to bargain collectively has been given:

> 50. Where notice to bargain collectively has been given under this Part,
>
> ...
>
> (*b*) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(*a*) to (*d*) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.
>
> (emphasis added)

[33] In this case, the statutory freeze commenced when CUPW gave CPC notice to bargain on October 4, 2010.

[34] Two points require comment. First of all, the 1999 *Code* amendments did not change the wording of section 50(*b*). Secondly, even though the 1999 amendments added subsections 89(1)(*e*) and (*f*) to the *Code*, section 50(*b*) still maintained its original reference solely to sections 89(1)(*a*) to (*d*).

[35] Section 89(1) sets out the escalating requirements the parties must satisfy before they can exercise the right to strike or lockout:

> 89. (1) No employer shall declare or cause a lockout and no trade union shall declare or authorize a strike unless
>
> (*a*) the employer or trade union has given notice to bargain collectively under this Part;
>
> (*b*) the employer and the trade union
>
> (i) have failed to bargain collectively within the period specified in paragraph 50(*a*), or
>
> (ii) have bargained collectively in accordance with section 50 but have failed to enter into or revise a collective agreement;
>
> (*c*) the Minister has
>
> (i) received a notice, given under section 71 by either party to the dispute, informing the Minister of the failure of the parties to enter into or revise a collective agreement, or
>
> (ii) taken action under subsection 72(2);
>
> (*d*) twenty-one days have elapsed after the date on which the Minister
>
> (i) notified the parties of the intention not to appoint a conciliation officer or conciliation commissioner, or to establish a conciliation board under subsection 72(1),
>
> (ii) notified the parties that a conciliation officer appointed under subsection 72(1) has reported,
>
> (iii) released a copy of the report to the parties to the dispute pursuant to paragraph 77(*a*), or
>
> (iv) is deemed to have been reported to pursuant to subsection 75(2) or to have received the report pursuant to subsection 75(3);
>
> (*e*) the Board has determined any application made pursuant to subsection 87.4(4) or any referral made pursuant to subsection 87.4(5); and
>
> (*f*) sections 87.2 and 87.3 have been complied with.
>
> (emphasis added)

[36] Section 89(1)(*a*), which refers to the notice to bargain, establishes the first step in the process. Step 2 examines the progress of the parties' collective bargaining, if any (section 89(1)(*b*)). Step 3 involves the *Code*'s conciliation procedures (section 89(1)(*c*)), while Step 4 references the delay following the end of those conciliation procedures (section 89(1)(*d*)), if any. The first four steps in section 89(1) existed prior to 1999, although the 1999 amendments modified the statutory language slightly, but not in a way that impacts the Board's analysis.

[37] Section 89(1)(*e*) is new and references the *Code*'s requirement in section 87.4 for "essential services". Similarly, the newly added section 89(1)(*f*) requires parties to give formal advance notice of any strike or lockout.

[38] Section 50(*b*) does not refer to these last two newly-added subsections in section 89(1).

[39] Section 89(1)(*f*) references section 87.2 of the *Code*. The 1999 *Code* amendments required employers and trade unions to provide a minimum of 72 hours' notice before resorting to strikes or lockouts. A new notice would be required if the lockout or strike did not start on the date set out in the notice:

> 87.2 (1) Unless a lockout not prohibited by this Part has occurred, a trade union must give notice to the employer, at least seventy-two hours in advance, indicating the date on which a strike will occur, and must provide a copy of the notice to the Minister.
>
> 2) Unless a strike not prohibited by this Part has occurred, an employer must give notice to the trade union, at least seventy-two hours in advance, indicating the date on which a lockout will occur, and must provide a copy of the notice to the Minister.
>
> (3) Unless the parties agree otherwise in writing, where no strike or lockout occurs on the date indicated in a notice given pursuant to subsection (1) or (2), a new notice of at least seventy-two hours must be given by the trade union or the employer if they wish to initiate a strike or lockout.
>
> (emphasis added)

[40] The 1999 amendments also added two new ULP provisions to the *Code* which were designed to protect employee insurance plans. Essentially, if the bargaining agent was prepared to tender payments sufficient to continue the insurance plans, then the employer could not cancel them. Like section 50(*b*), sections 94(3)(*d.1*) and (*d.2*) expressly reference sections 89(1)(*a*) to (*d*). The Legislator chose not to include a reference to the newly-added provisions in sections 89(1)(*e*) and (*f*).

> 94. (3) No employer or person acting on behalf of an employer shall
>
> ...
>
> (*d.1*) where the requirements of paragraphs 89(1)(*a*) to (*d*) have been met, cancel or threaten to cancel a medical, dental, disability, life or other insurance plan, whether administered by the employer or otherwise, that benefits employees, so long as the bargaining agent tenders or attempts to tender to the employer payments or premiums sufficient to continue the plan;

> (*d.2*) where the requirements of paragraphs 89(1)(*a*) to (*d*) have been met and the bargaining agent has tendered or attempted to tender to the employer payments or premiums sufficient to continue an insurance plan referred to in paragraph (*d.1*), deny or threaten to deny to any employee any benefits under the plan to which the employee was entitled before those requirements were met;
>
> (emphasis added)

[41] This case represents the first time the Board has had to work through the impact, if any, of these newer provisions.

