Saskatchewan
Labour Relations Board

UNIFOR CANADA LOCAL 594, Applicant v CONSUMERS' CO-OPERATIVE REFINERIES LIMITED, Respondent

LRB File No. 173-20; October 17, 2022
Chairperson, Susan C. Amrud, K.C.; Board Members: Aina Kagis and Clive Tolley

For Unifor Canada Local 594: Jana Stettner

For Consumers' Co-operative Refineries Limited: Eileen V. Libby, K.C.
Allison Graham

Employer breached duty to bargain in good faith – Failure to comply with duty of unsolicited disclosure is breach of duty to bargain in good faith – Employer made *de facto* decision during bargaining to eliminate master operator classification from bargaining unit and chose not to advise Union until several months after collective agreement signed – Employer made *de facto* decision during bargaining to make significant changes to operations in Process Department that were major steps forward in implementation of decision to eliminate master operator classification – Employer breached duty to bargain in good faith by failing to disclose these decisions – Employer did not make *de facto* decision during bargaining to eliminate operator II classification.

Employer did not satisfy its duty of unsolicited disclosure with hints, vague comment and cryptic message in letter to Union.

Application to defer certain issues to grievance arbitration dismissed – Dispute before Board and dispute raised in grievances not the same dispute – Issues raised before Board cannot be resolved by arbitrator – Remedies that arbitrator can provide will not resolve question at issue in this matter.

Board does not exercise discretion to dismiss portion of application for delay – Application was filed only six days late – While Union is sophisticated applicant and provided no evidence respecting why delay occurred, Employer provided no evidence that this short delay caused prejudice to its ability to defend its position – Given importance of issues raised in application, Board decided to determine all aspects of issues raised.

Remedy – Declaration that unfair labour practice committed – Employer cannot eliminate master operator classification or layoff master operators during current collective agreement – Employer to continue to schedule master operators on each shift – Employer to return duties to master operators pending determination of grievance – Order and Reasons to be posted in workplace.

REASONS FOR DECISION

I. Background:

[1] **Susan C. Amrud, Q.C., Chairperson:** On November 13, 2020, Unifor Canada Local 594 ["Union"] filed an Unfair Labour Practice Application[1] against Consumers' Co-operative Refineries Limited ["Employer"], alleging that the Employer breached its duty to bargain in good faith during the round of collective bargaining recently concluded between the parties, contrary to section 6-7 and clauses 6-62(1)(d) and (r) of *The Saskatchewan Employment Act* ["Act"].

[2] The latest round of collective bargaining between the parties was contentious and protracted. Despite many days of bargaining, and the assistance of a labour relations officer, a collective agreement could not be reached, and on December 5, 2019, the Employer locked out the employees represented by the Union. A collective agreement was eventually reached, and it was ratified by Union members on June 22, 2020. In this application, the Union pointed to several changes the employees discovered at the workplace after the return to work that it viewed as evidence that the Employer had bargained in bad faith: the Employer had taken away significant duties that master operators had historically performed, and given them to out-of-scope shift supervisors[2], it was running shifts without a master operator at all, and it was significantly increasing the number of out-of-scope shift supervisors.

[3] The hearing of this matter commenced on August 16 to 20, 2021, and was scheduled to resume on December 13, 2021. On October 4, 2021, the Employer advised the Union that it was proceeding with permanent layoffs that included the elimination of the master operator and operator II classifications. On October 5, 2021, the Employer started the process of contacting employees in master operator, operator II and other eliminated positions to advise them that their positions were being eliminated and to inquire whether they wanted to bump into a more junior position or be laid off. On October 20, 2021, the Union filed an Application for Interim Relief in which it asked the Board to issue an Order prohibiting the Employer from proceeding with the permanent layoffs. That Order was granted on November 18, 2021. The Union was also granted leave to file an Amended Application and to re-open its case.[3] The hearing of the unfair labour practice application continued on December 13 to 15, 2021 and February 16 and 17, April 27 to 29, May 30 and 31 and June 20, 2022.

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[1] LRB File No. 173-20.
[2] This position was referred to as both a shift supervisor and a process supervisor during the hearing. In these Reasons it will be referred to as a shift supervisor.
[3] LRB File No. 133-21. Reasons for Decision were issued on December 2, 2021.

[4] The Union called as witnesses five in-scope employees who work for the Employer in the Process Department: Avery Riche, Ryan Dzioba, Paul Woit, Jeff Roffey and Richard Exner. Riche was a member of the Union executive from June 2017 to June 2021. He was at the bargaining table for the current collective agreement. Roffey worked as an out-of-scope shift supervisor from December 2018 to December 2019, when he reverted back to in-scope master operator. Exner has been the chief shop steward and grievance chair for the Union since 2014. For the last two rounds of bargaining he sat at the bargaining table as note taker. The Union also called Scott Doherty, chief of staff to the Union's national president. He took over as lead at the bargaining table during conciliation and continued in that role until an agreement was reached. He was also the bargaining table lead at the end of the previous round of negotiations that led to the 2016-19 collective agreement.

[5] The Employer called four witnesses: Andreas Boersch, Megan Torrie, Trent Rowsell and Gilbert Le Dressay. Boersch is an out-of-scope section supervisor in the Process Department. He commenced work with the Employer in 2008 and worked his way up from relief pool operator. Torrie is the Superintendent of Process Safety for the Employer. The Employer is a wholly owned subsidiary of Federated Co-operatives Limited ["FCL"]. Rowsell has been the Director of Labour Relations for FCL since 2018 and, in that capacity, provides labour relations strategy and support to the Employer. He was a member of the Employer's bargaining committee with respect to the bargaining that is the subject of this application. Le Dressay was the Vice President, Refinery Operations for the Employer from 2013 to March 7, 2022 while being employed by FCL.

II. Bargaining:

[6] The Employer's Opening Proposal was presented to the Union on January 15, 2019[4]. It included two proposals relevant to this matter. In CP1, respecting Article 2 – Recognition, of the then existing collective agreement, it proposed to make the following change:

> *3. The Co-operative retains the right to contract work with outside person or firms. ~~It is understood that such right will not be used to displace any employees currently employed in classifications covered by this Agreement.~~ It is agreed that performance of work for the Company by contractors will not cause the layoff of any employee in the bargaining unit. ~~No work customarily performed by an employee covered by this Agreement shall be performed by another employee of the Co-operative or by a contractor, except as provided herein. Use of a contractor for running maintenance must be communicated to the Union and acknowledged prior to the work commencing. The agreed interpretation of this clause is contained in the Agreement Supplements under "Contract Work" (Letter of Understanding #58).~~*

[4] Exhibit U3, page 2/3.

[7] In CP2, respecting Article 3 – Scope, the Employer proposed that the following positions would be removed from the bargaining unit: master operator, operator I and programmer analyst I, II and III. (During the previous round of bargaining for the 2016-19 collective agreement, the Employer also proposed that the master operator position be excluded from the bargaining unit.)

[8] The Employer presented its next proposals to the Union on February 27, 2019[5]. The proposals respecting Articles 2 and 3 were unchanged.

[9] On July 23, 2019, the Employer presented a one-page counter proposal[6] that included the following statement: "Company will remove Master Operator and Operator I from CP 2b scope clause"; instead, it proposed: "Master Operator position to be filled by merit and ability, and by seniority where merit and ability are equal". Later the same day the Employer modified this counter proposal. The changes made included removing the proposal that the master operator position be filled by merit and ability.

[10] The Employer presented another proposal to the Union on July 24, 2019[7]. It included the following statement, on page 1:

> *CP2b - withdraw request to remove Master Operator, Operator I, and Programmer Analyst I, II and III from scope clause July 24/19;*
>
> > *- Company holds on position that Master Operator is awarded based on merit and ability, seniority where merit and ability ae* [sic] *equal*[8]

[11] The Employer presented a revised proposal to the Union on September 26, 2019[9], that included no proposed changes to Articles 2 or 3.

[12] At this point, the parties reached an impasse in bargaining. Despite the assistance of a labour relations officer, no progress was made. On December 3, 2019, the Union gave 48-hour strike notice to the Employer, followed one hour later by the Employer giving 48-hour lockout notice to the Union. On December 5, 2019, the Employer locked out the employees represented by the Union. During the lockout the refinery worked at a somewhat reduced capacity; none of the Employer witnesses would admit exactly what level it ran at during the lockout. During the lockout the Employer operated with fewer employees, both because it used a different shift schedule (3 days – 3 nights – 3 off rather than 2 days – 2 nights – 5 off) and also because it ran

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[5] Exhibit E29.
[6] Exhibit E4.
[7] Exhibit U5.
[8] Exhibit U5, page 1.
[9] Exhibit U6.

with a shift lead rather than both a shift supervisor and master operator. It also ran without operator IIs.

[13] The Employer next provided a proposal to the Union on January 31, 2020[10]. With respect to Article 2, this time it proposed to only delete "by another employee of the Co-operative or" from the sixth line. With respect to Article 3, it proposed "Add Master Operator to excluded positions".

[14] On February 12, 2020, the Minister of Labour Relations and Workplace Safety appointed Vince Ready and Amanda Rogers as Special Mediators, pursuant to section 6-28 of the Act. The Special Mediators met with the parties on a number of occasions in February and March 2020. In the Bargaining Brief that the Employer provided to the Special Mediators, it proposed the same changes to Articles 2 and 3 that it had proposed to the Union on January 31, 2020[11]. The elimination of the master operator position, it said, would be compensated for by increasing the number of shift supervisors. In its submission to the Special Mediators, the Union objected to these proposals[12].

[15] The report of the Special Mediators, providing their recommendations for resolving the dispute, was delivered on March 19, 2020[13]. With respect to Article 2 the report stated:

> *In light of our recommendations on LOUs 58 and 59, we are not persuaded there is a demonstrated need to change the provisions of Article 2. We therefore recommend no change to this Article.*

[16] With respect to Article 3, the report stated:

> *With the submissions before us, we are not persuaded that the elimination of the bargaining unit MO classification is necessary nor warranted at this time. In so finding, we observe this matter may be brought before the Labour Relations Board if conditions support such an application.*

[17] The Union membership voted 98% in favour of accepting the Special Mediators' recommendations. The Employer did not accept all of them. Instead, on March 25, 2020, it provided to the Union its Best and Final Offer Memorandum[14]. The proposed amendments to Articles 2 and 3 were not included in this offer. On March 30, 2020, the Employer applied pursuant to section 6-35 of the Act to have the Board conduct a vote among the employees in the bargaining unit to determine whether a majority of employees voting were in favour of accepting

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[10] Exhibit U7, page 2.
[11] Exhibit U8, pages 27-30.
[12] Exhibit U9 at pages 2 and 11.
[13] Exhibit U10.
[14] Exhibit U11.

the Employer's offer[15]. The "Best and Final Offer" that the Employer provided to the Board, that was the subject of the vote, indicated the following with respect to the Article 2 and 3 issues:

#	*Special Mediators' Report Recommendations*	*Co-op Offer*	
		Accepted	*Explanation*
4	*No change to provisions of Article 2*	*Yes*	
5	*Maintain bargaining unit MO classification*	*Yes*	

The vote was held and the offer was rejected.

[18] On April 24, 2020, the Employer sent a letter to the Union advising it that, because of the COVID-19 pandemic, the Employer intended to temporarily reduce the size of the in-scope workforce on the employees' return to work. The letter also included the following comment:

> *It is not currently anticipated that any jobs or job classifications will be abolished or created as a direct result of addressing the COVID-related conditions as they exist as* [sic] *this time. Having said that, the Employer is considering permanent layoffs related to operational efficiencies as you heard at the bargaining table.*[16]

[19] The Union witnesses indicated that they heard nothing about permanent layoffs related to operational efficiencies at the bargaining table. None of the Employer witnesses provided evidence that permanent layoffs were discussed at the bargaining table. On April 27, 2020 the Union replied to this letter enumerating "several preliminary questions/requests that require the Company's immediate response"[17]. None of the questions referred to the comment respecting permanent layoffs. The Employer did not respond to the Union's letter.

[20] The Employer and Union continued to negotiate, particularly with respect to return-to-work provisions, until they reached a tentative agreement on June 18, 2020. That collective agreement[18], which adopted the Special Mediators' recommendations on the Article 2 and 3 issues, was ratified by Union members on June 22, 2020. It will expire on January 31, 2026. The Union members gradually returned to work in July and August 2020.

III. Evidence:

[15] LRB File No. 061-20.
[16] Exhibit U13.
[17] Exhibit E10.
[18] Exhibit U14.

[21] The Employer operates an oil refinery that takes in crude oil and produces a variety of refined petroleum products, including gasoline and diesel fuel. The Employer's Process Department is divided into six sections for processing crude oil. Each section employs, as unionized employees, a number of outside workers, an operator I who operates the board (computer control panel that operates processing units), and a master operator who oversees all of the other unionized employees. When an employee joins a section, they start at the bottom (operator VI or relief pool/auxiliary) and work their way up, as they are trained, over a number of years. Extensive training, exams and hands-on work are required to become fully qualified at each step. The refinery operates 24 hours a day, 7 days a week. Each section requires six to eight operators. Unionized employees work 12-hour shifts on a schedule of two days, two nights, five off. Each section also has an out-of-scope shift supervisor, section supervisor, section superintendent and director of process. Prior to the lockout there was not a shift supervisor for each shift in each section. Some shift supervisors would oversee more than one section.

[22] Given the highly safety sensitive environment in which the Process Department employees work, before any maintenance work can be done in the Process Department, a permit must be obtained. There are three kinds of permits: low risk cold work (work activity that does not normally generate sufficient heat or spark energy to provide a potential ignition source for a flammable mixture); low risk hot work (activity that involves the use of tools, equipment or vehicles that may produce a spark but which does not normally generate sufficient heat or spark energy to provide a potential ignition source for a flammable mixture) and high risk hot work (work that will cause or require the use of a continuous or uncontrolled heat source such as open flame, arcs, sparks, or other high temperature/energy sources that could initiate a fire or explosion)[19].

