

BY EMAIL

April 9, 2020

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Labour Relations Board of British Columbia
6th Floor - 1066 West Hastings Street
Vancouver, BC V6E 3X1

Attention: Najeeb Hassan, Registrar

Dear Sirs / Mesdames:

Re: BC Ferry and Marine Workers' Union ("Union") -and- BC Ferry Services Inc. ("BC Ferries") - 2020 Layoffs – Section 54 Complaint

We represent the Union and are authorized on its behalf to file this application.

NATURE OF APPLICATION

The Union alleges that BC Ferries has breached section 54 of the B.C. *Labour Relations Code* by introducing a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies, namely the indefinite layoff of approximately 1400 employees, without providing the statutory advance notice to the Union.

PARTIES

Applicant Union

BC Ferry and Marine Workers' Union
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Counsel for the Applicant Union

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Respondent Employer

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FACTS

1. The Union is certified as the exclusive bargaining agent for a bargaining unit of approximately 4300 employees of BC Ferries.
2. 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.
3. 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 Camaraire to identify issues that may need to be addressed by BC Ferries in light of the COVID-19 pandemic.
4. On or around March 20, 2020, BC Ferries identified to the Union an intention to reduce service levels for coastal ferries in the Province.
5. 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. BC Ferries did not provide the Union with any specifics around the scope of the layoffs, who would be laid off or when layoffs would occur.
6. 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.
7. On March 29, 2020 by way of a conference call with the Union, BC Ferries began to provide service reduction scenarios they were considering.

8. It was not until the evening of April 1, 2020 that BC Ferries gave the Union notice of the actual service level reductions it planned to implement, but still could not provide specific information as to the planned scope of layoffs or impact on the Union's members.

9. 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.

10. On April 3, 2020, without prior formal notice to the Union, the Employer publicly announced that it would be laying off approximately 1000 to 1400 of its unionized employees, beginning on April 4, 2020.

11. Beginning on April 4, 2020, BC Ferries began to communicate the layoffs to individual laid off employees. Since that date, hundreds of Union members have been laid off. In addition to the locations set out in BC Ferries' April 3 announcement, Union members have been laid off on the Langdale and Southern Gulf Islands operations.

12. To date, the Union has not been provided with a list of which members are being laid off, nor has the Union been advised as to how long the layoffs will last. Indeed, BC Ferries has not provided any information to the Union about the layoffs since April 1, beyond its public announcement and general communications directly to members.

13. On April 6, 2020, BC Ferries posted a communication to its employees titled "Service Changes Frequently Asked Questions and Guide for Employees.

14. This included an estimate of a 60 day reduction in service levels. With respect to the duration of layoffs, the FAQ provided as follows:

Will I be able to come back to work?

These are temporary layoffs and we want to keep the temporary layoff period as short as possible. As the COVID-19 situation subsides, we will make every effort to recall our valued employees as soon as we can. We will need our skilled colleagues back as soon as possible to help restore ferry services when traffic returns. We look forward to having you rejoin the team, and resuming the level of service our customers have come to expect as soon as possible.

Our aim is to recall you back as soon as we can to help restore ferry services when traffic returns, however it will take time for us to ramp our service back up to previous levels as we bring ships back into service, and our crews back on board.

15. BC Ferries had, in its discussions with the Union and in its various notices and letters to its employees, described the layoffs as "temporary".

SUBMISSION

16. Section 54 of the Code provides:

16.1 4(1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,

(a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and

(b) after notice has been given, the employer and trade union must meet, in good faith, and endeavour to develop an adjustment plan, which may include provisions respecting any of the following:

(i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;

(ii) human resource planning and employee counselling and retraining;

(iii) notice of termination;

(iv) severance pay;

(v) entitlement to pension and other benefits including early retirement benefits;

(vi) a bipartite process for overseeing the implementation of the adjustment plan.

(2) If, after meeting in accordance with subsection (1), the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.

(3) Subsections (1) and (2) do not apply to the termination of the employment of employees exempted by section 65 of the Employment Standards Act from the application of section 64 of that Act.

17. A layoff of this nature clearly falls within the scope of section 54 of the *Code*, as it is a change or measure that affects the terms, conditions or security of employment of a significant number of employees to whom the collective agreement applies.

18. In this case, correspondence from BC Ferries suggest that nearly one third of the bargaining unit has or will be laid off for an undetermined length of time. Indeed, hundreds of members have received layoff notice from BC Ferries since April 4, 2020.

19. The application of section 54 of the *Code* in these circumstances is consistent with the purposes of the *Code*. As set out by the Board in the leading case *Pacific Press, A Division of Southam Inc.*, BCLRB No. B374/96:

... Section 54 is an important substantive addition to the Code designed to advance the purpose set out in Section 2(1)(b). Section 54 is particularly important to achieve the purpose of encouraging cooperative participation between employers and trade unions in resolving workplace issues, among other things. Because of the new purpose of the Code set out in Section 2(1)(b), Section 54 should be given a broad and liberal interpretation, not a narrow and restrictive one.