B. CPC Position

[42] CPC argued that an employer remains entitled to change terms and conditions of employment once the statutory freeze has ended. The 1999 amendments did not impact that right. Such changes do not constitute a lockout or require a lockout notice.

[43] CPC relied on cases from various labour boards and courts in support of its position that once the statutory freeze ends, an employer is no longer obliged to keep applying the terms of the expired collective agreement.

C. CUPW Position

[44] CUPW argued that section 50(*b*) of the *Code* does not authorize an employer to commence an illegal lockout. CUPW further argued that section 50(*b*) does not provide CPC with any right to make changes to the bilateral contract it had negotiated with CUPW. Rather, while section 50(*b*) prevents CPC from making changes, it does not authorize CPC to make changes after the freeze expires. Any right to change the bilateral contract would have to come from another legal source.

[45] In CUPW's view, the Legislator never intended to give employers the right to commence economic sanctions, such as by altering the existing terms and conditions of employment, when trade unions had no similar right to use pressure tactics. Instead, the *Code* must be interpreted to maintain balance between the parties, both during and after the freeze.

[46] CUPW argued, in the alternative, that even if the Board accepted CPC's argument about its entitlements once the statutory freeze ended, the parties had previously negotiated article 43.02 of their collective agreement. That bridging clause, which CUPW alleged maintained in force all the terms and conditions in the collective agreement until the start of a legal strike or lockout, prevented CPC from making the May 30, 2011 changes.

[47] CUPW argued furthermore that CPC could not change any terms and conditions of employment merely upon receipt of CUPW's strike notice. Rather, the *Code* and their collective agreement obliged CPC to wait for the 72-hour strike notice to run its course, and for a strike to actually begin, before it was free to impose economic sanctions. If it wanted to act earlier, then CPC would have to issue a proper lockout notice first.

D. Analysis and Decision

[48] The *Code* contains two different time periods after the statutory freeze ends. The first period, hereinafter called the "Interim Period", starts as soon as the statutory freeze ends. In the Interim Period, subject to any bridging clause, the parties are no longer bound to respect their expired collective agreement, though nothing prevents them from continuing to do so while they negotiate.

[49] During the Interim Period, neither party can strike or lockout without first completing the remaining steps in sections 89(1)(*e*) and (*f*). While it was open to the Legislator to amend the *Code* to ensure the end of the statutory freeze coincided with the actual start of a lawful strike or lockout, that legislative extension was not made.

[50] The "Final Period" begins once the parties have satisfied the notice requirements in section 87.2 and can engage in a strike or lockout. This entitles them to engage in the economic warfare the *Code* contemplates will lead to a new collective agreement.

[51] The parties dispute whether CPC's actions fell properly within the Interim Period or could only occur after the start of the Final Period.

The *Code*

[52] The Board is satisfied that the Legislator intended, despite the 1999 amendments, for the end of the section 50(*b*) statutory freeze to signify the start of the Interim Period. The Final Period does not begin, if ever, until a party has respected the requirements of the new sections 89(1)(*e*) (essential services) and 89(1)(*f*) (strike or lockout notices).

[53] In this case, the parties agreed that the statutory freeze ended on May 25, 2011. The Interim Period thus began.

[54] The Board commented earlier on sections 94(3)(*d.1*) and (*d.2*). These ULP provisions allow a bargaining agent to ensure its members maintain their insurance plan coverage following the expiration of the statutory freeze, as long as premiums are paid. Put another way, once the Interim Period begins, an employer cannot end the collective agreement's insurance plans, without first providing the bargaining agent with an opportunity to pay the premiums required to maintain members' coverage.

[55] This demonstrates two things. First of all, the Legislator clearly did not intend for the freeze to remain in place until a lawful strike or lockout occurred. If it did, the text of section 50(*b*), and of the new ULP provisions at sections 94(3)(*d.1*) and (*d.2*), would refer to all of section 89(1), rather than just 89(1)(*a*) to (*d*).

[56] In contrast with section 50(*b*) of the *Code*, the Quebec *Labour Code* at section 59 extends the freeze in that province to coincide with the exercise of the right to strike or lockout. The Quebec *Labour Code* also explicitly provides for negotiated bridging clauses which extend the freeze until a new collective agreement is signed:

> 59. From the filing of a petition for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of each petitioning association and, where such is the case, certified association.
>
> The same rule applies on the expiration of the collective agreement until the right to lock out or to strike is exercised or an arbitration award is handed down.

> The parties may stipulate in a collective agreement that the conditions of employment contained therein shall continue to apply until a new agreement is signed.
>
> (emphasis added)

[57] Secondly, the existence of the new ULP provisions confirm that, during the Interim Period, an employer could refuse to apply the collective agreement, including employee insurance plans, subject to the bargaining agent's right to pay the premiums.