[23] Prior to the lockout, there was a position guide for master operators that set out all their duties. These duties included issuing and authorizing all safe work permits and authorizing all maintenance work. After the Union members returned to work, they discovered that the master operators' duties had changed significantly. The Employer filed a position guide for the master operator in section III dated January 6, 2010[20] and an undated position guide for that position[21] from which a number of duties, including the following, had been removed:

> 2. *Issues and authorizes all required safe work permits for the Section III unit areas.*
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> 3. *Authorizes all maintenance work in the Section.*

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[19] Exhibit U15.
[20] Exhibit E16.
[21] Exhibits E3 and E15.

11. Directs the work of the operators on shift as specified by their Position Guides.

[24] While the reliability of this undated position guide is questionable (see para 138), these three changes were evident in the workplace. Prior to the lockout, master operators were responsible for reviewing requested permits, considering how they might conflict with each other and determining what work was safe to do each day. They were responsible for coordinating the permitted work. The only role for the shift supervisor was to sign off on high risk hot work permits. Following the return to work, the shift supervisors did all of this work and issued the permits. During the lockout, a new CRC Safe Work Permit Program ["Permit Procedure"] was adopted by the Employer. In the Procedure Revision History, it indicated that on June 9, 2020: "Moved MO responsibilities to Shift Supervisor or designate"[22]. This was 13 days before the new collective agreement was ratified.

[25] Another procedure that was changed related to who could grant approval to people to enter the Process Department: Permit Exemption and Access to Controlled Areas[23] ["Access Procedure"]. Prior to the lockout, it was the master operator who could authorize or deny entry; after the return to work, this duty was transferred to the shift supervisor. The Procedure Revision History on this document indicated this change was made "June 2020". It was signed off by Superintendent Earl Argue on June 24, 2020. The "Revised Date" was June 25, 2020 and the "Effective Date" was July 30, 2020.

[26] Three further changes were commented on by the Union. During the lockout the shift supervisors moved into the master operators' offices, so that they would have ready access to the computers used for issuing permits. After the master operators returned to work the shift supervisors kept those offices. After the return to work, shift supervisors directed the in-scope operators to report directly to them and bypass the master operators. Initially on their return to work master operators were excluded from the start of shift planning team meetings. Their inclusion was reinstated in November 2020.

[27] The Employer also adopted a new Process Shift Staffing Program ["PSSP"][24]; it was signed by Argue on June 15, 2020 and approved by Kevin Ham, Director of Process, on June 30, 2020. It implemented a significant change to the process followed by the Employer in the event of a short notice (seven days or fewer) absence of staff in the Process Department. It established

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[22] Exhibit U15.
[23] Exhibit U17.
[24] Exhibit U19.

a minimum complement for each section; the master operator was not required as part of the minimum complement in any section. The implementation of the PSSP has resulted in the Process Department running short staffed very often (three to four shifts per week). Prior to the lockout, it was rare for the Process Department to run short staffed. In fact, up until shortly before the lockout, the Employer recorded a short-staffed shift as a safety incident. Boersch's evidence was that the PSSP was implemented because the Employer had already decided that it could run safely without a master operator or operator II.

[28] The Union submitted two grievances respecting these changes. The first, filed August 10, 2020, objected to the implementation of the PSSP. The settlement desired was:

> *That the Company delete the Process Department Minimum Staffing Policy and abide by staffing requirements and callout procedures in the collective agreement and established past practice. That any member that has been negatively affected as a result of the implementation of this policy be made whole in all respects.*[25]

[29] The second grievance, filed September 14, 2020, objected: "That the Company has removed customarily performed duties of the in-scope Master Operator position in all Process Department Sections and assigned them to Out-of-Scope employees". The settlement desired was:

> *That all Out-of-Scope employees immediately discontinue performing work of the bargaining unit. That the in-scope Master Operator continue to perform all customarily performed duties and tasks. That any member affected be made whole in all respects.*[26]

[30] Two of the Employer's witnesses (Torrie and Boersch) admitted in cross-examination that they were advised, before the collective agreement was ratified, that the master operator position would be eliminated. Borsch said that in the April to June time period he heard Argue say that was the intent, to eliminate the master operator position. The Employer had already decided, before the collective agreement was signed, that the position was redundant. Rowsell agreed that during the lockout the Employer decided it could run without a master operator.

[31] The Employer's witnesses gave evidence describing the decision-making process for the elimination of the master operator position. Le Dressay stated that Ham first put forward a written proposal to eliminate the master operator position in June 2020. That document was not tendered in evidence or disclosed to the Union. Le Dressay testified that he and Ham discussed the proposal in July, and he advised Ham that it did not contain enough information for him to make

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[25] Exhibit E7.
[26] Exhibit E8.

a decision on it. Ham continued work on the proposal and other departments also began considering permanent layoffs.

[32] Le Dressay testified that he and others reviewed a Business Case respecting shift supervisors[27] ["Business Case"] at a meeting on November 25, 2020. He described it as a proposal to increase the number of shift supervisors from 22 to 32 or 40, and to eliminate the master operator position. At the November 25, 2020 meeting, the Employer says, Le Dressay asked Ham and Rowsell to do further work on the proposal.

[33] Le Dressay testified that he approved the CRC Permanent Layoff Project Charter[28] on December 8, 2020. Departments then carried out the necessary work to determine which positions would be recommended for permanent layoff. Le Dressay indicated that on March 2 or 3, 2021, he approved a business case to increase the number of shift supervisors to 32, even though, he said, he had not yet made a decision whether to eliminate the master operator classification. He testified that he approved the layoff plan for all departments at a meeting on March 26, 2021, following which he directed that an operational risk assessment and a legal review be undertaken.

[34] Sometime in May 2021 Torrie was assigned to lead the operational risk assessment, through a Management of Organizational Change process ["MoOC"].

[35] In a May 27, 2021 meeting, the Employer advised the Union that it planned to eliminate the master operator and operator II classifications and implement a number of additional permanent layoffs.

[36] A decision that it was safe to implement the layoffs was made the first week of September 2021, even though Torrie would not complete her MoOC report until December 9, 2021. In cross-examination, Torrie was not able to name anything that would have been a safety "show stopper" to the Employer proceeding with the elimination of the master operator and operator II positions.

[37] On October 5, 2021 the Employer began issuing layoff notices to employees in connection with the package of layoffs, including the elimination of the master operator and operator II classifications. The Interim Order granted by the Board on November 18, 2021 brought this process to a halt.

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[27] Exhibit E17.
[28] Exhibit E31.

[38] Both parties provided the Board with substantial amounts of evidence that is not referred to in this brief summary. Significant portions of that evidence were not relevant to the decision the Board is to make.

IV. Preliminary Issues:

Deferral to grievance arbitration:

[39] As noted above, the Union has filed grievances asserting that the PSSP and the changes in the master operators' duties contravene the collective agreement. The Employer argues that the Board should defer consideration of the Union's allegations respecting those issues to the grievance arbitration process.

[40] The test for when deferral is the appropriate procedure is set out in *Communications, Energy & Paperworkers Union of Canada, Local 911 v ISM Information Systems Management Canada Corporation (ISM Canada)*[29] ["*CEP v ISM*"]:

> *Our Court of Appeal in United Food & Commercial Workers, Local Union 1400 and The Labour Relations Board et al., established the following criteria for the Board to exercise its authority to defer to arbitration:*
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> > *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
> > *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
> > *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[41] The first question is whether the disputes at issue in both proceedings are the same dispute. The Employer argues that the essential character of the PSSP grievance and that aspect of this matter are the same. The parties are the same. They both raise the issue of whether the PSSP complies with the collective agreement. They both raise the issue of past practice with respect to staffing. The master operator duties grievance and this matter have the same essential character: both allege the Employer agreed that out-of-scope employees would not perform duties of the bargaining unit and that the Employer is in breach of the collective agreement by having shift supervisors perform those duties.

[42] Second, the Employer argues, the grievance arbitration process can resolve the dispute about these two issues. An arbitrator is clearly empowered to determine whether the Employer

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[29] 2013 CanLII 1940 (SK LRB), at para 22.

breached the collective agreement by implementing the PSSP and/or removing duties from the master operators.

[43] Third, the grievance arbitration process can provide a suitable remedy. The Union has proposed in the first grievance that the PSSP be deleted and that the procedures in the collective agreement and established past practice be followed. The master operator duties grievance asks that out-of-scope employees be ordered to cease performing the work of the bargaining unit.

[44] Further, the Employer argues, any disagreement between the Union and the Employer with respect to whether the Employer is contravening the terms of the return-to-work provisions of the collective agreement cannot be determined by the Board. Those provisions specifically state that any such disputes are to be resolved through the grievance process outlined in the collective agreement.

[45] The Union referred the Board to the same decision as the Employer cited in the consideration of this issue, *CEP v ISM*. With respect to the application of the principles established in that decision, the Union comes to different conclusions. The Union argues that the questions at issue in this matter are not properly deferred to grievance arbitration.

[46] In this matter, it says, the first criterion is not met. The unfair labour practice application and the grievances are not the same dispute. In this matter, the Employer's conduct following the conclusion of the collective agreement merely serves as evidence that the Employer had in fact made *de facto* decisions during bargaining and that the Employer breached its duty to bargain in good faith by failing to disclose those decisions. The issue in this matter is whether the Employer had a duty to disclose those *de facto* decisions, and not whether those decisions breach the collective agreement. In this matter, the Union is not asking the Board to interpret the collective agreement, but to determine whether the Employer breached its duty to bargain in good faith. That issue does not require an interpretation of the meaning, application or alleged contravention of the collective agreement.

[47] The Union argues that the second criterion is not met because a grievance arbitrator does not have jurisdiction to decide whether an unfair labour practice has occurred.[30]

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[30] *University of Saskatchewan Faculty Association v University of Saskatchewan*, 2020 CanLII 40393 (SK LRB).

[48] Thirdly, the remedies sought by the grievances do not provide suitable alternatives to the remedies sought in this matter. The Board's Order in this matter will help to set the ground rules for future bargaining.

[49] The Board agrees that none of the criteria in *CEP v ISM* are met in this matter. The dispute in this matter is whether the Employer committed an unfair labour practice by bargaining in bad faith. This proceeding will not decide the questions at issue in the grievances. It does not involve an interpretation of the collective agreement. It will decide whether the Employer engaged in bad faith bargaining in arriving at the collective agreement. An arbitrator has no jurisdiction to decide the issues before the Board. Finally, while an arbitrator may provide a suitable remedy if the grievances are upheld, that remedy will not resolve the question at issue in this matter.

[50] The Employer's application to defer certain questions arising in this matter to grievance arbitration is denied.

Are portions of the Union's application untimely?

[51] Next the Employer argues that the Union's allegations with respect to the PSSP should be dismissed on the basis of timeliness. Subsection 6-111(3) of the Act authorizes the Board to refuse to hear an allegation of an unfair labour practice that is made more than 90 days after the complainant knew of the action giving rise to the allegation. This provision reflects the fact that time is of the essence in addressing labour relations disputes.

[52] The Employer referred to *CLR Construction Labour Relations Association of Saskatchewan Inc. v International Brotherhood of Electrical Workers*[31] ["*CLR v IBEW*"] as setting out the onus of proof in the consideration of timeliness issues. The Employer bears the evidentiary burden to demonstrate that the Union has surpassed the 90-day period. Once that onus is met, the Union bears the evidentiary burden of demonstrating that there are countervailing considerations that justify the Board exercising its discretion to allow the application outside of the 90-day period.

[53] The grievance respecting the PSSP was filed on August 10, 2020; it identified the date the incident took place as July 20, 2020. This application was not filed until November 13, 2020. The Employer argues that this means this aspect of the application was filed late.

[31] 2019 CanLII 79295 (SK LRB) at para 57.

[54] The Employer referred to *United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*[32] ["*Saskatoon Co-op*"] as setting out the principles to be applied to the issue of whether the Board should consider a late-filed application:

> • Applications alleging an unfair labour practice must be filed within 90 days after the applicant knew or ought to have known about the misconduct giving rise to the allegation.
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> • The 90-day period reflects the fact that time is of the essence in addressing labour relations disputes and timely resolution of those disputes is essential to ensuring amicable labour relations.
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> • It is important to identify with precision when the 90-day period commences.
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> • A complaint may be based on a continuing policy or practice rather than a discrete set of events. This fact makes it more difficult to ascertain the commencement of the 90-day period and may make it easier to justify a delay.
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> • The Board will adjudicate applications filed outside the 90-day period if the other party consents or waives its application.
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> • If no consent or waiver is given, the Board has discretion to adjudicate the application.
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> • When exercising this discretion, the Board should apply the non-exhaustive list of countervailing factors identified in *Toppin v UA, Local 488*[33] ["*Toppin*"].
>
> • Prejudice is presumed in all late filings; however, if actual prejudice could result from hearing the application it will be dismissed.

[55] In *Toppin*, the Alberta Labour Relations Board described what it considered to be the correct approach to application of the 90-day period:

> *1. The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.*
>
> *2. "Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.*
>
> *3. Late complaints should be dismissed unless countervailing considerations exist.*
>
> *4. The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.*
>
> *5. Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:*
>
> > *(a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?*
> > *(b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?*

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[32] 2021 CanLII 37009 (SK LRB).
[33] 2006 CarswellAlta 313 (AB LRB) at para 30.

> *(c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?*
> *(d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?*

[56] Based on these criteria, the Employer argues that the allegations respecting the PSSP in this application should be dismissed. The Union is a sophisticated applicant, and no explanation for the delay was provided. The Union has not identified any countervailing consideration that would justify allowing the portion of its application with respect to the PSSP to proceed.

