

**BY EMAIL**

April 7, 2020

Reply to: **STEVEN ROGERS**  
telephone direct: 604.602.7996  
e-mail: srogers@vslo.ca

British Columbia Labour Relations Board  
600 - 1066 West Hastings St,  
Vancouver, BC

**Attention: Najeeb Hassan, Registrar**

**Re: Re: BC Ferry and Marine Workers' Union ("Union") – and- B.C. Ferry Services Inc. ("BC Ferries") – 2020 Layoffs – Unfair Labour Practice Complaint - *Labour Relations Code* ["Code"] ss. 6(1), 11 and 27 Direct Negotiations with Members and Interference with Union Administration**

**NATURE OF APPLICATION**

1. We represent the Union and are authorized on its behalf to bring this complaint seeking various orders and declarations arising out of the BC Ferries' violations of the *Code*.
2. This unfair labour practice complaint is filed pursuant to sections 6(1), 11 and 27 of the *Code*. After deciding to lay-off up to 1400 employees, BC Ferries attempted to negotiate terms of employment directly with its members by offering layoff terms to each employee outside the process and provisions required by the Collective Agreement.
3. BC Ferries continues to violate the *Code* with each offer for layoff terms it sends directly to Union members. For this reason, we request a hearing in Vancouver by telephone or videoconference by no later than **Thursday, April 9, 2019** and/or an interim order that BC Ferries' cease and desist its negotiations with individual employees.

**ATTACHMENTS**

4. Enclosed with this letter of application are the documents upon which the Union intends to rely in support of the application.
5. If Union identifies additional reliance documents prior to the hearing of this application, it will promptly forward those to the Board and to the Respondents or their counsel.

## **PARTIES**

### Applicant Union

BC Ferry and Marine Workers' Union  
1511 Stewart Avenue  
Nanaimo, BC V9S 4E3

Graeme Johnston, President  
Email:  
[graemejohnston@bcfmwu.com](mailto:graemejohnston@bcfmwu.com)

### Counsel for the Applicant Union

Victory Square Law Office LLP  
710 - 777 Hornby Street, Vancouver  
Phone: (604) 684-8421  
Fax: (604) 684-8427

Attn: Steven Rogers  
**Email: [srogers@vslo.ca](mailto:srogers@vslo.ca)**

### Respondent Employer

BC Ferry Services Inc.  
Suite 500 - 1321 Blanshard St.  
Victoria, BC V8W 0B7

Attn: John D'Agnolo, VP, People

Office: (250) 978-1187  
Email: [john.dagnolo@bcferries.com](mailto:john.dagnolo@bcferries.com)

## **FACTS**

6. The Union relies upon the following facts in support of its application.
7. The Union is certified to represent BC Ferries' non-management employees working in the coastal ferry service. The Union and BC Ferries are parties to a collective agreement that is scheduled to expire on October 31, 2020.
8. On February 24, 2020, the Union sent correspondence asking BC Ferries to prepare for the impending pandemic and to provide the Union a detailed response plan.
9. On March 6, 2020, Graeme Johnston, President of the Union, spoke with both John D'Agnolo, Vice President of People for BC Ferries, and BC Ferries' acting COO Frank Camaraille to identify issues that may need to be addressed by BC Ferries in light of the COVID-19 pandemic.
10. In those conversations, Mr. Johnston encouraged BC Ferries to review the Collective Agreement to ensure all provisions continued to be followed and asking to participate in service maintenance planning.
11. Later that day, Mr. Johnston emailed Mr. D'Agnolo to identify the WHO and CDC online guidance for businesses, as well as legal advice for employers posted online.

12. On or around March 20, 2020, BC Ferries identified to the Union an intention to reduce service levels for coastal ferries in the Province.
13. On March 24, 2020, BC Ferries and the Union began discussing the concept of issuing temporary layoffs as an interim solution to manage the service reductions during the COVID-19 crisis.
14. Between March 24 and April 1, 2020 the Union and BC Ferries discussed various options with respect to implementation of the expected service reductions. In particular, the Union raised the prospect of using programs made available by the Federal Government to support businesses and avoid layoffs, such as the Canada Emergency Wage Subsidy.
15. The Union also emphasized BC Ferries' obligations under the Collective Agreement if BC Ferries was contemplating layoffs of Union members.
16. Article 12 of the Collective Agreement imposes a detailed and explicit set of obligations on BC Ferries in the event of layoffs and/or severance of the employment relationship.
17. Article 12.01 of the Collective Agreement requires BC Ferries to give 45 days written notice of group layoff to the Union and to work cooperatively with the Union to facilitate the workplace adjustment in the "best manner possible for the employees affected". Article 12.01 reads as follows:

### **12.01 - Workforce Adjustment**

(a) The parties recognize that workforce adjustments may be necessary due to a reduction in the amount of work required to be done by the Company, the reorganization of work, contracting out, the relocation of positions, and changes in or the elimination of programs and services.