[58] The Legislator foresaw that changes might occur during the Interim Period. These changes would not always constitute, contrary to CUPW's submissions, an unlawful lockout.

Sims Report

[59] The 1999 changes to the *Code* followed a thorough review in the mid-1990s of Part I of the *Code*: *Seeking a Balance: Canada Labour Code Part I Review* (Ottawa: Human Resources Development Canada, 1995) (the Sims Report).

[60] While the Board must interpret the actual wording of the *Code*, comments from the Sims Report nonetheless provide helpful context.

[61] At pages 117–118 of the Sims Report, there was a discussion about the *Code*'s statutory freeze, parties' rights to negotiate a bridging clause and whether the freeze should be extended longer into the collective bargaining process:

> Currently under the *Code*, once a notice to bargain is served, the employer may not change terms and conditions of employment without the consent of the bargaining agent. This "freeze" continues in force until the parties acquire the right to strike or lockout, which, at present, means until the conciliation processes are over. After that point, subject to the duty to bargain in good faith and the prohibition on unlawful lockouts, the employer may unilaterally alter the terms and conditions of employment. Similar provisions are found in five provincial statues. In four other provinces, the freeze on terms and conditions of employment continues until the right to strike or to lockout is actually exercised. In some cases, this is achieved by a statutory "bridging clause" rather than a freeze, but the effect is similar.

> Some labour organizations suggested extending collective agreements through the period of strike or lockout, primarily as a technique to ensure a remedy in the event of discipline, but also to preserve other benefits. Others advocated extending the freeze period up to the point that one side exercises the right to strike or lockout. This would mean that an employer would have to impose a lockout in order to make changes to terms and conditions.
>
> Parties are free to negotiate, and often do negotiate a "bridging clause" that, once notice to bargain is given, extends the terms of their collective agreement past its nominal expiry date up until the exercise of the right to strike or lockout. In case there is any doubt about the parties' ability to do this, the statute should make it clear that the parties may agree to such an extension, either in the original collective agreement, or on an *ad hoc* basis, during bargaining.
>
> Elsewhere, we have made a recommendation that would extend the parties' ability to grieve and arbitrate discipline and discharge at any time that there is no collective agreement in place. This protects the employees' more fundamental interests during the period following the contract's expiry date.
>
> Beyond this, we are not persuaded that a further extension of the statutory freeze is needed. Unions and employers can negotiate bridging agreements if they wish. If they do not, then they must find settlement or fall back on their statutory rights to strike or lockout.
>
> (emphasis added)

[62] The Sims Report did not recommend an extension to the statutory freeze until the actual exercise of a strike or lockout. The Sims Report did mention that the parties to a collective agreement may negotiate a bridging clause in order to obtain this effect. Section 50(*b*) does not remain in force to the point in time when a lawful strike or lockout actually begins. CPC and CUPW negotiated a bridging clause in their collective agreement. The interpretation of that clause will be decided by an arbitrator.

[63] The Sims Report also noted that, once the freeze ended in the federal jurisdiction, employers could alter the terms and conditions of employment, subject to the duty to bargain in good faith and the prohibition on unlawful lockouts.

[64] While employers may alter terms and conditions of employment following the end of the statutory freeze, this does not allow them to engage in an unlawful lockout or to refuse to bargain in good faith. These issues are examined later in this decision.

Is there a lack of balance if an employer can change terms and conditions of employment?

[65] CUPW's argument that there is a lack of balance if an employer can refuse to follow the collective agreement initially appears compelling. An employer's right to alter the terms and conditions of employment seems to leave a trade union with only one response, that being to give a strike notice and commence a lawful strike.

[66] However, once the Interim Period begins, the obligations in a collective agreement no longer apply to either employers or trade unions.

[67] In the Board's experience, trade unions regularly exercise their rights during the Interim Period. These actions are often not viewed as strikes. For example, trade union members may "work to rule" after the statutory freeze. Teachers may no longer perform extra-curricular activities. Bargaining unit members may refuse to wear their uniforms when there is no longer a collective agreement requirement to do so.

[68] Both employers and trade unions may engage in activities during the Interim Period which do not amount to a strike or lockout. Each case must be analyzed on its own facts in order to determine whether an activity crosses the line and becomes an unlawful strike or lockout.

[69] Decisions from both the Supreme Court of Canada (*CAIMAW* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983) and the Federal Court of Appeal (*ADM Agri-Industries Ltée* v. *Syndicat National des Employés de les Moulins Maple Leaf (de l'Est)(CSN)*, 2004 FCA 69) confirm that an employer may unilaterally change terms and conditions of employment after the statutory freeze ends.

[70] It was open to the Legislator to extend the statutory freeze until the start of a lawful lockout or strike, just as it exists in Quebec. But the 1999 *Code* amendments did not make this change to the duration of the statutory freeze.

[71] The Board has been satisfied that an employer may decide no longer to apply the expired collective agreement once the freeze ends and the Interim Period begins. But this finding does not resolve this particular case.