[57] The Union argues that the actions or circumstances giving rise to the allegation that the Employer breached its duty to bargain in good faith did not arise until the end of the interim return to work period, which was no earlier than August 20, 2020. The Union brought its application within 90 days of the end of that interim period. Even if the Board accepts the Employer's argument that the 90-day time period began to run no later than August 10, 2020, the date the grievance was filed, this application was filed only three days late. The Board should allow it to proceed, because the Employer has suffered no prejudice.[34]

[58] In making a determination on this issue, the Board considered *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*[35], where the delay was approximately five weeks. The Board stated:

> *To begin, it is significant that the delay at issue in this case is approximately five (5) weeks, i.e. September 8, 2015 to October 14, 2015. It is true that labour relations prejudice is presumed in all cases of delay. However, we must conclude that this delay is slight and no evidence was presented to indicate that proceeding to adjudicate this application would prejudice the Employer in any way.*

The Board described the delay as minimal and noted that the employer did not experience any real litigation prejudice.

[59] In *CLR v IBEW*, the Board did not dismiss an application that was filed nine weeks late:

> *[71] The Board starts with the premise that labour relations prejudice is presumed in all cases of delay. Certainly, labour relations prejudice is always a concern. As demonstrated in Sask Polytechnic, a case in which the delay totaled only five weeks, an applicant may be given more leniency when there is only slight delay, especially absent specific evidence of litigation prejudice. While the delay in the current case is lengthier, it does not approach the ten-month delay in Mosaic Potash, which necessitated "compelling reasons" but still fell short of "extreme". The Board notes further that, as of the date of the hearing, no evidence had been lost due to demise or destruction. The passage of time*

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[34] *United Food and Commercial Workers Union, Local 1400 v Corps of the Commissionaires*, 2021 CanLII 15152 (SK LRB).
[35] 2016 CanLII 58881 (SK LRB) at para 25.

> *does not appear to have undermined the Union's ability to mount a defense to the CLR's application.*

[60] In *Saskatoon Co-op*, the application was, in part, filed approximately seven months after the expiry of the 90-day timeline, and was continuing. In determining the date the clock begins to run, the Board cautioned that "The clock does not begin to run on the date when a breach is anticipated; it begins when the breach has occurred". The Board heard the application, stating: "the Board is not persuaded that the delay has prejudiced the Employer's ability to defend its position in this matter".

[61] Subsection 6-111(3) of the Act provides as follows:

> *(3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.*

[62] In assessing a request that the Board exercise its discretion to dismiss an application for delay, the first issue is to determine when the 90-day time frame referred to in subsection 6-111(3) began to run. In this matter, the time period began to run when the Union knew or ought to have known that the Employer bargained in bad faith by failing to advise the Union that it had made a *de facto* decision during bargaining to eliminate the master operator position. The PSSP grievance identified the date the incident took place as July 20, 2020. Boersch testified that the gradual return to work commenced on that date with refresher training that continued until sometime in August. The only evidence before the Board respecting when the Union members actually returned to work in the refinery are the schedules filed by the Union[36]. They indicate that date to be August 9, 2020. The Board finds this to be the date the 90 days began to run. This means this aspect of the application was filed six days late. Even accepting the earliest date alleged by the Employer (July 20, 2020), this aspect of the application was filed 26 days late.

[63] The Union is a sophisticated applicant. It provided no evidence respecting why the delay occurred, other than to argue that this aspect of the application was not filed late. On the other hand, the Employer provided no evidence that this short delay caused any prejudice to its ability to defend its position in this matter. Given the importance of the rights asserted in this matter, the Board has determined that it will not exercise its discretion under subsection 6-111(3) and will instead determine all aspects of this matter. Even if the Employer is right that the applicable date

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[36] Exhibit U22.

is July 20, 2020, and the allegations in the application respecting the PSSP were filed 26 days late, the same analysis and outcome would apply.

V. Duty to bargain in good faith:

Argument on behalf of Union:

[64] The Union argues that the Employer had a duty to disclose during bargaining two *de facto* decisions that it had already made at that time:

- To implement the PSSP, that would allow the Employer to run without a master operator and/or operator II on shift in cases of short notice absences;
- To take key permitting and other duties away from the master operators and instead assign them to out-of-scope shift supervisors, paving the way for the planned elimination of the master operator classification.

[65] The Employer also had a duty to disclose during bargaining the *de facto* decision that it had already made at that time, or alternatively that it was seriously considering at that time, to move toward eliminating the master operator and operator II classifications from the bargaining unit, and to have the master operators' duties performed by out-of-scope shift supervisors.

[66] The Union argues that the Employer's duty to make unsolicited disclosure of these *de facto* decisions to the Union during bargaining arose for two reasons. First, the Employer had a general duty to disclose those decisions as part of its duty to bargain in good faith because of the major impact they would have on the bargaining unit. Second, the Employer had a heightened duty to disclose these decisions as part of its duty to bargain in good faith in the particular circumstances of this case. The removal of the master operator classification had been expressly proposed by the Employer during bargaining, but the Employer ultimately represented that the master operator classification would be maintained. Even if the Employer was just seriously considering these decisions, it had a duty to disclose that to the Union to avoid misrepresenting to the Union that the master operator and other in-scope process operator classifications would be maintained and that the Process Department would generally continue to operate as it had previously.

[67] The test for whether there is a duty of unsolicited disclosure about a *de facto* decision that the Employer has made depends on whether it "may have a major impact on the bargaining

unit"[37]. The Union argues that these decisions meet this test because they could reasonably be expected to have a major impact on the safety and wellbeing of bargaining unit members. Out-of-scope shift supervisors are not required to go through the same degree of training as master operators. That means unskilled workers now have responsibility for determining whether maintenance work can proceed in inherently dangerous process units with which they are not familiar. The Permit Procedure and Access Procedure undermine the entire nature and purpose of the master operator position, which is to be responsible for overseeing and ensuring the safe functioning of all of the operations within their section.

[68] The Union made its position clear during bargaining that it considered the master operator position to be crucial to maintaining the safe operation of the refinery. Had it known that the operator II position was at issue, it would have raised the same concerns about that position. In the context of a highly safety sensitive workplace with a history of significant incidents and emergencies, where the refinery had, except in rare circumstances, historically run and prioritized running with a full complement of process operators, the Employer's decision to implement the PSSP is a decision with a major impact on the bargaining unit that should have been disclosed and bargained. Similarly, taking safety sensitive duties away from the workers most qualified to perform those duties and instead giving them to out-of-scope shift supervisors who may not be qualified to perform them, paving the way for the elimination of the master operator position altogether, is also a decision with a major impact on the bargaining unit.

[69] Even apart from the significant safety impacts of the Employer's decisions, decisions to eliminate the most senior and third most senior classifications from the Process Department, to run without these positions pursuant to the PSSP, and to take away key in-scope duties, can reasonably be expected to have a major impact on the bargaining unit, because of their significant economic consequences for members.

[70] Although there is not a general duty to disclose plans that the Employer is merely seriously considering, a heightened duty of disclosure can arise based on the particular facts of a case, to prevent one party from misrepresenting the facts or its position to the other party. The Employer's positions in bargaining effectively represented that: the removal of a particular classification was something that required the agreement of the parties; and the master operator and other positions would remain in the scope of the bargaining unit unless the Employer brought an application to the Board to try to exclude them. If the Employer was seriously considering unilaterally eliminating

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[37] *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*, 2019 CanLII 98484 (SK LRB), at para 85.

the master operator or any other classification during bargaining, it had a duty to disclose that to the Union. It also had a duty to disclose any significant and related plans that would pave the way for it to eliminate the master operator classification (Permit Procedure; Access Procedure; PSSP). The Employer had a general duty to disclose those decisions because they were *de facto* decisions with a major impact on the bargaining unit.

[71] In light of the particular representations that the Employer made during bargaining, the Employer also had a heightened duty to disclose those decisions to avoid effectively misrepresenting the facts and its position to the Union. The Board needs to analyze what the Employer's words and conduct reasonably led the Union to believe or expect. The duty to bargain in good faith includes an obligation not to deliberately misrepresent material facts.[38] The Union argues that the Employer's evidence indicates that as of March 30, 2020, it was already seriously considering permanent layoffs in the Process Department and knew there was a high probability of permanent layoffs. The following facts support the heightened duty requiring the Employer to disclose during bargaining any consideration or serious consideration of eliminating the master operator or operator II positions:

- What the Employer is trying to unilaterally do now (eliminate the master operator classification and instead increase the number of out-of-scope shift supervisors to perform master operators' duties) is precisely what it unsuccessfully proposed during bargaining.
- The Union made clear during bargaining it was not agreeable to elimination of the master operator classification.
- The Special Mediators' report indicated that they were not persuaded that the elimination of the master operator classification was necessary or warranted.
- The Employer expressly represented to the Union and the bargaining unit members that it was accepting the Special Mediators' recommendation on this issue.
- On the whole of the evidence, the Employer effectively represented to the Union that it was maintaining the master operator classification and, by implication, the other process department classifications.

[72] With respect to the PSSP, Permit Procedure and Access Procedure, the documentary evidence clearly establishes that the Employer made final, formal decisions to implement these policies while the parties were still bargaining. The PSSP was signed by Argue on June 15, 2020. The Permit Procedure indicates that it was finalized on June 9, 2020. The Access Procedure was

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[38] *Saskatchewan Union of Nurses v Regina Qu'appelle Health Region*, 2007 CanLII 68774 (SK LRB).

signed by Argue and Boersch on June 24, 2020, just two days after ratification of the new collective agreement. No evidence was provided by the Employer respecting when the *de facto* decisions to proceed with these changes were made. In any event, they were definitely made while the parties were still bargaining.

[73] The Union argues that the evidence indicates that the Employer made a *de facto* decision during bargaining to move toward the elimination of the master operator and operator II classifications:

- It had the mandate during bargaining to propose the elimination of the master operator position from the bargaining unit and if the Union had agreed, the position would have been eliminated. There were still some logistics to work out in terms of how many out-of-scope shift supervisors would be needed but that did not prevent the Employer from reaching the decision that it wanted the master operator position removed from the bargaining unit.

- In its written submissions to the Special Mediators, the Employer effectively indicated that some logistics still needed to be worked out respecting the number of management supervisors required, however, it had already decided that it wanted the master operator position removed from the scope of the bargaining unit.

- When the Employer represented in its March 30, 2020 Best and Final Offer that the master operator position would be maintained, Le Dressay's evidence was that it was seriously considering layoffs in the Process Department in line with the operational efficiencies achieved during the lockout, and that there was a high probability of such layoffs.

- Rowsell's evidence was that, at the time of the March 30, 2020 offer, the Employer was already aware of the issues used to subsequently justify elimination of the master operator classification (its comparative labour costs, changing environmental requirements, forecasted decline in demand for oil).

- Le Dressay did not identify any logistics that needed to be resolved before the master operator classification could be removed from the bargaining unit, other than how many out-of-scope shift supervisors would be needed to replace them.

- The Employer did not tender any written evidence supporting their submissions respecting when the decision was made to eliminate the master operator classification.

- Logistical issues did not prevent the Employer from effectively deciding that it wanted to move toward the elimination of the master operator and operator II classifications.

- Even on the Employer's version of events, Le Dressay made the decision to eliminate the master operator and operator II classifications before the MoOC process had even started, so before it could work through the logistics associated with eliminating the positions.

- Boersch's evidence was that Argue (who was on the bargaining committee) told him before the collective agreement was ratified and potentially as early as April 2020 that the master operator position would be eliminated.

- Boersch indicated that when the Employer decided, during the lockout, to implement the PSSP, it had already determined that the master operator and operator II positions were redundant and that it could operate safely and efficiently without them.

- The evidence of the Employer's witnesses was clear that further documentation existed respecting the date that the Business Case was prepared, but it was not tendered.

- Le Dressay already had all of the information he needed during the lockout to make his decision. There is no evidence that any further information was provided or used.

- Le Dressay said he decided on March 2 or 3, 2021 that there would be 32 shift supervisors on a permanent basis, but that he did not decide to eliminate the master operator classification until March 26, 2021. Given the Employer's extreme emphasis on cost savings, it is not credible to believe the Employer would increase the number of out-of-scope shift supervisors unless it had already decided that the master operator classification would be eliminated.

[74] The law is clear that the duty to bargain in good faith includes a duty to disclose material facts to the other party during collective bargaining, even when not solicited. In addition to the general duty to make unsolicited disclosure of facts that could have a major impact on the bargaining unit, employers also have a more specific duty, based on the particular facts of the case, to make whatever disclosure is necessary so as not to misrepresent the facts or their proposals. In this case, the Union reasonably understood that the Employer's proposal to eliminate the master operator classification from the bargaining unit was off the table. When the *de facto* decision was not disclosed, there was an underlying misrepresentation that the bargaining relationship and conditions of employment would continue as they had previously, when in fact the Employer had decided to make a change with a major impact on the bargaining unit.

[75] The Union relies on *Consolidated Bathurst Packaging Ltd. v IWA, Local 2-69*[39] ["*Consolidated Bathurst*"]:

> *50 On the other hand, plans and decisions to close a plant can effectively extinguish a bargaining unit and the relevance of the usual terms of a collective agreement. In this context, where a decision to close is announced "on the heels" of the signing of a collective agreement, the timing of such a significant event may raise a rebuttable presumption that the decision-making was sufficiently ripe during bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining. It can be persuasively argued that the more fundamental the decision on the workplace, the less likely this Board*

[39] 1983 CarswellOnt 1111 (ON LRB).