In interpreting and applying the words “that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies”, a number of considerations may be taken into account. One is the percentage of employees in the bargaining unit who are affected. That, however, is not the sole consideration. The actual number of employees affected is another consideration. The impact of the change on those employees who continue to work may also be borne in mind. Which one or more of these factors will be important will be assessed by the Board in relation to the particular circumstances before it (paras 111-112).

20. Group layoffs of this nature fall within the scope of section 54 of the *Code* and are not exempted from its application by s. 54(3) or otherwise.¹

21. In *Wolverine Coal*, which was upheld by the Board on reconsideration in BCLRB No. 185/2015, the Board determined that a mine closure causing the layoff of the majority of a bargaining unit constituted a "measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees" despite the fact that the Employer said that the mine would reopen during the employees' 24-month recall period.

¹ *Wolverine Coal Partnership and USW, Local 1-424, Re, BCLRB B106/2015 ("Wolverine Coal")* at paras. 99-102

22. The Board found that s. 54 was triggered as this layoff was “neither a predetermined nor predictable feature of the employment relationship” (at para. 125). The Board expressly noted that s. 54 applied to decisions made to curtail production in response to market conditions:

In the present case, the Employer points to the pressures inherent in the relationship between the global price of metallurgical coal and the ongoing economic viability of its mining operation in the short, medium and long-term. However, I find this evidence speaks largely to the bona fide reasons that underlie the decision to implement the Indefinite Layoff. There is no dispute before me that the Indefinite Layoff was a valid response to these market conditions. There is also no dispute before me that a range of layoffs can and do arise due to market conditions. Those market conditions can be volatile and may require quick decisions or make it difficult to identify a fixed date for recall with precision.

Wolverine Coal, para. 90

23. The Board further explained that s. 54 does not prevent layoffs, but it does require the Employer to consult with the Union about its circumstances before making a decision or implementing actions which impact the bargaining unit.

It is also well-established that the duties under Section 54 of the Code must factor into an employer's decision-making process. Employers must take into account the requirement for 60 days' notice. For example, a negotiated closing date for a sale of business should ensure the 60-day notice requirement can be met. A failure to do so will not render the notice provision inapplicable. See *Pacific Pool* at para. 45, citing *Pacific Press and Canada Safeway Limited (MacDonald's Consolidated Division)*, BCLRB No. B75/97.

Wolverine Coal, para. 135.

24. In this instance, BC Ferries made a business decision to change its ferry schedule, in response to a change in passenger habits related to the ongoing pandemic. In making the further business decision to layoff nearly a third of its workforce, BC Ferries ought to have factored in the s. 54 notice obligation and ensured compliance. Its failure to do so does not render the 60 day statutory notice period inapplicable.

25. We note that the collective agreement between BC Ferries and the Union (the "Collective Agreement") imposes its own set of obligations on BC Ferries in the event of layoffs and/or severance of the employment relationship, under Article 12.

26. In particular, Article 12.01 requires BC Ferries to give 45 days written notice of group layoff to the Union and to consult with the Union to work cooperatively to facilitate the workplace adjustment in the "best manner possible for the employees affected".

27. 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 B (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.

28. In discussions with the Union and in recent submissions to the Board, BC Ferries has taken the position that the Workforce Adjustment language in Article 12 does not apply to the current or proposed layoffs. The Union does not agree and has filed a grievance in response to the group layoffs of its members without notice.

29. To be clear, the Union's position is that regardless of the application of Article 12, BC Ferries' obligations under s. 54 cannot be avoided. However, BC Ferries' position that Article 12 does not apply to these layoffs increases the necessity to the Union and its members to be able to access s. 54.

30. In *Mount Polley Mining Corporation v. USW, Local 1-2017*,² the Board held that an employer's compliance with its obligations under a collective agreement are not determinative of a union's application under section 54. The purpose of the Union's section 54 application is to seek damages for the lost opportunity to negotiate, independent from any claims arising from the Collective Agreement.

31. For the foregoing reasons, we submit that s. 54 clearly applies to the group layoffs imposed by BC Ferries and further submit that BC Ferries clearly breached its obligations under this important provision of the *Code*.

² BCLRB No. B98/2018, at para 25.

REMEDY

32. The Union submits that it is appropriate in this context to make a remedial order that the Employer pay the laid off employees in lieu of notice under s. 54: see *Money's Mushrooms*, BCLRB No. B82/2005, at para 50.

33. As a remedy, the Union seeks the following orders and declarations:

- (a) an Order requiring BC Ferries to make whole all employees who were not provided sufficient notice of a significant change affecting the terms, conditions or security of their employment; and
- (b) such other orders that the Board may consider appropriate.

SERVICE

34. A copy of this application is being served on BC Ferries by email at the address above, concurrent with this application.

Yours truly,

VICTORY SQUARE LAW OFFICE LLP
per:



Steven Rogers
Law Corporation

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