Deferral to Arbitration

[72] The Board asked the parties, both at the oral hearing and in its follow-up letter dated September 23, 2011, about the relevance of article 43.02 of their collective agreement to this matter:

> During argument, the Board asked the parties whether its interpretation of section 50(b) [sic] of the *Canada Labour Code (Part I–Industrial Relations)* might be inextricably linked to section 43.02 of the Collective Agreement. A policy grievance is proceeding shortly on the issue of the interpretation of section 43.02. If the parties have any comments to add about the Board's question, they may do so in their written submissions.

[73] CUPW, in its November 9, 2011 letter to the Board, reiterated that the case raised important issues the Board should decide. CUPW had also argued in its submissions, in the alternative, that CPC, by negotiating article 43.02, had given up any right it might have had under the *Code* to alter employees' terms and conditions of employment following the expiration of the statutory freeze.

[74] CPC argued that article 43.02 had no relevance to the CIRB's interpretation of section 50(*b*) of the *Code*. CPC ended its comments stating:

> 57. Canada Post requests that the CIRB deal with the section 50(b) issue. CUPW's arguments respecting Article 43.02 of the Collective Agreement are distinct and should be dealt with in arbitration.

[75] The Board in *ADM Agri-Industries Ltd.*, 2002 CIRB 206, previously observed that parties to a collective agreement may decide to negotiate a bridging clause to extend the *Code*'s statutory freeze:

> [43] For these reasons, we find that although the *Code* is silent on the possibility that parties may negotiate bridging clauses designed to extend the effects of their collective agreement, such clauses are valid and must be interpreted in such a way as to give them the effect contemplated by the parties, to the extent that they do not contravene the *Code*'s provisions. Thus, we concur with the original panel's statement [*ADM Agri-Industries Ltd.*, 2001 CIRB 141] when it states:

> [19] ... Consequently, the collective agreement should be interpreted in light of the objectives of the *Code*, as set out in its preamble, and with the intention of establishing a framework for good working conditions and sound labour-management relations. Therefore, the collective agreement and the *Code* should be interpreted as a whole.
>
> (page 7)
>
> [44] The present panel is of the opinion that nothing in the *Code* prevents the parties from mutually agreeing to extend the *Code*'s minimum protection. Parties can agree to extend the *Code*'s freeze period related to the terms and conditions, just as they may negotiate benefits that go beyond the minimum labour standards prescribed by legislation. This is true to the extent that this agreement does not challenge the parties' opportunities to exercise other rights recognized by the *Code*, including the right to strike or lockout.
>
> ...
>
> [46] The purpose of clause 34.01 of the collective agreement is to create a bridge between the time the parties have acquired the right to strike or lockout and the time that right is effectively exercised. That clause in no way limits the parties' opportunity to exercise their right to strike or lockout, but merely extends the freeze period of the terms and conditions of employment set out in section 50(*b*) of the *Code*.
>
> (emphasis added)

[76] Section 98(3) of the *Code* allows the Board to refuse to determine a complaint brought under section 97(1) when the matter can be dealt with by an arbitrator under the parties' collective agreement.

> 98.(3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

[77] Section 97(1) of the *Code* includes complaints about a violation of the statutory freeze:

> 97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that
>
> (*a*) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 47.3, 50, 69, 87.5 or 87.6, subsection 87.7(2) or section 94 or 95; or
>
> (*b*) any person has failed to comply with section 96.
>
> (emphasis added)

[78] CUPW advised it filed its complaint because the Board would be able to deal with the matter more quickly than the parties' arbitration process. However, the Board is satisfied that the resolution of the complaint involves both the *Code* and the parties' bridging clause in their collective agreement.

[79] While the Board would have been prepared to give the parties a final answer in a timely manner by interpreting their bridging clause, the Board will not do so when one of the parties objects. The parties' arbitration process will have to take its course.

[80] Therefore, even though the arbitration process had not yet started when the Board heard oral argument in this case, the Board, pursuant to section 98(3), will not determine CUPW's section 97(1) complaint that CPC violated the freeze. Since the parties differ over how to interpret their bridging clause, and its specific reference to section 89(1) of the *Code*, the essence of the matter will be resolved by an arbitrator.

2. If an employer has the right to change terms and conditions of employment after the expiry of the freeze, can the extent of the changes meet the definition of a lockout?

[81] While the Board under section 98(3) may refuse to determine a complaint about an alleged freeze violation when the essence of the matter can be dealt with under the parties' collective agreement, the Board is obliged to decide section 92 illegal lockout complaints.

[82] In its analysis of the statutory freeze, *supra*, the Board noted that, while changes can be made once the Interim Period begins, those changes cannot amount to an unlawful strike or lockout.

[83] The Board therefore must determine whether CPC's changes to its employees' terms and conditions of employment, in response to CUPW's strike notice, constituted an unlawful lockout.