> *should be willing to accept fine distinctions in timing between "proposals" and "decisions" at face value and particularly when strong confirmatory evidence that the decision-making was not manipulated is lacking. This approach is sensitive to the positive incentive not to disclose now built into our system, and the potential for manipulation. Indeed, a strong argument can be made that the de facto decision doctrine should be expanded to include "highly probable decisions" or "effective recommendations" when so fundamental an issue as a plant closing is at stake. Having regard to the facts in each case, the failure to disclose such matters may also be tantamount to a misrepresentation. We might also point out that there are decisions taken because of costs which really ought not to be made until the underlying problem is discussed with the union to see if adjustments can be made and the decision avoided. However, for the reasons discussed above, we are not willing to adopt the Ozark Trailers test of "thinking seriously" for unsolicited disclosures as urged upon us by the complainant. The failure to reveal such "possibilities" as a general matter is not tantamount to a misrepresentation and therefore lacks the bad faith rationale developed in Westinghouse justifying unsolicited disclosure. The purpose of such information would be investigative and to facilitate the rational discussion purpose of the bargaining duty. Accordingly, the purpose of the information and the difficulties detailed above with unsolicited disclosure militate against any substantial expansion of the unsolicited disclosure obligation as elaborated to date. The interests of employees are real but the Board is not ignoring these interests by requiring a questioning approach to disclosure as a general matter. The position urged upon us by the complainant has too much potential for "greater heat than light" at the bargaining table. There is already enough uncertainty over precisely how significant and what nature a decision must be to trigger the unsolicited disclosure duty. Unsolicited disclosure must be understood to be exceptional and centered essentially on a bad faith rationale.*
>
> *. . .*
>
> *53 In any event, we find that the matter of the impending closing was so concrete and highly probable in early January and dealt with by the board of directors in such a perfunctory manner (in that there was no documentation or apparent consideration of alternatives), the company had a minimum obligation to say that unless a certain percentage of the new business was retained or unless there was a dramatic turn in the operation a recommendation to close would be made within the next few weeks. Having regard to the Christmas letter to employees; the productive second half of 1982; and to the then state of dialogue between local labour and management on the future of the plant, the company's silence at the bargaining table was tantamount to a misrepresentation within the meaning of the de facto decision doctrine established in Westinghouse. It may well be that the union could have contributed little to whether the plant had to be closed, i.e. "decision bargaining", but it had a vital interest in the "impact" of that closing on the employees it represented. . . .*

[76] In this case, the Employer did not immediately announce its decision to eliminate the master operator and operator II classifications "on the heels" of the signing of the collective agreement. However, immediately after the lockout ended, evidence started to mount suggesting the Employer had made a decision during the lockout to move toward the elimination of the master operator and operator II classifications.

[77] In *Consolidated Bathurst*, in determining that a *de facto* decision had been made prior to the end of bargaining, that the company would proceed to close the plant, the Ontario Board relied on the fact that "there was no documentation or apparent consideration of alternatives". In this matter, Le Dressay's evidence on cross-examination was that even at the time of the March 30,

2020 offer, it was already highly probable that there would be layoffs in line with the operational efficiencies achieved during the lockout, including running without the master operator and operator II. The documentary evidence tendered by the Employer lacks any consideration of whether or why or how the master operator and operator II classifications would be eliminated. The only proposal put forward by the Employer relates to the number of shift supervisors.

[78] Le Dressay indicated that the Employer did not want to proceed with layoffs in a piecemeal fashion. This, the Union says, simply means that not all of the layoffs may have been determined prior to the end of bargaining, and the Employer waited until those decisions were also made to move forward with its previous decision to eliminate the master operator and operator II classifications.

[79] The Union referred to the fact situation in *IUOE, Local 865 v Canadian Pacific Forest Products Ltd.*[40]:

> *11 The documentary evidence before the Board, most of which came from the files of the respondent, establishes that the problems with turbine #1 which eventually resulted in a shut down first became apparent in the course of an inspection in early November 1985. Almost immediately thereafter, a review process, was* [sic] *culminated in the shut down, was begun. The evidence suggests that shutting down turbine #1 was explored in early 1986 as a alternative to the extensive overhaul that would otherwise have been required. By July and August 1986, it had been specifically identified and costed as an alternative. The overhaul alternative was specifically rejected in the budget discussions which occurred in late 1986. In addition, as early as February 25, 1987 correspondence to and from a consulting firm retained with respect to the future of turbine #1 refer to it being "eliminated" There is also correspondence with respect to the respondent's insurance coverage in May 1987 which unequivocally states that the respondent planned to shut down turbine #1 by late 1988.*
>
> *12 Although the respondent presented no evidence with respect to when any formal decision to shut down turbine #1 was made, it is quite clear that that decision had, for all practical purposes, been made well before the July, 1987 collective bargaining sessions between the parties.*

[80] Similarly in this case, the Union argues, the Employer’s decisions during bargaining to implement the PSSP, take key duties away from master operators and have a shift supervisor working on each shift in each section, evidence the Employer’s intention to move toward the elimination of the master operator and operator II classifications altogether. The evidence was clear that the Employer had determined that the master operator and operator II classifications were redundant and Argue, who was on the bargaining committee, was telling people in the April to June 2020 timeframe that the master operator classification would be eliminated. The fact that

[40] 1989 CarswellOnt 1132 (ON LRB).

the Employer may not yet have worked out all of the logistics associated with eliminating the master operator and operator II classifications does not take away from the fact that the Employer had in fact made a *de facto* decision to move toward those eliminations.[41] Significantly, the Employer had not worked out the logistics of its decision as of the conclusion of the hearing in this matter, and only appeared to begin to do so when it commenced the MoOC process in May 2021.

[81] The Union argues that this matter is similar to *RWDSU v Temple Gardens Mineral Spa Inc.*[42], where the Board found the employer had failed to bargain in good faith by failing to disclose at the bargaining table its plans for expansion. The Board noted that the plans for expansion were at an early stage, but were not, as the employer alleged, merely preliminary. Clearly the project had proceeded past the stage of a mere idea or concept. The Board relied on two previous decisions of this Board where:

> *Each of the employers consciously withheld information from the union about decisions that had already been made in circumstances where there was no question that it would significantly impact on bargaining (if it were known to the union) and on the bargaining unit during the term of an agreement. In each of the foregoing cases, decisions had either already been made, or the Employer knew that they were going to be made, that would result in significant reorganization of the bargaining unit and lay offs or job loss. Indeed, in Regina Exhibition Assn. Ltd. and Loraas Disposal Services Ltd. , both supra, the employers' actions appear to demonstrate an element of deception or subterfuge concerning their plans for the workplace.*

[82] Le Dressay's evidence suggests that during the lockout he was of the view that position eliminations were highly probable. The only evidence of alternatives being considered by the Employer was whether to replace the master operators with 32 or 40 shift supervisors. There is no evidence that alternatives to eliminating the master operator and operator II classifications were considered. Torrie and Le Dressay both indicated that there was nothing that would be a showstopper to the Employer's plan to proceed with these decisions.

[83] The Employer referred to the Business Case as a proposal to eliminate the master operator position. The Union argues that a more reasonable interpretation is that, since it had previously made the decision to eliminate the master operator classification, the purpose of this document was to decide how many shift supervisors they would need when that decision was implemented: 32 or 40. The argument that the decision to eliminate the master operator

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[41] *ECWU, Local 593 v Union Carbide Canada Ltd*, 1992 CarswellOnt 1376 (ON LRB).
[42] 2002 CarswellSask 860 (SK LRB) at p.7. See also *CEP Local 255G v Central Web Offset Ltd.*, 2008 CanLII 46476, CarswellAlta 1274 (AB LRB); *Canadian Union of Public Employees, Local 1251 v New Brunswick*, 2009 CanLII 74885 (NB LEB).

classification had already been made before the Business Case was prepared is proven by the following excerpts:

> *Interdependencies*
> *These new management positions are required to support the elimination of the in-scope Master Operator classification.*[43]
>
> *Appendix A*
> *A separate business case has been submitted to address this gap by adding to the supervisor complement, in conjunction with the in-scope Master Operator job deletion. It is acknowledged that this process may take some time.*[44]
>
> *The purpose of this business case is not to request addition to complement, but rather to provide interim compensation and recruitment support for this staffing model until the Master Operator job deletion and departemental* [sic] *re-organization processes are concluded.*[45]
>
> *Interdependencies*
> *This proposal is an interim measure until the plan is in place to permanently fill Process Supervisor positions in conjunction with the elimination of the in-scope Master Operator classification.*[46]

[84] The Union argues that there is very little documentation to support the timing of the Employer's decision. The Business Case is undated, and the other available evidence to confirm its timing (*e.g.*, emails) were not tendered in evidence. No other proposals or decision documents were put into evidence (*e.g.*, a June 2020 proposal to eliminate the master operator position that was referenced by Le Dressay). While the Employer did call Le Dressay as a witness, it did not produce documentation that supported his version of events. If there were still logistics to be worked out, there is no documentary evidence that they were in fact worked out before March 26, 2021. Le Dressay said more detail was needed than existed in the Business Case but he did not produce any more detailed proposals.

[85] In *International Association of Fire Fighters, IAFF Local 4794 v Rocky View County*[47] ["*Rocky View County*"] the Alberta Labour Relations Board described the trigger for the duty to disclose as the date when a "firm course" was set for layoffs. The Union argues that it is clear from the evidence in this matter that the Employer set a firm course during bargaining to move toward the elimination of the master operator and operator II classifications. It had already determined those classifications were redundant and it could run without them. As in *Rocky View County*, some additional decisions remained to be made before the decision to eliminate the

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[43] At page 5.
[44] Appendix A, page 1.
[45] Appendix A, page 1.
[46] Appendix A, page 3.
[47] 2013 CarswellAlta 2053; 2013 CanLII 67124 (AB LRB) at para 51.

master operator and operator 2 classifications would be implemented, including which other employees would be concurrently laid off. A *de facto* decision may be conditional on internal or external factors or may be subject to further detail and determination. In this matter, the Board may properly infer, from the absence of any consideration of alternatives, that a *de facto* decision had been made. The Employer cannot avoid its good faith disclosure obligations by waiting until after the collective agreement is concluded to formalize plans already effectively decided that will impact the bargaining unit. The duty to disclose arises when the Employer has made a *de facto* decision to proceed, even if the formalities and logistics of the decision are not worked out until after bargaining has concluded.

[86] The Union relied on *Association of Management, Administrative and Professional Crown Employees of Ontario v Ontario (Government Services)*[48] ["*Ontario (Government Services)*"]:

> *Thus, the jurisprudence has long and consistently held that one of the functions served by the duty to bargain in good faith and make every reasonable effort to make a collective agreement is to foster rational and informed discussion. The duty requires parties to engage in full and honest discussion and censures parties for withholding information that the party opposite requires in order to intelligently appraise a proposal.*

[87] The Board took a similar approach in *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*[49] ["*Moose Jaw Firefighters 2019*"]. The Board held that the employer had not bargained in good faith when it failed to disclose a decision that was entirely contrary to the association's reasonable expectations, given the parties' bargaining history. In the circumstances of this case, the Union argues, the Employer created a construct whereby the Union would believe that the master operator and other operator classifications would remain in the bargaining unit absent either agreement between the parties or a Board order. The Union relied on that misrepresentation, to its detriment.

[88] The Employer would have been keenly aware of the possibility of an unfair labour practice application being filed against it. It would have had an incentive to delay the implementation of its *de facto* decision so that it could argue that no decision was made until after bargaining concluded. In light of this, the Board must be extra cautious in reviewing the evidence. Merely calling Le Dressay to make a bald statement that the decision was made on March 26, 2021 is not sufficient to rebut the presumption established by the overwhelming evidence suggesting the Employer decided during bargaining to move toward the elimination of the master operator and operator II positions.

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[48] 2012 CanLII 3597 (ON LRB) at para 69.
[49] *Supra* note 38.

[89] The Union points out that the Permanent Layoffs Project Plan[50] ["Project Plan"] is dated December 2, 2020, after this application had already been filed. The Project Plan is unhelpful in shedding light on when the Employer made the decision to eliminate the master operator and operator II positions. While the Employer may not yet have made decisions on all of the layoffs it would be implementing, the evidence indicates that the *de facto* decision to eliminate the master operator and operator II positions had already been made before the Project Plan was created and further, that at the time the Project Plan was created, the Employer had already been considering layoffs for some time. Le Dressay's evidence, that he wanted to proceed with all of the layoffs at the same time, is consistent with the Union's view that the purpose of the Project Plan was to consider what other layoffs it would implement at the same time.

[90] Le Dressay indicated that the Employer would not have proceeded with the layoffs of the master operators and operator IIs if the MoOC found them unsafe. On the other hand, the news release issued by the Employer on October 4, 2021 was entitled "The Co-op Refinery Complex to Proceed with Involuntary Separations" and contained the following statement:

> *The CRC's decision to reduce its workforce was made once the Company had undertaken the appropriate steps to ensure that any workforce reduction would not impact the safety and reliability of the Refinery.*[51]

[91] The MoOC Report assessing the risk of proceeding was not issued until December 9, 2021. It stated: "The evaluation determined it is acceptable to proceed with the layoff process"[52]. This was more than two months after the Employer sent notice of layoff to the first group of employees.[53]

[92] Turning to the April 24, 2020 letter, the Employer's disclosure in the April 24, 2020 letter that it was considering permanent layoffs did not satisfy its disclosure obligations or dispel its earlier representation that the master operator classification would be maintained, and that the Employer could achieve the necessary cost reductions with the master operator position intact. The Union argues that this letter did not satisfy the Employer's duty of disclosure. It made no reference to: the Employer considering classification eliminations; the Process Department in particular; or operational efficiencies achieved during the lockout. The master operator and

[50] Exhibit E30
[51] Exhibit U26.
[52] Exhibit E27, p. 5.
[53] Exhibit U28, letter dated October 5, 2021.

operator II are not among the positions listed as impacted by the temporary layoffs. The Employer is required to provide more than hints, vague comments or cryptic messages.[54]

[93] The purpose of the duty of unsolicited disclosure is to facilitate rational discussion and to respect the Union's exclusive bargaining status. The Employer's argument that its management rights enable it to implement the PSSP, move duties of master operators to out-of-scope shift supervisors and eliminate classifications is irrelevant to whether it had a duty to disclose those decisions to the Union in the first place. The duty to disclose applies to all major decisions, whether they are permissible under the collective agreement or not:

> *However, management rights do not exist in a vacuum. When an employer's actions intersect with a process of collective bargaining, its conduct is subject to scrutiny to the extent necessary to ensure that it engaged in the collective bargaining process, in good faith. . . .*[55]

[94] The Union takes issue with the credibility of all of the Employer's witnesses. The Union pointed out in detail numerous examples of the Employer witnesses providing different evidence on examination in chief and cross-examination and their failure to produce documentary evidence that would support their version of events. In particular the Union argues that the Employer's evidence that a decision to eliminate the master operator and operator II positions did not occur until March 26, 2021 is not credible and not supported by the evidence. A key aspect of considering the credibility of Rowsell and Le Dressay is their failure to put forward documents that they say are in existence, that are material to the issues in dispute.[56] Le Dressay referred to several documents that would have been highly material, that the Employer did not produce to the Union or tender in evidence. Torrie's demeanor on cross-examination was notably different than it had been in examination in chief. Her evidence was not internally consistent. Her evidence respecting the MoOC confirmed that it was not a legitimate process; on cross-examination she was unable to identify anything that might have prevented the Employer from proceeding with the layoffs.