(b) The Company shall provide the Union in writing with 45 calendar days notice (30 calendar days for individual or group layoffs affecting 5 or less employees) of the workforce adjustment. The notice shall identify the reason for the workforce adjustment, the classification and location of employees directly affected, whether the Company intends to implement a pre-adjustment canvass, and the nature of such canvass. This notice may run concurrent with any notice of layoff to regular employees in accordance with Clause 12.04.

(c) The Company will consult with the Union regarding the workforce adjustment and shall meet within seven (7) calendar days of receipt of the notice referred to in Clause 12.01(b) in order to work cooperatively to facilitate the workforce adjustment in the best manner possible for the employees affected.

18. On the evening of April 1, 2020, BC Ferries advised the Union of its intended service levels and expectation of layoffs.
19. On April 2, 2020, BC Ferries emailed the Union a proposal that would waive all notice periods and rejected any consideration of utilizing the Canada Emergency Wage Subsidy. The proposal was set out in that email as follows:

Impacted Casual Employees

Casual employees impacted by the reductions will be notified of Temporary Layoff in reverse order of seniority and provided:

- Extended health benefits will be maintained by the Company at no cost to the Employee (casuals with benefits)
- A one-time lump sum of \$500.00 will be paid to the employee upon recall by the Company “recall payment”
- The employee will have an ROE issued

Impacted Regular Employees

Regular employees in classifications impacted by the reductions will be provided with one of the following options for self-selection.

Option A

- Placed on credits (CTO/PTO approved time off)
- Credits are drawn down at rate of 4 weeks for every 5 weeks off (20% incentive)
- Extended health and all other benefits maintained
- A one-time lump sum of \$500.00 will be paid to the employee upon recall by the Company “recall payment”

Or

Option B

Regular employees impacted by the reductions will be notified of Temporary Layoff in reverse order of seniority and provided:

- Extended health benefits will be maintained by the Company at no cost to the Employee
- A one-time lump sum of \$500.00 will be paid to the employee upon recall by the Company “recall payment”
- The employee will have an ROE issued

20. None of the components of this proposal are terms in the Collective Agreement.
21. On April 3, 2020, BC Ferries announced to its employees its intention to layoff “hundreds” of Union members working on vessels and terminals based out of Tsawwassen, Swartz Bay, Horseshoe Bay, Duke Point and Departure Bay.
22. The Union rejected BC Ferries’ offer on the evening of April 3, 2020.
23. On or around the morning of April 4, 2020, Geoff Blighton, Senior Chief Steward (BC Ferries excluded manager) wrote the following email to all BC Ferries Chief Stewards:

Hi Chiefs, please verbally communicate this message to all your crew asap:

‘If there are any senior employees who wish to utilize their time bank to book off over the next 60 days in order to allow a junior employee to continue to work, please self-identify to their Employee Relations office ASAP.’

24. Beginning on April 4, 2020, BC Ferries began to communicate the layoffs to each of the laid off employees. As part of this written communication of its intention to layoff each employee, BC Ferries offered each employee two options:
  - a. Use their existing approved time off or pre-retirement bank to be drawn down on the basis that for every 4 weeks taken, BC Ferries would give a bonus of one additional week; or
  - b. Take a temporary layoff with a “one-time lump sum of \$500.00” paid upon recall.
25. These were the modifications to the Collective Agreement which were rejected by the Union as exclusive bargaining agent on April 3<sup>rd</sup>.
26. The Collective Agreement provides for use of time bank and outlines detailed layoff provisions, but does not include any of the terms offered by BC Ferries directly to employees for their individual acceptance.
27. On April 6, 2020, BC Ferries published a list of FAQs for its unionized employees about the layoffs. As part of this communication, BC Ferries included for the first time, an offer of one week’s notice of layoff or “pay in lieu of notice” to regular employees, as follows:

I am a Regular employee. If I take time off on my credits, will I earn any premiums?

Credits will be drawn down at rate of 4 weeks for every 5 weeks off (a 20% incentive rate) and do not attract premiums. This selection will be offered and made through Employee Relations.

I am a Regular employee. Will I get any notice of temporary layoff?

We will provide you with one week notice, or pay in lieu of notice.
28. The inclusion of one week’s notice or “pay in lieu of notice” was not included in offers to laid-off members before April 6, 2020, was not negotiated with the Union and does not arise from any provision in the Collective Agreement.