A. Applicable *Code* Provisions

[84] The *Code* defines a lockout as follows:

> 3.(1) In this Part,
>
> ...
>
> *"lockout"* includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of their employees, done to compel their employees, or to aid another employer to compel that other employer's employees, to agree to terms or conditions of employment.

[85] Section 92 prohibits unlawful lockouts:

> 92. Where a trade union alleges that an employer has declared or caused or is about to declare or cause a lockout of employees in contravention of this Part, the trade union may apply to the Board for a declaration that the lockout was, is or would be unlawful and the Board may, after affording the employer an opportunity to make representations on the application, make such a declaration and, if the trade union so requests, may make an order
>
> (*a*) enjoining the employer or any person acting on behalf of the employer from declaring or causing the lockout;
>
> (*b*) requiring the employer or any person acting on behalf of the employer to discontinue the lockout and to permit any employee of the employer who was affected by the lockout to return to the duties of their employment; and
>
> (*c*) requiring the employer forthwith to give notice of any order made against the employer under paragraph (*a*) or (*b*) to any employee who was affected, or would likely have been affected, by the lockout.

[86] A lockout has both an objective and subjective element. The contested act must fit within the non-exhaustive objective definition of a lockout. Moreover, the Board must be satisfied that the measure had the intention of compelling employees to agree to the employer's offer regarding terms and conditions of employment.

[87] The Board in *Vidéotron Télécom Ltée*, 2002 CIRB 190, summarized the applicable principles:

> [37] The Board's recent decision in *Maritime Employers Association*,[2000 CIRB 77], recognized that the definition of a lockout contains both a subjective and an objective element, and that the two elements must be linked for a lockout to exist. To establish the objective element, facts that would,

absent any context, constitute an act prohibited by the definition must exist. The subjective element relies on the fact that the employer's actions were aimed at compelling employees to accept working conditions. In order to establish the subjective element, the Board must consider the reasons for the employer's actions:

> [78] These examples demonstrate that a lockout has a broad definition. Not applying a new collective agreement's working conditions constitutes economic consequences that amount to a lockout situation. However, these economic consequences cannot be groundless. They must be linked to a subjective element related to the collective bargaining process, that is, applied with the intention of forcing employees to accept certain working conditions.
>
> (pages 28; 25–26; and 143,013)

[88] The issue for the Board is whether CPC's change to terms and conditions of employment could meet the objective element. Just as importantly, that change must be intended to compel CUPW members to accept CPC's proposed terms and conditions of employment.

B. CUPW Position

[89] CUPW argued CPC's changes to the terms and conditions of employment, in response to its strike notice, constituted an unlawful lockout. The pressure tactic was designed to force employees to accept CPC's final offer.

C. CPC Position

[90] CPC argued that it merely exercised its right to end the collective agreement after the freeze. An exercise of a *Code* right during the Interim Period could not satisfy the objective definition for a lockout.

[91] In addition, for the subjective element, CPC referred the Board to its correspondence with CUPW. CPC argued it wanted to continue negotiating a new collective agreement. In order to do that, CPC unilaterally agreed to keep the existing terms and conditions of employment in force, despite the end of the freeze, unless and until CUPW delivered a strike notice. CPC argued there was no evidence of any intent to compel CUPW members to accept CPC's most recent offer.

D. Analysis and Decision

[92] When the statutory freeze in the *Code* ends, subject to any bridging clause, changes can occur which do not amount to an unlawful lockout. For example, conditional changes to employee insurance plans during the Interim Period are explicitly dealt with in sections 94(3)(*d.1*) and (*d.2*) of the *Code*.

[93] The Board must decide whether CPC's change to terms and conditions of employment, which, subject to the parties' collective agreement, is not prohibited by section 50(*b*) of the *Code*, can nonetheless constitute an illegal lockout.

i) Do CPC's changes satisfy the objective element of a lockout?

[94] The *Code*'s definition of a lockout in section 3 is not exhaustive. The examples contained in section 3, such as a "closing of a business", a "suspension of work" or "a refusal ... to continue to employ", may suggest any lockout prevents employees from working. But a refusal to apply a collective agreement during its term has also been found to satisfy the definition, even though no suspension of work occurred: *Maritime Employers Association*, 2000 CIRB 77.

[95] For current purposes, the Board is prepared to assume that a significant change to employees' working conditions, even during the Interim Period, could meet the objective element for a lockout. The bigger challenge comes from a lockout's subjective element.

ii) Do CPC's changes satisfy the subjective element of a lockout?

[96] The Board's conclusion in this case is limited to the specific facts set out by CPC and CUPW.

[97] CUPW has not satisfied the Board that CPC refused to apply the expired collective agreement in order to compel employees to accept its last offer. Rather, the facts suggest that CPC intended, by not exercising rights it could have exercised on May 25, 2011, to avoid strike action and continue negotiations.

[98] As long as CUPW did not issue a strike notice, CPC was prepared to apply the working conditions under the expired collective agreement. CUPW could counterargue that CPC did nothing that it was not already obliged to do, given the parties' bridging clause in the collective agreement, but that is an issue for the arbitrator. For current purposes, subject to the bridging clause, section 50(*b*) did not oblige CPC to keep applying the terms and conditions of the collective agreement once the freeze ended.