Argument on behalf of Employer:

[95] The Employer denies that a *de facto* decision was made during bargaining to eliminate the master operator and operator II classifications such that a duty of unsolicited disclosure would

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[54] *UMFA v University of Manitoba*, 2018 CarswellMan 42, 2018 CanLII 5426 (MB LB) at para 132. See also *Rocky View County* at para 54-55.
[55] *Moose Jaw Firefighters 2019* at para 78. See also *Alberta Union of Provincial Employees v Shepherd's Care Foundation*, 2016 CanLII 23192 (AB LRB).
[56] *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB), paras 169-172.

arise respecting it. A *de facto* decision is only made where it is sufficiently certain that one can say that the decision has effectively been made. In the Employer's opinion, this did not occur until March 26, 2021, nine months after the collective agreement was ratified. It had no duty to disclose the decision to eliminate the master operator and operator II classifications, because that decision was not made, even on a *de facto* basis, until well after the collective agreement was ratified.

[96] The Employer relies on several decisions that explain why the duty of unsolicited disclosure applies only to *de facto* decisions. In *Moose Jaw Firefighters 2019*, the Board stated that an unrestricted duty to disclose information about the possibility of organizational changes may invite evaluation of organizational imperatives and undermine confidentiality in organizational planning. For these reasons, a union is not generally entitled to information about a management decision, in advance, or in order to bargain the merits of that decision.[57]

[97] In *CUPE, Local 30 and Edmonton (City), Re*[58] ["*Edmonton (City)*"], the Alberta Labour Relations Board made the following comments in describing the duty of unsolicited disclosure:

> *In the Gainers case, the Board adopted the approach of the Ontario Board in respect of the scope and limits of the duty of unsolicited disclosure. The Board accepted that the duty of unsolicited disclosure is an exceptional obligation arising out of de facto decisions, not serious possibilities, effective recommendations or highly probable decisions. We adopt and apply that same rationale in this case.*

[98] The Employer relied on *Elementary Teachers' Federation of Ontario v The Crown in Right of Ontario*[59], which made the following statements under the heading "The duty to disclose":

> *150. In bargaining, an employer must disclose on its own initiative any actual (including de facto) decision which is likely to have a significant impact on the bargaining unit. Additionally, when asked by the union in bargaining whether it is seriously contemplating initiatives which are likely to have a significant impact on the bargaining unit, an employer must answer honestly.*
>
> *151. In both cases, the duty to disclose requires that the subject of disclosure be one that has a significant impact on the bargaining unit.*
>
> *152. The parameters of required disclosure must ensure balance in bargaining, because overbroad disclosure has the potential to distort the process, as discussed by the Board in Westinghouse and National Steel Car, supra. To require disclosure about issues that may not come to fruition because they are not sufficiently firm when bargaining occurs would unnecessarily divert and dissipate the parties' attention and bargaining priorities.*

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[57] At para 86.
[58] 1995 CarswellAlta 1680 (AB LRB) at para 36.
[59] 2022 CanLII 15874 (ON LRB).

[99] The Employer also relied on *Consolidated Bathurst* in this regard. In that matter, the Ontario Board confirmed that "it is 'tantamount to a misrepresentation' for an employer not to reveal during bargaining a decision it has already made which will have a significant impact on terms and conditions of employment such as a plant closing and which the union could not have anticipated"[60]. It was not willing, however, to adopt a test of "thinking seriously" for unsolicited disclosures, stating: "The failure to reveal such 'possibilities' as a general matter is not tantamount to a misrepresentation and therefore lacks the bad faith rationale developed in *Westinghouse* justifying unsolicited disclosure"[61]. It concluded that "Unsolicited disclosure must be understood to be exceptional and centered essentially on a bad faith rationale"[62].

[100] Next the Employer turned to *UE, Local 504 v Westinghouse Canada Ltd.*[63] where the employer did not advise the union during bargaining of a plan to relocate its plant:

> *39 . . . Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, can there be any doubt that the section 14 duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. Similarly, can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.*
>
> *40 The more difficult question is whether there is an obligation on an employer to reveal on his own initiative plans which are not finalized at the time of bargaining but which, if implemented during the term of the collective agreement, would have a significant impact on the economic lives of bargaining unit employees. On one side the Board must be concerned with potential distortion of the bargaining process by the imposition of an obligation which requires the employer to advise the union on his own initiative of plans which may never become decisions. On the other side, however, the Board must be sensitive to the purpose of the collective bargaining process and to the role of the trade union as exclusive bargaining representative of the employees who might be affected if these plans resulted in decisions being made by the company.*
>
> *41 The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage or are later abandoned because of changing environmental factors. The company's*

[60] At para 44.
[61] At para 50.
[62] At para 50.
[63] 1980 CarswellOnt 954 (ON LRB); affirmed at 1980 CarswellOnt 1449 (ON SCDC).

> *initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his onw* [sic] *initiative plans which have not become at least de facto decisions.*

[101] The Employer also compared its situation to *CEP Local 255G v Central Web Offset Ltd.*[64]. There, the employer began making inquiries about the market for printing presses in September 2005, and received an offer to purchase that it did not accept. It received another offer to purchase the printing press in November 2005; the employer's representative advised the potential purchaser he lacked the authority to sell on his own and a board meeting would be required (sale of the press would mean closure of the plant). On January 27, 2006 the board instructed its representative to sell the printing press. On January 30th, the employer accepted the offer to purchase. Bargaining with the union had commenced on January 20, 2006, but the employer said nothing to the union about the impending sale at that meeting:

> *[140] The plant closure here was a decision that attracts a duty of unsolicited disclosure. The cases say that the duty of disclosure arises only at the point that a de facto management decision is made, not when it is just an idea or even a reasonable likelihood. In our opinion, a de facto decision to close the Ed Web plant occurred on January 30, 2006, three days after the Central Web board meeting at Black's offices in Victoria. On that date Mr. Caston for Central Web accepted Shuttle's offer to buy the press. Although the sale was conditional on certain things, including an inspection, at this point the sale and consequent closure was a sufficient certainty that the Union was entitled to know that this was the reality it had to deal with in the bargaining for the bindery unit.*

In applying the rationale in that decision to the facts of this matter, the Employer argues that it was not required to disclose the potential for elimination of the master operator classification when it was just an idea or even a reasonable likelihood. It was only once the *de facto* decision was made on March 26, 2021 that a duty of disclosure would have arisen, long after the collective bargaining was completed.

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[64] *Supra* note 43.

[102] In *Ontario Public Service Employees Union v Ontario (Management Board of Cabinet)*[65] ["*OPSEU*"], the Ontario Labour Relations Board did not find a breach of the duty to bargain in good faith. The Ontario government had operated a temporary help service, whose employees worked on temporary assignment in various ministries and agencies. The future of the service was under serious review in 1993/94. As early as June 1995 the elimination of the service was being considered as an option. Although elimination seemed to be the preferred option, other options continued to be actively considered until mid-July 1996. On June 28, 1996, a business case to eliminate the service was finalized. A July 17, 1996 memorandum indicated that, by that date, a *de facto* decision had been made. Until that point, other options continued to be actively considered and there remained reservations about elimination of the service. Collective bargaining concluded on March 29, 1996. The Ontario Board found no breach of the duty of unsolicited disclosure because no *de facto* decision was made until after bargaining concluded.

[103] In *Canadian Union of Public Employees, Local 1251 v New Brunswick*[66], the New Brunswick Board found no breach of the duty to bargain in good faith. A collective agreement was signed on April 8, 2008. At the end of March a newly appointed Deputy Minister asked his senior administrators to compile ideas for administrative efficiencies. They met and discussed ideas in June and July 2008. Laying off human services counselors was an option conditionally chosen by July 2008, subject to testing. The Deputy Minister testified that he made the decision to proceed with the layoffs on August 25, 2008. On November 5, 2008, 36 counselors were issued written layoff notices. The New Brunswick Board stated:

> *43 Adopting this "broadened" recognition that a de facto decision may be extended to "concrete and highly probable" plans under a "failure to disclose" analysis, the Board accepts that expected decisions, e.g., as here, what Hughes described as the "conditionally chosen" but not yet finalized decision for HSC layoffs, reached in July 2008, if extant during negotiations, call for disclosure.*
>
> *44 However, on the direct evidence heard, that is not the case here, and this whether an "unsolicited" or "solicited" situation arising, the latter claimed by the Complainant. The direct evidence in this Complaint, not refuted and here accepted, confirms that the Departments' considerations over the HSCs were only part of several contingencies under discussion during negotiations, or at the time of settlement.*

[104] In *Rocky View County*, the association and county proceeded to compulsory arbitration for a new collective agreement at the end of February 2013. The county agreed to the association's wage proposals for full-time firefighters and captains. While the county let the association know in clear terms that it had funding concerns about other association proposals, it

[65] 1998 CanLII 18271 (ON LRB).
[66] *Supra* note 43.

disclosed nothing similar regarding the full-time wages. In late April, the administration discussed with council a series of options for cost savings respecting the fire service; all of the options saw the layoff of all of the county's full-time firefighters. On May 7th the council decided not to increase taxes, meaning the layoffs must proceed. An expert was hired to review the options for proceeding with that decision. On June 12th, the arbitration board released its award. The next day the association and county met, and the county informed the association that all of the county's full-time firefighters would be laid off. The Alberta Board found that the county had breached its duty to bargain in good faith:

> *[47] As in many cases of this sort, the fundamental difficulty is determining when plans become sufficiently concrete that one can conclude a de facto decision has been made. It is clear from this Board's jurisprudence that a de facto decision is something more than: a serious possibility, an effective recommendation, or even a highly probable decision: see CUPE, supra at page 110. Instead, the decision must be sufficiently certain that one can say the decision has effectively been made. Each case has to be judged on its own facts. Thus, a sale of a business that is conditional on certain things can be sufficiently certain to demand disclosure; so too, can reorganization plans that are in place, but awaiting final approval: see: Central Web, supra, and CUPE, supra.*
>
> *[48] Once a de facto decision is made, an employer must disclose its plans to a union with sufficient detail to enable the union to have an understanding of the extent of the changes that are planned. After all, the whole raison d'être for the duty to disclose is to require the disclosure of "pertinent information so that both parties can intelligently appraise proposals": see quote from CUPE, supra.*

The Alberta Board found that the *de facto* decision was made around May 7th. The only real issue that remained outstanding as of May 7th was who besides full-time firefighters would be laid off. Following the May 7th decision not to increase taxes, the administration had reached a decision to layoff the County's full-time firefighters with sufficient particularity and certainty of implementation that it was characterized by the Alberta Board as a *de facto* decision.

[105] Finally, the Employer referred to *UMFA v University of Manitoba*[67] ["*University of Manitoba*"]:

> *131 The duty to bargain in good faith requires the timely disclosure of de facto decisions that will have a significant impact on the employees in the unit. In the present case, a senior Provincial government official made it clear to the University on October 6, 2016 that it was imposing a new compulsory mandate and that there would be consequences to the University for non-compliance. The imposition of a new mandate, and the University's decision to capitulate to the government order, was sufficiently certain as to constitute a de facto decision immediately following the government's communication on October 6, 2016. The decision concerned wages and, obviously, had a significant impact on employees in the unit. Accordingly, there was an obligation to disclose that critical information to the Faculty Association at that point in time. The University had many opportunities to make*

[67] 2018 CarswellMan 42; 2018 CanLII 5426 (MB LB) at para 131.

> *appropriate disclosure during bargaining. Instead, the Faculty Association and its members were effectively left in the dark regarding a decision that had a significant impact on bargaining until the afternoon of the first day of mediation on October 27, 2016. Absent the information which related to a matter of such fundamental importance (wages), the Faculty Association and its members could not realistically assess their positions and priorities or formulate a meaningful response to the changed circumstances.*
>
> *. . .*
>
> *133 The Board is satisfied that the University's failure to disclose this information at bargaining was tantamount to a misrepresentation and constituted a breach of section 63(1) of the Act and an unfair labour practice pursuant to section 26. As a result of the failure of the University to make appropriate and timely disclosure, rational discussion with respect to all of the issues between the parties was compromised. In the circumstances, the University failed to provide full and candid disclosure and, as such, did not bargain in good faith and make every reasonable effort to conclude a collective agreement.*

[106] Applying these authorities to the facts in this matter, the Employer argues that no *de facto* decision was made by it that required disclosure to the Union. While the potential for and consideration of layoffs first began in March 2020, the decision to eliminate the master operator and operator II classifications did not crystallize into something concrete and highly probable until March 26, 2021. Le Dressay testified that the potential for permanent layoffs arose in March 2020. The Employer knew it was operating the refinery with fewer employees and fewer contractors during the lockout. It considered this likely to result in it operating with fewer in-scope employees going forward, and it had begun to have preliminary discussions. It did not know and had not decided which classifications this would affect. According to the Employer, the evidence shows that it had no intention of eliminating the master operator or the operator II classifications when Union members returned to work in July 2020. The master operators returned to work; they remained part of many procedures; they remained involved in permitting.