## OVERVIEW OF LEGAL SUBMISSIONS

29. Under s. 27 of the *Labour Relations Code*, the Union has the exclusive authority to bargain collectively on behalf of its members. Section 11 requires BC Ferries to negotiate with the Union in good faith with respect to all aspects of the Collective Agreement, including proposed mid-contract modifications.
30. The Labour Relations Board has consistently interpreted these provisions as prohibiting an employer from bargaining directly with employees, such as proposing to alter individual terms of employment for employees outside the provisions of the Collective Agreement.<sup>1</sup>

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<sup>1</sup> See e.g., *Insurance Corp. of British Columbia v. O.P.E.I.U., Local 378*, 2004 CarswellBC 2915, at paras 45, 158.

31. By offering employees the choice of (minimal) compensation for layoffs or using earned banks in a manner not provided under the Collective Agreement, BC Ferries has engaged in bargaining directly with its employees.
32. Furthermore, Section 6(1) of the *Labour Relations Code* prohibits an employer from interfering with the administration of a trade union. BC Ferries' direct communication of lay-off terms not negotiated with the Union interfered with the Union's ability to administer its obligations as exclusive bargaining agent for its members.
33. Thus, by offering terms outside the Collective Agreement to its laid-off employees, rather than negotiating with the Union, BC Ferries has committed an unfair labour practice, contrary to ss. 6(1), 11 and 27 of the *BC Labour Relations Code*.
34. The Union's position is that unless this matter can be decided by way of expeditious hearing and decided no later than Thursday, April 9, 2020, an interim order by the Board is appropriate under the circumstances.
35. BC Ferries continues to blatantly disregard the Union's exclusive bargaining authority and alter terms of employment for the Union's members with every layoff letter it sends.
36. The Board has the discretion to make interim orders by virtue of Section 133(5) of the *Code*, as follows:
  - (5) If an application or complaint is made under this section or the minister makes a direction under Part 6 the board may, in its discretion, after giving each party to the matter an opportunity to be heard, make an interim order or designation pending a final resolution of the application or complaint under this section or a designation under Part 6.
37. In *RBA Canada Inc.*, BCLRB No. B31/97, the Board adopted five criteria it would consider when deciding whether to exercise its discretion to make an interim order:<sup>2</sup>
  1. Whether an adequate remedy would be unavailable to the applicant at the final hearing without an interim order;
  2. The existence of a strong link between an alleged breach of the Code, the consequences of the breach and the interim relief sought;
  3. The claim must not be frivolous or vexatious and must usually be based on a *prima facie* case;
  4. An interim order must not penalize the respondent in a manner which will prevent redress if the application fails on its merits;
  5. An interim order must be consistent with the purposes and objects of the Code. The discretion to grant an interim order will not be exercised absent a critical labour relations purpose or if the granting of the interim order would grant the entire remedy sought or otherwise tilt the balance in favour of one party.

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<sup>2</sup>Adopting the IRC decision in *White Spot Restaurants Limited*, IRC No. C274/88.

38. The Union submits that each of the above criteria are met, as follows:
- a. A delayed order will result in an inadequate remedy. The key remedy sought in this case is a cease and desist order. Union members are being asked to make individual decisions on altering their terms and conditions of employment during a crisis and under threat of layoff. A cease and desist order would be worthless after BC Ferries has completed its layoffs. The harm done to the Union by undermining its representation of its members cannot easily be undone.
  - b. A cease and desist order is consistent with the alleged breaches of the *Code*.
  - c. It is settled law that an employer cannot negotiate terms of employment directly with unionized employees. The emails and documents created by BC Ferries and attached to this application clearly establish a *prima facie* case that this is exactly what this employer has been doing.
  - d. The Union only seeks to restrain BC Ferries from negotiating directly with its members. An interim cease and desist order prohibiting this could not conceivably “penalize” BC Ferries in a manner that prevents redress.
  - e. An interim order in this case would further the critical labour relations purpose of encouraging negotiation and cooperation between the Union and BC Ferries. It would also avoid undermining the exclusive authority of the Union to represent its members. These purposes are consistent with the duties of the Board set out in s. 2(a) and (d) of the *Code*.

## HEARING

39. As noted at the outset of this letter, the Union requests a hearing into this matter by telephone or videoconference **no later than Thursday, April 9, 2019.**

## REMEDY

40. The Union seeks the following relief and remedies:
- i. A declaration that BC Ferries has committed breaches of ss. 6(1), 11 and 27 of the *Code*.
  - ii. An order that BC Ferries cease and desist from negotiating employment terms directly with Union members.
  - iii. An Order requiring BC Ferries to post a copy of the Board’s decision at all of its workplaces and circulate it to all of its employees, including laid off employees.
  - iv. An interim cease and desist order based on the reasons set out above;

- v. Any other orders or declarations that the Board may consider appropriate.

**SERVICE**

41. We confirm that a copy of this application will be personally served on the BC Ferries today. A copy of the application will also be delivered by email to BC Ferries, concurrent with the filing of this application.

42. Please charge the filing fee for this application to our firm's pre-approved account.

VICTORY SQUARE LAW OFFICE LLP



Steven Rogers  
Law Corporation