[99] The Board mentioned at the beginning of this decision that the focus of the case is on a three-day period from May 30 to June 2, 2011. CPC only took action upon receipt of CUPW's May 30, 2011 strike notice.

[100] This meant there were but three days before CUPW started lawful strike action. Once the strike commenced, as it in fact did in accordance with the notice, CPC would have been able to impose a lockout without any notice requirement.

[101] The decision to keep applying the terms and conditions of the collective agreement, despite the end of the statutory freeze, militates against the suggestion that CPC's later action intended to compel employees to accept its final contract offer. If the intent of CPC's action was to compel CUPW members to accept its offer, it seems somewhat ineffective to apply this measure for, at best, the three days before CUPW's lawful strike took place.

[102] The Board understands that rotating strikes did start, on June 2, 2011 at 11:59 p.m., which ultimately prompted CPC to impose a full lockout. The matter then became the subject of back-to-work legislation.

[103] There may be other situations, such as making immediate full-scale changes after the freeze, but at a time when section 89(1)(*e*) prevents any significant response from the trade union, which might oblige the Board to examine again whether an unlawful lockout had occurred. The Board therefore limits its current analysis to the situation where CPC decided not to exercise rights it had under the *Code*, for as long as CUPW did not issue a strike notice. This comment is evidently nuanced by the collective agreement issue the parties' arbitrator will decide.

[104] The Board is satisfied the change to conditions on May 30, 2011 was not done to compel employees to accept CPC's last offer. Rather, it was the last act in CPC's effort to persuade CUPW not to exercise its *Code* right to issue a strike notice. CPC's actions in this context did not amount to a lockout under the *Code*.

3. Did CPC's May 18, 2011 letter to CUPW constitute a valid lockout notice?

[105] CPC argued, in the further alternative, that if the Board found that there had been an unlawful lockout, then its letter of May 18, 2011 constituted a valid lockout notice. The Board will examine this position, despite its finding that no lockout took place in this case.

A. *Code* Provisions

[106] For ease of reference, sections 87.2(2) and (3) of the *Code* read:

> 87.2(2) Unless a strike not prohibited by this Part has occurred, an employer must give notice to the trade union, at least seventy-two hours in advance, indicating the date on which a lockout will occur, and must provide a copy of the notice to the Minister.
>
> (3) Unless the parties agree otherwise in writing, where no strike or lockout occurs on the date indicated in a notice given pursuant to subsection (1) or (2), a new notice of at least seventy-two hours must be given by the trade union or the employer if they wish to initiate a strike or lockout.
>
> (emphasis added)

[107] Section 7 of the *Canada Industrial Relations Regulations,* SOR/2002-54 (*CIR Regulations*), reads:

> 7.(1) A notice of strike or lockout given under section 87.2 of the Act shall be given in writing, be dated and signed by or on behalf of the party giving the notice, be addressed to the other party to the dispute and state
>
> (*a*) the name and address of the party giving the notice of a strike or lockout;
>
> (*b*) the number of employees in the bargaining unit that will be affected by the strike or lockout;
>
> (*c*) the date and time when the strike or lockout is to commence; and
>
> (*d*) whether it is a first notice under subsection 87.2(1) or (2) of the Act or a new notice under subsection 87.2(3) of the Act.

(2) A copy of the notice referred to in subsection (1) shall be given to the Minister at the same time and in the same manner as referred to in subsection (1).

(emphasis added)

B. CPC Position

[108] CPC argued that its written notice of May 18, 2011 satisfied the intention of section 87.2(2) of the *Code*. Its May 18, 2011 letter ensured CUPW knew of the exact changes which would occur when, and if, CUPW issued a strike notice. In CPC's view, CUPW received not only the minimum 72 hours' notice, but in fact 12 days' written notice, from May 18-30, 2011, of what would happen if it issued a strike notice.

[109] CPC submitted that the Board had been flexible in the past in its interpretation of the *Code*'s strike or lockout notice requirements. Its approach focussed on the fundamental purpose of the notice. The overriding purpose was to give the other bargaining party advance notice of the date when the action would take place.

[110] CPC argued the Board has been willing to overlook technical deficiencies in notices, as long as the notice respected the overall purpose of the *Code*. In this case, CUPW knew exactly when a lockout would occur, since it controlled the timing of that event with its decision to issue a strike notice.

C. CUPW Position

[111] CUPW argued that the *Code* and the *CIR Regulations* require any lockout notice to indicate the precise date and time when a lockout would commence. While CUPW agreed that form should not triumph over substance, any notice must still indicate precisely that it constitutes a strike or lockout notice.

[112] A conditional notice, and one which does not specify its purpose, cannot meet the requirements of the *Code*. CUPW also suggested that since trade unions are required to hold a strike vote prior to issuing any strike notice, employers must be held to a clear standard for lockout notices.