[107] According to the Employer the timeline for a decision respecting permanent layoffs followed ratification of the collective agreement. In June 2020 Ham first proposed to Le Dressay that the master operator classification be eliminated. They discussed the proposal in July 2020; Le Dressay asked Ham to further develop the proposal. Ham and Rowsell did further work on the proposal and presented it to Le Dressay on November 25, 2020. Le Dressay again asked for further work to be done, to build a better economic model, demonstrate that the Employer could recruit and retain shift supervisors, and analyze and identify how the master operator duties would be distributed if that position was eliminated. In early November 2020 Le Dressay also directed Rowsell to develop a formalized process to evaluate proposals coming forward from other departments for permanent layoffs. Rowsell worked with the departments on this process until a layoff proposal was completed on March 18, 2021. Meanwhile, on March 2 or 3, 2021, Le Dressay

approved Ham's proposal to increase the shift supervisor complement. The departments presented their layoff proposal to Le Dressay on March 26, 2021, and he approved it.

[108] No *de facto* decision was made as the Employer gathered information and began to prepare a plan for restructuring from December 2020 to February 2021. It was only in March 2021 that specific positions and classifications were identified. The *de facto* decision was made on March 26, 2021, nine months after the collective agreement was ratified.

[109] With respect to the issue of whether the Employer had a duty to disclose its decisions to implement the PSSP, the Permit Procedure or the Access Procedure, the Employer argues there was no duty to disclose them because they were not significant decisions. The duty of unsolicited disclosure arises only where an employer has made a decision or a *de facto* decision that may have a major impact on the bargaining unit. The Employer acknowledges that it made at least a *de facto* decision to implement the PSSP, Permit Procedure and Access Procedure before the collective agreement was ratified. However, these changes do not meet the threshold of having a significant impact on the bargaining unit. It referred to several cases which, it argues, support its argument that these decisions are not significant enough to attract the duty of unsolicited disclosure. In the following cases, the decisions noted were found to be significant enough to attract the duty of unsolicited disclosure:

- *Consolidated Bathurst*: plant closure
- *CUPE Local 2801 v Alberta (Labour Relations Board)*: contracting out all work of bargaining unit
- *Edmonton (City)*: major reorganization
- *RWDSU v Regina Exhibition Assn. Ltd.*: closure of business
- *SJBRWDSU v Loraas Disposal Services Ltd.*: sale of significant portion of business
- *RWDSU v Temple Gardens Mineral Spa Inc.*: significant plans for expansion of business
- *CEP Local 255G v Central Web Offset Ltd.*: closure of business
- *Moose Jaw Firefighters 2019*: decision to eliminate in-scope Assistant Chief position after the employer advised the union that it had completed a final reorganization.[68]

[110] On the other hand, in *CUPE Local 70 v Lethbridge (City)*,[69] a decision to implement a new Employee and Family Assistance Program was found not to be a major or significant change to the employment relationship that would attract the duty of unsolicited disclosure.

[68] *Consolidated Bathurst*, *supra* note 40; *CUPE Local 2801 v Alberta (Labour Relations Board)*, 1985 CarswellAlta 274 (AB KB); *Edmonton (City), supra* note 59*; RWDSU v Regina Exhibition Assn. Ltd.*, 1997 CarswellSask 829 (SK LRB); *SJBRWDSU v Loraas Disposal Services Ltd.*, [1998] Sask LRBR 1 (SK LRB); *RWDSU v Temple Gardens Mineral Spa Inc.*, *supra* note 43; *CEP Local 255G v Central Web Offset Ltd.*, *supra* note 43; *Moose Jaw Firefighters 2019*, *supra* note 38.
[69] 2001 CarswellAlta 1829 (AB LRB).

[111] The Employer argues that the evidence in this matter indicates that the decisions respecting the PSSP, Permit Procedure and Access Procedure had a minor impact on operations. It argues that these changes can be implemented without input by the Union. With respect to the Permit Procedure and Access Procedure, it notes that these duties were minor aspects of the master operators' responsibilities, not core duties of the master operator position, and the master operators continue to have a role in these matters. These decisions do not have a major impact on the bargaining unit. No duty of unsolicited disclosure arose with respect to these decisions.

[112] The Employer further argues that these are the Employer's decisions to make. The Board has no jurisdiction to adjudicate the reasonableness, merits or safety of these operational decisions. The Employer argues that it made no promise or representation during bargaining that it would not change how it operates its business.

[113] The Employer acknowledges that during bargaining it put forward proposals to exclude the master operator from the bargaining unit and withdrew those proposals. However, it argues, it made no representations that the master operator or its duties would be maintained or that it would not effect permanent layoffs. The current collective agreement expressly maintains its management rights and its ability to effect permanent layoffs. And, it says, it expressly advised the Union that it was considering permanent layoffs two months before ratification of the collective agreement. During bargaining the Union never asked the Employer about potential changes to staffing levels, potential changes to master operator duties or permanent layoffs. Therefore, the Employer had no duty to provide that information.

[114] Further, the Employer argues, there is no relationship between its proposals at bargaining and the PSSP, Permit Procedure, Access Procedure or the permanent layoffs. Accordingly, those issues did not give rise to a duty of unsolicited disclosure. This, the Employer argues, is because their proposals respecting master operators were specific, and did not relate to staffing changes, master operator duties or permanent layoffs. Their proposals were only to move the master operator position out of the bargaining unit or fill it on the basis of merit and ability.

[115] The Employer argues that withdrawal of bargaining proposals, without more, does not give rise to a representation as to how a party will conduct itself under a collective agreement. In *Casco Inc. and UFCW, Local 175, Re*[70] ["*Casco*"], during bargaining for a collective agreement,

[70] 2004 CarswellOnt 10766 (ON LA); see also *CRH Canada Inc. v International Brotherhood of Boilermakers Local D366*, 2021 CanLII 138027; 2021 CarswellOnt 19430 (ON LA).

the employer put forward a proposal respecting proposed rates of pay that did not include a rate of pay for the maintenance scheduler. This was intended to signify a proposal to eliminate that job classification. The union did not agree, and eventually the employer agreed to include the position in the new collective agreement. The arbitrator held that "mere advancement and withdrawal of a proposal at the bargaining table, without further discussion" did not constitute a clear and unequivocal representation on which estoppel could be founded. This finding, the Employer argues, demonstrates that withdrawing a proposal does not constitute a representation.

[116] The Employer also referred to *Wolfville Nursing Homes and Elms Residential Facility v International Union of Operating Engineers, Local 721*[71]. The issue in that matter was whether employees who had resigned before the new collective agreement was signed were entitled to the benefit of the retroactive pay increases included in the new agreement. One of the arguments the employer relied on to argue against this proposal was that the union had proposed during bargaining to include a specific clause in the agreement providing for those employees to receive those payments; the employer did not accept the proposal and the union withdrew it. The arbitrator held that in the absence of express representations to the contrary, it would not be reasonable to read from this an intent to do anything more than to remain governed by the existing language of the collective agreement.

[117] The Employer argues that all that its decision to withdraw the Article 2 and 3 proposals from bargaining indicates is that it was prepared to live with the language of the collective agreement.

[118] The Union, it says, must establish that the Employer made a misrepresentation, and the Employer argues that the Union has not done that. There is no basis for the Union's allegation that the Employer made misrepresentations during bargaining. The Employer made no representations guaranteeing the Union that the master operator and operator II roles would continue to be filled with no adjustments to job duties during the life of the collective agreement. It made no representation that it would not rely on the existing terms of the collective agreement. The Employer argues that it made no promise or representation during bargaining that it would not implement permanent layoffs during the life of the collective agreement. It argues that its proposals respecting the master operator position during bargaining were not to eliminate it, but to move it out-of-scope. It provided no explanation as to why it withdrew the proposal, and the Union did not ask for one.

[71] 2012 CanLII 23667, 2012 CarswellNS 297 (NS LA).

[119] With respect to the Union's reliance on the Employer's acceptance of the Special Mediators' recommendation, the Employer contends that it only said that it accepted the Special Mediators' recommendation. It only said that it agreed not to move the master operator classification out of the bargaining unit, that it was prepared to maintain this classification within the scope of the bargaining unit. The Employer was not saying that it would not effect layoffs or eliminations of this position; it was saying only that it was prepared to not move it out-of-scope of the bargaining unit and into management. This, according to the Employer, does not amount to a misrepresentation.

[120] Next the Employer turns to the Union's reliance on the Employer's letter of March 30, 2020[72], and its statement that its Best and Final Offer would provide "seven years of certainty and labour peace". The Employer again argues that this is not a misrepresentation. The letter does not say that the Employer will not effect any layoffs during the life of the collective agreement.

[121] In the alternative, even if the Union mistakenly believed that the Employer had indicated as of March 30, 2020 that it would not eliminate the master operator or any other classification, the Employer advised the Union otherwise in the April 24, 2020 letter. That letter gave the Union notice that it was considering permanent layoffs. It did not specifically mention master operators, nor did it exclude them. The Union did not ask the Employer any questions about this comment. The Employer disclosed to the Union in the April 24, 2020 letter that it was considering the possibility of permanent layoffs. The Union ratified the collective agreement on June 22, 2020 with the express knowledge that the Employer was considering permanent layoffs and without taking any steps to make inquiries about those permanent layoffs.

Relevant Statutory Provisions:

[122] The following provisions of the Act were relied on in this matter:

> *6-7 Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*
>
> *6-45(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.*
> *(2) Subsection (1) does not prevent the director of employment standards as defined in Part II or the director of occupational health and safety as define in Part III from exercising that director's powers pursuant to this Act.*

[72] Exhibit U12.

(3) Without restricting the generality of subsection (2), the director of employment standards may issue wage assessments, issue hearing notices, take action to collect outstanding wages or take any other action authorized pursuant to Part II that the director of employment standards considers appropriate to enforce the claim of an employee who is bound by a collective agreement.

6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:

. . .

(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;

. . .

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

6-103 Without limiting the generality of subsection (1), the board may do all or any of the following:

. . .

(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;

6-111(1) With respect to any matter before it, the board has the power:

. . .

(l) to defer deciding any matter if the board considers that the matter could be resolved by mediation, conciliation or an alternative method of resolution;

(3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.

Analysis and Decision:

[123] The Board thanks the parties for their extensive written and oral submissions in this matter. Although not all of them may have been referred to in these Reasons, all were reviewed and considered in making this decision.

[124] This matter examines the obligations imposed on the Union and the Employer by the requirement in section 6-7 of the Act to engage in collective bargaining in good faith. Clause 6-1(1)(e) of the Act defines collective bargaining:

(e) "collective bargaining" means:

(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;

(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;

(iii) executing a collective agreement by or on behalf of the parties; and

(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union.

[125] Again, it emphasizes the good faith component. The Board elaborated on this requirement in *Service Employees International Union (West) v Saskatchewan Association Of Health Organizations*[73]:

> *The function of this Board is to ensure that the parties engage in a process of collective bargaining; that they agree to meet; that they come to the bargaining table prepared to enter into a collective agreement and/or resolve the issues in dispute between the parties through collective bargaining; that their negotiators have authority to bind their principals; <u>that they explain their proposals and disclose relevant and necessary information that could affect their collective bargaining relationship; and that they not misrepresent the facts or their proposals to the other party</u>.* [emphasis added]

[126] As the many decisions cited by the parties explain, the duty of disclosure during collective bargaining includes two components: solicited disclosure and unsolicited disclosure. The issues in this matter arise out of the allegation by the Union that the Employer breached its duty of unsolicited disclosure. This Board and many other Boards in Canada have described the duty of unsolicited disclosure.

[127] In *RWDSU v Regina Exhibition Assn. Ltd.*[74] the Board stated:

> *72 The purpose of the disclosure requirement is to enable parties to bargain matters that may impact on the bargaining unit over the term of the agreement that is under negotiation. It is also designed to foster rational discussion of the bargaining issues. In order for collective bargaining to work effectively without mid-contract disruptions, a union must be kept informed during bargaining of the initiatives that the employer is planning over the course of the collective agreement. The union is also entitled to use its economic weapons in order to negotiate provisions to protect its members from the effects of the employer's initiatives.*

[128] In *Moose Jaw Firefighters 2019*, the Board stated:

> *[85] In collective bargaining, the parties are expected to engage in full, rational, and informed discussion about the relevant issues. To promote such discussion, the Board must recognize a duty, in some cases, to provide unsolicited disclosure. An employer is required to disclose decisions already made, or de facto decisions, that may have a major impact on the bargaining unit. As explained in C.E.P., Local 255G v Central Web Offset Ltd., [2008] Alta LRBR 289, at paragraph 139,"[t]o not disclose a management decision with a major impact on the bargaining unit is tantamount to a misrepresentation". In cases involving a duty to provide unsolicited disclosure, timely disclosure is paramount.*

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[73] 2014 CanLII 17405 (SK LRB) at para 131; reversed by *SEIU-West v Saskatchewan Association of Health Organizations*, 2015 SKQB 222 (CanLII); reversed in part by *Cypress (Regional Health Authority) v Service Employees' International Union-West*, 2016 SKCA 161 (CanLII), but not respecting this issue. See also *Moose Jaw Firefighters 2019*.

[74] *Supra* note 69.