D. Analysis and Decision

[113] The Board may be flexible with regard to the strict requirements for a strike or lockout notice, as long as each side clearly knows the document's intention.

[114] However, that flexibility will only be applied where it is clear that either an employer or a trade union has intended to give the other a strike or lockout notice.

[115] A letter which originally was not intended to be a strike or lockout notice cannot, *ex post facto*, be recast as a valid notice under the *Code*.

[116] In this case, the May 18, 2011 letter, as CPC candidly admitted, had no intention to give specific notice about the time and date when a lockout would occur. The purpose behind the letter was to give CUPW a certain control over whether CPC altered the terms and conditions of the expired collective agreement following the expiration of the statutory freeze.

[117] Section 87.2(3) requires employers and trade unions to provide new notice where no strike or lockout "occurs on the date indicated in a notice given pursuant to subsection (1) or (2)". This section requiring fresh notices could become meaningless if a letter like that of May 18, 2011 morphs into a perpetual, indeterminate or conditional lockout notice.

[118] CUPW's notice, rather than CPC's May 18, 2011 letter, determined when a lawful lockout could occur. It was only when CUPW commenced its lawful strike that CPC acquired its corresponding right to lockout. The May 18, 2011 letter from CPC had no effect on these important time limits in the *Code*.

4. Did CPC's change to terms and conditions of employment after the end of the statutory freeze constitute a ULP under sections 94(1) and (3) of the *Code*?

[119] The Board also has before it CUPW's ULP complaint alleging that CPC violated both sections 94(1) and 94(3) of the *Code*. The Board has decided not to determine these complaints under section 98(3) of the *Code* given the current arbitration process which will interpret the parties' bridging clause.

A. CUPW Position

[120] CUPW argued that CPC's May 18, 2011 letter, and subsequent actions, constituted a ULP. CUPW argued that the letter interfered with the representation of its members by suggesting that a legitimate exercise of the right to issue a strike notice would lead to negative economic consequences.

[121] Similarly, CUPW referred to section 94(3) which prohibits employer reprisals when employees exercise their rights under the *Code*. CUPW saw CPC's May 18, 2011 letter as a threat which was later carried out when CUPW sent its strike notice.

B. CPC Position

[122] CPC argued that its exercise of its rights after the end of the statutory freeze under the *Code* could not constitute a ULP. It further argued that nothing prevented it from delaying the exercise of its right under the *Code*, but on the condition that the parties continue to negotiate at the bargaining table.

C. Analysis and Decision

[123] This issue, in its essence, just like the first issue concerning section 50(*b*) of the *Code*, concerns whether CPC was entitled to change the terms and conditions of employment following the end of the statutory freeze. If no bridging clause existed, then it is clear an employer can change terms and conditions of employment after the freeze ends, as long as no unlawful lockout occurs.

As the Board mentioned earlier when dealing with the interpretation of section 50(*b*) of the *Code*, any final resolution for these specific parties will be based on the bridging clause they negotiated into their collective agreement.

[124] CPC and CUPW will argue before an arbitrator whether CPC had the right to make the changes it did, as outlined in its May 18, 2011 letter, given the wording of article 43.02 of their collective agreement.

[125] The Board has already decided not to determine the freeze complaint given the parties' desire to debate the interpretation of the bridging clause at arbitration. The Board similarly exercises its discretion under section 98(3) of the *Code* not to determine the complaints raising sections 94(1) and (3). The essence of these matters arises not from the *Code*, but rather from the parties' own private negotiations: *Canada Post Corporation* (1989), 76 di 212 (CLRB no. 729).

5. Did CPC's change to the terms and conditions of employment constitute a failure to bargain in good faith?

[126] The final issue raised in CUPW's complaint alleged that CPC's changing of the terms and conditions of employment violated its obligation to bargain in good faith.

A. Applicable *Code* Provisions

[127] Section 50(a) of the *Code* sets out all parties' obligations to bargain in good faith once a notice to bargain has been given. This obligation remains in force throughout the negotiations, including during strikes and lockouts. It does not end with the lifting of the statutory freeze:

> 50. Where notice to bargain collectively has been given under this Part,
>
> (*a*) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall
>
> (i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
>
> (ii) make every reasonable effort to enter into a collective agreement.

B. CUPW Position

[128] CUPW argued that CPC had no right to modify terms and conditions of employment after the freeze ended. CPC's change of those conditions therefore amounted to bargaining in bad faith.

C. CPC Position

[129] CPC argued that it had the right, following the end of the statutory freeze, to alter terms and conditions of employment. Therefore, its exercise of this right could not constitute a violation of the obligation to bargain in good faith.

D. Analysis and Decision

[130] In this case, CUPW and CPC had a significant difference of opinion, not only about how to interpret the *Code*'s freeze provision, but also when a lockout may occur.

[131] The Board is satisfied, when viewing this case in context, that both CUPW and CPC have satisfied their section 50(*a*) obligation to "make every reasonable effort to enter into a collective agreement".

[132] Where experienced parties raise novel arguments, or have opposing legal views about newer *Code* provisions, then that difference of opinion alone does not, when examined within the overall context, give rise to a valid complaint about a failure to bargain in good faith. The Board recently had a similar situation in *VIA Rail Canada Inc.*, 2011 CIRB 569:

> [58] Section 50(*a*) obliges the parties to meet to commence collective bargaining in good faith and to make every reasonable effort to enter into a collective agreement. The Supreme Court of Canada has described the content of this obligation in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 269:
>
> > Section 50(*a*) of the *Canada Labour Code* has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an

> objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.
>
> [59] In this case, the TCRC and VIA had a legitimate difference of opinion about a notice to bargain under section 49(1) of the *Code*. There was no previous case precisely on point. Had there been, then pushing the issue to the point of impasse would have raised serious issues for the Board: *CICT-TV Calgary, CanWest Global Communications Corp*., 2003 CIRB 247.
>
> [60] The Board finds that VIA had the subjective intent to enter into collective bargaining. In addition, on an objective analysis of all the facts put forward by both parties, VIA has made reasonable efforts to bargain.
>
> [61] Even discounting the fact that VIA's notice of August 25, 2010 has now been found to be defective, VIA wrote again on October 4, 2010 to the TCRC and indicated its desire to collectively bargain.
>
> [62] When the TCRC did not respond to VIA, VIA then wrote to the Minister and requested the appointment of conciliation officers.
>
> [63] The TCRC provided its own notice to bargain on November 17, 2010. Both parties agreed to meet from December 15–17, 2010 to commence the process. Presumably, bargaining has not taken place due to the parties' different opinion over section 49(1) of the *Code*. This decision resolves that dispute.
>
> [64] In considering all of these circumstances, the Board dismisses the bad faith bargaining complaint against VIA.
>
> [65] The Board hopes that this decision, and the earlier bottom line decision, on a new legal point, will allow the parties to move forward and conduct their collective bargaining in accordance with the obligations imposed by the *Code*.

[133] CPC and CUPW had different views about the impact of the 1999 *Code* changes on the statutory freeze. The Board is not aware of any previous case which examined the interplay of the statutory freeze, or a bridging clause, and the addition of strike or lockout notice provisions to the *Code*. A dispute relating to this issue, when considered in the context of the steps taken throughout the parties' negotiations, does not demonstrate a failure to bargain in good faith.

[134] Indeed, the facts recited at the beginning of this decision demonstrate the many steps these parties each took in an effort to reach a collective agreement.

V–Summary

[135] CUPW alleged that CPC violated the *Code* when, following the expiration of the statutory freeze, it advised it would change employees' terms and conditions of employment if CUPW issued a strike notice.

[136] The Board has decided that the *Code* distinguishes between the ending of the statutory freeze (Interim Period) and the time when the parties may lawfully commence strike or lockout action (Final Period). The Legislator decided not to extend the statutory freeze up to the point of the commencement of a lawful strike or lockout.

[137] Given that parties may agree to extend their collective agreement beyond the expiration of the *Code*'s statutory freeze, the Board did not determine the CUPW's freeze complaint. An arbitrator will determine the impact of the parties' bridging clause.

[138] The Board also accepted that, despite the ending of the statutory freeze, certain actions during the Interim Period could still amount to an illegal lockout. In the current case, however, CUPW did not satisfy the Board that CPC's actions on May 30, 2011 constituted a lockout under the *Code*.

[139] Subject to the parties' bridging clause, which will be interpreted at arbitration, CPC had the right to change terms and conditions of employment once the statutory freeze ended. The delay in exercising this *Code* right, and making it conditional on receipt of a strike notice, did not demonstrate an intent to compel employees to accept CPC's final offer. The Board is satisfied CPC intended instead to ward off a strike by foregoing changes the *Code* otherwise allowed it to make.

[140] While it was put forward as an alternative argument, and the matter is somewhat academic, the Board disagrees that CPC's May 18, 2011 letter to CUPW constituted a valid lockout notice. The Board may be flexible for minor irregularities in strike or lockout notices, but a document, *inter alia*, must be intended to be a strike or lockout notice.

[141] The Board has also decided not to determine CUPW's ULP complaints under sections 94(1) and 94(3). Those complaints cannot be separated from the issue of whether CPC has the right under the collective agreement to alter terms and conditions of employment prior to a strike or lockout commencing. The essence of this matter, which is dependent upon the interpretation of the parties' bridging clause, will be decided at arbitration.

[142] Finally, CPC and CUPW are experienced parties under the *Code*. The overall context suggests that they negotiated with each other in good faith, even though they did not arrive at a new collective agreement. The Board is not satisfied that a difference of opinion over the effects of the ending of the statutory freeze, as well as the impact of article 43.02 of their collective agreement, establishes a case for bargaining in bad faith.

[143] CUPW's Complaint is dismissed. A final resolution of certain issues CUPW raised will be decided by an arbitrator, pursuant to the parties' collective agreement and the bridging clause therein.

[144] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

Daniel Charbonneau
Member

André Lecavalier
Member