[129] In *HCEUA and Alberta Hospital Edmonton, Re*[75] the Alberta Labour Relations Board relied on the following comment by George W. Adams, K.C. in Canadian Labour Law, 2nd Edition, respecting the law of unsolicited disclosure:

> *... there is an evolving Canadian requirement of "unsolicited disclosure" which arises from the good faith purpose of the bargaining duty. This approach builds upon the misrepresentation cases by holding that it is "tantamount to a misrepresentation" for an employer not to reveal during bargaining a decision it has already made which will have a significant impact on terms and conditions of employment, such as a plant closing, and which the union could not have anticipated. In this respect the Ontario board in Westinghouse Canada Ltd. stated:*
>
> > *Similarly can there be any doubt that an employer is under a section 14 [now s. 15] obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of a trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.*

It is interesting to note that, some 18 years later, Adams makes almost the exact same comments, and calls this duty a requirement rather than an evolving requirement.[76]

[130] The Manitoba Labour Board emphasized the importance of the duty to make unsolicited disclosure, in *University of Manitoba*:

> *166 A party that fails to bargain in good faith due to its failure to make required disclosures during collective bargaining effectively undermines the ability of the other party to engage in decision-making that is essential to collective bargaining. Such conduct interferes with the ability of the parties to focus on the real issues, improperly inhibits informed bargaining, and impedes rational discussion. In addition to not permitting timely discussion about the real issues, the failure to disclose decisions as required by the duty to bargain in good faith negatively impacts the ability of the union to communicate important information about negotiations to its members, to manage their expectations, and to make the appropriate tactical and strategic adjustments to its positions.*

[131] In *OPSEU*, the Ontario Labour Relations Board described the duty as follows:

> *18. As I noted in my March 11, 1998 decision, it is well-established that one of the purposes of the duty to bargain in good faith which is established by section 17 of the Act is to protect the integrity of the process of collective bargaining by requiring an exchange of relevant information which will facilitate informed and rational bargaining, and thereby minimize the potential for industrial conflict or the need for either party to resort to economic sanctions. Section 17 requires collective bargaining partners to be honest with each other. Accordingly, misrepresentations designed to deceive or which mislead the*

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[75] 1994 CarswellAlta 1268 (AB LRB) at para 87.
[76] *Canadian Labour Law*, Second Edition, 2022 Thomson Reuters, Rel. 2, 6/2022, at para 10:26.

other collective bargaining partner into adopting or accepting a proposal which is materially different from one which it could and would have sought to negotiate if it had known the real facts are prohibited by section 17 (see, for example, Inglis Ltd., [1977] OLRB Rep. Mar. 128; Indalloy, Division of Indall Ltd., [1979] 1998 CanLII 18271 (ON LRB) OLRB Rep. Jan. 35; Old Oak Properties Inc., [1996] OLRB Rep. July/Aug. 648). To put it another way, conduct which undermines another party's ability to make rational collective bargaining decisions is contrary to section 17 of the Act.

. . .

20. It is trite to say that collective bargaining is the appropriate place for dealing with changes in the workplace which affect employees. Under the legislative scheme in this Province there are temporal limits to collective bargaining (absent appropriate provisions in the collective agreement) which make the disclosure component of the duty to bargain in good faith even more important. A trade union can only force an employer to bargain about things which affect bargaining unit employees during collective bargaining, and not during the term of a collective agreement. It is therefore important that an employer which has made a decision or has a settled intention which is likely to have a significant impact on the bargaining unit reveal it to its trade union collective bargaining partner. To the extent that the common law and contractual concept caveat emptor has any application today, it is an extremely poor fit with the principles of collective bargaining.

[132] In *Ontario (Government Services),* the Ontario Board described the purposes served by the duty to bargain in good faith. Proper collective bargaining depends on effective communication and an open and full discussion of all the issues in dispute. Conduct by one of the parties that inhibits or undermines the decision-making capability of the other is contrary to the requirement to bargain in good faith and make every effort to reach a collective agreement. It referred to a decision of the British Columbia Labour Relations Board that stated:

It is a long-established principle of American labour law that a party commits an unfair labour practice if it withholds information relevant to collective bargaining without reasonable grounds....That principle does fit comfortably within the language of the [duty to bargain provision of the British Columbia Labour Code]. One would hardly say that an employer who deliberately withheld factual data which a union needed to intelligently appraise a proposal on the bargaining table was making "every reasonable effort to conclude a collective agreement." The policy behind the American rule has been summed up in this comment: "Negotiation nourished by full and informal discussion stands a better chance of bringing forth the fruit of collective bargaining agreement than negotiation based on ignorance and deception."[77] [emphasis added by BCLRB]

[133] The principle established by the many cases cited to the Board in this matter is that the duty of unsolicited disclosure arises when the Employer has made a *de facto* decision during bargaining that will have a major impact on the bargaining unit.

[134] The first issue, then, is what is a *de facto* decision? The jurisprudence on this issue in other jurisdictions variously describes it as:

[77] *Canadian Association of Industrial, Mechanical and Allied Workers v Noranda Metal Industries Ltd.*, [1975] 1 Can LRBR 145 (BC LRB).

- Concrete and highly probable, with no documentation or apparent consideration of alternatives (*Consolidated Bathurst*, para 53)
- A decision that had, for all practical purposes, been made (*IUOE, Local 865 v Canadian Pacific Forest Products*, *supra* note 41, para 12)
- Sufficient particularity and certainty of implementation (*Edmonton (City)*, para 39)
- The employer has made a decision or has a settled intention (*OPSEU*, para 20)
- It was a sufficient certainty even though still conditional (*CEP Local 255G v Central Web Offset Ltd.*, *supra* note 43, para 140)
- Concrete and highly probable plans; expected decisions conditionally chosen but not yet finalized; when mere ideas move to the verge of implementation (*CUPE Local 1251 v New Brunswick*, *supra* note 43, paras 43 and 46)
- Sufficiently concrete; sufficiently certain that one can say the decision has effectively been made even if conditional on certain things or awaiting final approval; a firm course was set; absence of any consideration of alternatives; reached a decision with sufficient particularity and certainty of implementation (*Rocky View County*, paras 47 and 51)
- Sufficiently certain (*University of Manitoba*, para 131).

[135] In describing a *de facto* decision, these same cases noted that it is more than: thinking seriously; plans that are not finalized; plans that may never become decisions; an idea or a reasonable likelihood; a serious possibility; an effective recommendation; or a highly probable decision. A *de facto* decision has not been made if there are still a number of ideas or other options that continue to be actively considered, many of which may never become decisions at all. It is to be noted that a *de facto* decision includes a highly probable decision in *Consolidated Bathurst*, considered by many to be the seminal decision on this issue. The Alberta Board, on the other hand, has moved away from that finding.

[136] The decisions of this Board relied on by the parties provide a firm test for the duty of unsolicited disclosure:

- Initiatives that the employer is planning over the course of the collective agreement (*RWDSU v Regina Exhibition Assn Ltd., supra* note 69, para 72)
- Decisions that have been made that will be implemented during the course of the collective agreement (*SJBRWDSU v Loraas Disposal Services Ltd.*, *supra* note 69, p. 16)
- The decision had already been made or the employer knew it was going to be made (*RWDSU v Temple Gardens Mineral Spa Inc.*, *supra* note 43, p. 7).

[137] The Board confirms that these descriptions of the test are appropriate. The Board does not agree with the Union's suggestion that the duty of unsolicited disclosure should be extended to decisions that the Employer was seriously considering during bargaining. The following discussion in *Consolidated Bathurst* is helpful in understanding the rationale for maintaining the principle that unsolicited disclosure is an exceptional obligation:

> *50 . . . However, for the reasons discussed above, we are not willing to adopt the Ozark Trailers test of "thinking seriously" for unsolicited disclosures as urged upon us by the complainant. The failure to reveal such "possibilities" as a general matter is not tantamount to a misrepresentation and therefore lacks the bad faith rationale developed in Westinghouse justifying unsolicited disclosure. The purpose of such information would be investigative and to facilitate the rational discussion purpose of the bargaining duty. Accordingly, the purpose of the information and the difficulties detailed above with unsolicited disclosure militate against any substantial expansion of the unsolicited disclosure obligation as elaborated to date. The interests of employees are real but the Board is not ignoring these interests by requiring a questioning approach to disclosure as a general matter. The position urged upon us by the complainant has too much potential for "greater heat than light" at the bargaining table. There is already enough uncertainty over precisely how significant and what nature a decision must be to trigger the unsolicited disclosure duty. Unsolicited disclosure must be understood to be exceptional and centered essentially on a bad faith rationale.*

[138] In the end, the issue comes down to an evaluation of the facts of each case. Applying the test to the facts in this matter, the Board finds that a duty of unsolicited disclosure arose in this matter respecting the decision to eliminate the master operator classification. The Board finds that the evidence discloses that the *de facto* decision was made no later than March 9, 2020. By that point, the decision had, for all practical purposes, been made. The Employer had a settled intention to proceed with removal of the master operator classification from the bargaining unit and intended to implement that decision over the course of the collective agreement it was then bargaining with the Union. All of the evidence that leads to this conclusion is too voluminous to spell out in detail. Some of the most compelling evidence that led to this conclusion is as follows:

- All of the Employer's witnesses agreed that the Employer decided, during the lockout, that the master operator position was redundant and it could run without them.
- None of the Employer's witnesses provided evidence that any options or alternatives were being considered that would lead to the retention of the master operator classification. None of the documentation provided by the Employer evidenced a consideration of any alternatives that would see the retention of the master operator classification.
- During the lockout the Employer commenced work on changing its policies to eliminate the master operators' role, for example the Permit Procedure and the Access Procedure. While Exner agreed on cross-examination that many other policies still contemplated a role for master operators, the only one filed in evidence, "Thawing and reinstatement of

frozen process lines", contemplated a role for the master operator that was shared with the supervisor: "5.1 Once a frozen line is identified. a) Report the line to the Master Operator/Supervisor for the area."[78]

- In the Interim Decision, the Board noted that immediately on the return to work of the unionized employees, the Employer began using changed position guides that did not reference the master operators, and there was no position guide at all for master operators. When Boersch subsequently gave evidence, he produced a position guide for master operators, but it was undated. From other documentation provided by the Employer, it was evident that its normal practice was to date such documents. Accordingly, the Board does not accept this document as evidence that a position guide for master operators existed following the return to work.

- The Employer's Bargaining Brief to the Special Mediators, dated March 9, 2020, indicated that the master operator classification was to be deleted and that maintaining supervisory tasks in the shift supervisor role "continues to be a high priority for the company and has been validated by the company's experience since the labour disruption". The Employer indicated that the master operator classification would be deleted and "changes" would be made to the number of out-of-scope supervisors to provide sufficient and competent supervision for all shift teams. This is exactly what the Employer is proposing now to do.

- Le Dressay did not identify any logistics that needed to be resolved before the master operator classification could be removed from the bargaining unit, other than how many out-of-scope shift supervisors would be needed to replace them. The fact that not all the logistics of implementing this decision had been resolved by March 9, 2020 is not compelling. According to the Employer's own evidence, not all of the logistics had been worked out by the date the Employer says it made the *de facto* decision, March 26, 2021, or even by the last date of the hearing in this matter. According to the Employer it did not even turn its mind to considering what logistics needed to be worked out until sometime in May 2021 when Torrie was assigned to lead the MoOC process.

- The Employer started advertising for new shift supervisors on September 16, 2020[79], another step forward in implementing the plan to replace master operators with shift supervisors.

- The Business Case was not a proposal to eliminate the master operator position, but rather a proposal addressing whether there would be 32 or 40 out-of-scope shift supervisors, based on a decision already having been made to eliminate the master operator classification. It is another example of the Employer addressing one of the logistics that had to be worked out in light of its decision to eliminate the master operator classification. In Appendix A it states: "The purpose of this business case is not to request addition to complement, but rather to provide interim compensation and recruitment support for this staffing model until the Master Operator job deletion and departemental [*sic*] re-organization processes are concluded". In other words, the Employer also viewed the elimination of the master operator classification and the decision respecting other layoffs as two separate processes/decisions. As noted by the Union, there were other comments noted in the Business Case that were premised on the master operator decision already having been made.

[78] Exhibit E9.
[79] Exhibit U38.

- Le Dressay referred in his evidence to what he described as the first proposal to eliminate the master operator classification allegedly given to him by Ham in June 2020. If such a document exists, it was not disclosed to the Union or tendered in evidence at the hearing of this matter.

- Le Dressay testified that he made a decision on March 2 or 3, 2021 to increase the number of shift supervisors. He did not need to wait for the March 26, 2021 decision respecting the other layoffs, as the Employer had long since made the decision to eliminate the master operator classification. Given the Employer's position that one of the main reasons for the layoffs is to reduce costs, the Board does not consider it credible that the decision to increase the number of shift supervisors would be made before the decision was made to eliminate the master operator classification.

[139] By March 9, 2020 the only decisions left to be made were what additional classifications would be eliminated or reduced in number and logistics respecting the reassignment of the master operators' duties. Those logistics continued to be discussed long after even March 26, 2021, the date the Employer suggests that the *de facto* decision was made. By March 9, 2020 the Employer was not just thinking about eliminating the master operator classification. They were not considering any options that would retain the master operator classification. They decided during the lockout that the master operator was redundant. They did not need both the master operator and shift supervisor and they were keeping, and increasing the number of, shift supervisors.

[140] Le Dressay made a decision on March 26, 2021, but it is for the Board to determine when a *de facto* decision to eliminate the master operator classification, sufficient to invoke the duty of unsolicited disclosure, was made. In Le Dressay's evidence, he indicated that the Employer did not want to undergo multiple layoffs, he wanted all of them to be done at the same time. While the decision to eliminate the master operator classification was made in March 2020, the Board finds that the process that followed ratification described by the Employer's witnesses was undertaken for the purpose of determining what other positions should be eliminated at the same time. The purpose of the process led by Rowsell was to determine the extent of the opportunity to operate with fewer in-scope staff, drawing on the Employer's experience at running the refinery with fewer people during the lockout. The decision made by Le Dressay on March 26, 2021 was approval of the full package of layoffs that would be combined with the master operator layoffs. He waited for every department to be ready before he proceeded with layoffs. As a result, the fact that the master operator deletion was not announced on the heels of the ratification of the collective agreement is not compelling.

[141] The Union bears the burden of proof. It must prove its allegations on a balance of probabilities. To satisfy this standard of proof, the evidence must be sufficiently clear, convincing and cogent.[80] The Board is satisfied that the Union has met this standard and proven that a *de facto* decision to eliminate the master operator classification was made during bargaining.

[142] With respect to the second aspect of the test to be met by the Union, there is no dispute that the elimination of the master operator classification would have a major impact on the bargaining unit. It is the most senior in-scope position, responsible for oversight of day-to-day operational processes. The Employer agreed.

[143] In its Amended Application, the Union suggested the Board should also find that a *de facto* decision was made during bargaining to eliminate the operator II position. The Board declines to do so for a number of reasons:

- None of the Employer's proposals during bargaining, to remove the master operator from the bargaining unit, mention the operator II.
- No evidence was provided to the Board that the removal of operator IIs from the bargaining unit was discussed at the bargaining table.
- No evidence was presented to the Board that would lead to a conclusion that a *de facto* decision was made during bargaining to eliminate the operator II classification.

[144] The Union argues that the Employer also had a duty of unsolicited disclosure with respect to the PSSP, the Permit Procedure and the Access Procedure. Given the documentary evidence filed in this matter[81], there is no issue that these decisions were made during bargaining. Where the parties disagree is on the question of whether these decisions meet the second criterion, that they may have a major impact on the bargaining unit. The Board has determined that the Permit Procedure and Access Procedure should also have been disclosed to the Union during bargaining. While they may appear on their face to be minor adjustments to operations in the Process Department, in practice they were in fact major steps forward in the implementation of the decision to eliminate the master operator classification. The Employer argues that the Permit Procedure and Access Procedure do not remove key duties from master operators because the Union witnesses testified that they might spend as little as five minutes/day on those duties. The Board disagrees. The amount of time spent on a duty is not determinative of whether it has a

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[80] *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc.*, 2017 CanLII 44004 (SK LRB) at paras 85 and 86; *Moose Jaw Firefighters' Association Local 553 v Moose Jaw (City)*, 2016 CanLII 36502 (SK LRB) at paras 4 and 82.

[81] Exhibits U15, U17 and U19.

major impact on the bargaining unit. These are key duties given their purpose is to preserve safety. This is reflected by the position guide that lists permitting duties as the first substantive duty of master operators. The Board does not consider the PSSP in the same light. Although it affects them as it affects all employees in the Process Department, it was not aimed at master operators or implemented as part of the plan to eliminate the master operator classification.

[145] The Employer implemented the Permit Procedure and the Access Procedure because it had already determined that the master operator classification was redundant and that it could operate safely and efficiently without them. The Board agrees with the Employer's submission that in this matter the Board is not adjudicating the reasonableness, merits or safety of these operational decisions. But that is not the issue. The issue is whether the Employer was required, as part of its duty to bargain in good faith, to disclose to the Union during bargaining that it had made these decisions. The answer to that question is yes.

[146] The Employer argues that its management rights enable it to move duties of master operators to out-of-scope supervisors and eliminate classifications. That is not the question before the Board. Whether or not those changes fall within the Employer's management rights does not answer the question of whether it had a duty to disclose those decisions to the Union. The duty to disclose applies to all major decisions, whether they are permissible under the collective agreement or not.

[147] In *Moose Jaw Firefighters 2019*, the Board made a comment that succinctly describes the Employer's obligations in this matter:

> *[96] The Board is not suggesting that the City is required to bargain the redundancy decision, but rather, that it is required to bargain about the terms and conditions of employment for the Association's members, in an atmosphere of candor about the City's organizational imperatives, or lack thereof. This conclusion acknowledges the reality of the existing negotiations, and breathes life into the duty to disclose.*
>
> *[97] To be clear, this is not a conclusion on the bona fides of the City's decision to declare the positions redundant or a finding that the City is required to negotiate the merits of a new organizational imperative. The City's actions failed to meet the Association's reasonable expectations about the underlying premise of the negotiations. Accordingly, the City had a duty to allow the Association time to digest the changes, and adjust the positions it had been taking all along. If, through the Association's response, the City then saw fit to adjust its own decision, so be it. The duty to bargain is not a duty to agree. If the negotiations between the two parties failed, the City remained free, absent anti-union animus or mal fides, to proceed with its decision.*

[148] Next the Board turns to the Employer's argument that, if it had a duty of unsolicited disclosure, it was satisfied by the April 24, 2020 letter. On this issue, the Board finds the reasoning in *University of Manitoba* compelling:

> *132 The duty of unsolicited disclosure requires there be full and frank discussion about issues arising out of the disclosure. Hints, vague comments, and cryptic messages of the kind the University made to the Faculty Association in this case do not satisfy the obligation to make unsolicited disclosure. The decision to provide hints rather than meaningful disclosure was clearly motivated, at least in part, by the University's agreement to keep its communications with the government confidential. The Board agrees with the submission of the Faculty Association that there is no evidence that the University gave any meaningful consideration to challenging the government's direction to keep the discussion confidential or that there was any thoughtful reflection on the impact of failing to disclose it having regard to the University's obligation to bargain in good faith. The University's vague and often misleading statements to the Faculty Association did not enable it, or its members, to have any reasonable understanding of the relevant circumstances or provide sufficient pertinent information to allow for an intelligent appraisal of the situation and the bargaining proposals. Furthermore, the direction from government officials not to share the information with the Faculty Association does not constitute a viable defense to the complaint nor otherwise exculpate the University in the circumstances. The Board also rejects the University's suggestion that the Faculty Association was somehow obliged to follow up and question the cryptic and vague hints that it offered up.*

[149] In *Rocky View County* the county relied on a letter to the association and a press release to argue that it had satisfied its duty of unsolicited disclosure. The letter referred to a pending reorganization to reduce costs and increase efficiency, that included the statement: "This reorganization will result in job losses". The press release referred to a need to rationalize fire services in the face of dramatically rising costs, and stated: "The streamlining and changes will see a reduction of a firefighter position on each shift":

> *The Association assumed that the plan was to eliminate one part-time position per platoon because the County had only a few months earlier agreed to the Association's wage proposal regarding full-time staff. Its view was also based on the fact that the last round of layoffs had already cut the full-time fire staff and the Association could not see how the platoons could function with fewer full-time employees.*[82]

The Alberta Board found, with respect to the letter:

> *The County needed to provide something more than this to properly disclose its plan to restructure. . . . While we accept that the Association might have drawn certain inferences from the June 5th letter and June 6th press release, both documents left much room for misinterpretation. The letter and press release simply fail to disclose the kind of information needed in order to satisfy the duty under section 60.*[83]

[82] At para 32.
[83] At paras 54 and 55.

[150] Similarly here, the Board does not agree that the April 24, 2020 letter satisfied the Employer's duty of unsolicited disclosure. The letter focuses almost entirely on COVID-related temporary layoffs. In closing it states: "the Employer is considering permanent layoffs related to operational efficiencies as you heard at the bargaining table", but all of the witnesses who were present at the bargaining table agreed that such a discussion never occurred. The letter did not refer to operational efficiencies achieved during the lockout. Neither the letter nor the attached list of affected positions mentions the master operator. While in hindsight it may have been prudent for the Union to have made inquiries about that statement, it is noteworthy that the Union received no response to its April 27, 2020 letter to the Employer raising eight questions about the temporary layoffs described in the Employer's letter. Hints, vague comments and cryptic messages do not satisfy the duty. The April 24th letter did not disclose the kind of information needed to satisfy the duty of unsolicited disclosure.

[151] The Employer referred to three arbitration decisions[84] which, it says, stand for the proposition that if one party thinks they are able to do something under a certain clause of a collective agreement but want to make it express, they might nevertheless put clear language to that effect on the bargaining table. If it is later withdrawn, this would not automatically mean they had ceded the right which they thought they had all along. In the absence of express representations to the contrary, the Employer argues, it is not reasonable to read from the withdrawal of the master operator proposals from bargaining an intent to do anything more than to remain governed by the existing language of the collective agreement.

[152] In assessing this argument, the Board would note that care must be taken in relying on these decisions, since the question before the arbitrators was the interpretation of the collective agreement, a much different question than the question before the Board. The Employer made proposals during bargaining for the current collective agreement for the removal of the master operator classification from the bargaining unit. Those proposals were withdrawn after extensive discussion of them by the parties. Rowsell testified that the issue was discussed during bargaining on seven different days. The Employer included a proposal to remove the master operator from the bargaining unit in its Opening Proposal dated January 15, 2019 and maintained it in the revised Opening Proposal dated February 27, 2019. On July 23, 2019 the Employer changed this to a proposal that the master operator position be filled by merit and ability, then later the same day removed the proposal altogether. The Employer added the proposal back in on January 31,

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[84] *Casco*, *supra* note 71; *CRH Canada Inc. v International Brotherhood of Boilermakers Local D366 supra* note 71; *Wolfville Nursing Homes and Elms Residential Facility v International Union of Operating Engineers, Local 721*, *supra* note 72.

2020. It maintained the proposal in its Bargaining Brief to the Special Mediators. The Employer's Best and Final Offer that it provided to the Union on March 25, 2020 stated that it accepted the Special Mediators' recommendation to maintain the master operator classification. It specifically noted, in the Best and Final Offer it provided to the Board in LRB File No. 061-20, and that was the subject of the vote: "Maintain bargaining unit MO classification: Yes". The Union reasonably thought that the Employer had abandoned the idea, as it had following the negotiations that led to the ratification of the previous collective agreement. (The Employer made similar proposals during bargaining for the previous collective agreement.) The Board finds that the Employer's subsequent silence on the issue at the bargaining table was "tantamount to a misrepresentation within the meaning of the *de facto* decision doctrine"[85].

[153] The Employer argues that its representations during bargaining that it had accepted the Special Mediators' recommendations to maintain the master operator classification was not a misrepresentation, because in its view, moving the master operator position outside the scope of the bargaining unit and eliminating the classification from the bargaining unit are not the same thing. The Board entirely rejects that argument. In both cases the resulting fact scenario is exactly the same: the people in the previous master operator positions have the option of applying for one of the shift supervisor or other out-of-scope positions; if they choose not to apply, or are not a successful applicant, they can bump into a more junior in-scope position. In both cases, the master operator position is no longer in the bargaining unit. For all practical purposes, it is the same.

VI. Remedy*:*

Union Submissions on Remedy:

[154] The Union requested several remedies (see paras 168 to 181), including that the Board prohibit the Employer, pending the opportunity to negotiate with the Union during the next round of bargaining, from proceeding with: the elimination of the master operator and operator II classifications; the PSSP; and the removal of duties from the master operators. This will, in essence, hold the Employer to the deal that the parties reached, and put the Union in the position it would have been in but for the breach.

[155] The Union argues that the Board has the broad remedial jurisdiction necessary to make the requested Orders:

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[85] *Consolidated Bathurst* at para 53.

> *In determining the proper remedy, the Board has a broad discretion. In the exercise of that discretion, it must seek to place the parties in the position they would have been in, but for the commission of the unfair labour practice. There must also be a rational connection between the breach, its consequences and the remedy ordered. Further, the goal of the remedy should be to ensure collective bargaining and promote a healthy relationship between the parties, and should not be punitive in nature.*[86]

[156] There is a rational connection between the breach, its consequences and the remedies requested. The Employer's breach resulted in the Union agreeing to a collective agreement that it would not have agreed to had it known of the Employer's plan.

[157] In *Sunnycrest Nursing Homes Ltd. v CUPE*[87] ["*Sunnycrest*"], in a situation where the parties had not yet negotiated a first collective agreement, the Ontario Board stated:

> *The respondent employer asserts that notwithstanding section 15 or the ongoing bargaining process in which it was engaged, it was entitled to unilaterally eliminate the job opportunities of its employees, without notice or negotiations with their bargaining representative. We cannot accept this proposition. Even if the employer's decision in this case were wholly free of anti-union animus, in our opinion, a decision, made during bargaining, to eliminate so many bargaining unit jobs should have been raised and discussed at the bargaining table. It is implicit in the employer's obligation to bargain in good faith.*

The Ontario Board ordered the reinstatement of all of the employees who had been laid off.

[158] The Union also relies on the following determination in *Manitoba and MGEA, Re*[88]:

> *42 This Board is indebted to both counsel for very thorough and comprehensive submissions which unquestionably simplified the task before us. Expressed at its simplest, Mr. Myers suggested that since the Union could not strike, or take other effective action, during the course of the Collective Agreement term in order to oppose the unilateral imposition of paid parking, the Government, having withdrawn its proposals prior to the conclusion of bargaining in 1987, was now obliged to wait until September of 1990, when bargaining would commence for a new Agreement. He relied, of course, on the doctrine of estoppel and the unfairness evident in leading the Union to believe that the issue was withdrawn and would be raised for bargaining at some future time, and then attempting to impose it during the currency of the Agreement. If the Government had not withdrawn the question in August of 1987, but had persisted with its October 1st implementation date, the Union would have been in the position to seek some compensating benefit at the bargaining table or to strike. The Government' s withdrawal made this unnecessary. If, on the other hand, it was not intended as a withdrawal but merely a temporary tactical maneuver, then it should have been expressed so as not to lead the Union into believing that the proposal was withdrawn. The Union's belief was rendered all the more reasonable*

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[86] *Moose Jaw Firefighters 2019* at para 125. See also *Royal Oak Mines Inc. v Canada (Labour Relations Board)*, 1996 CanLII 220, [1996] 1 SCR 369 (SCC) at para 55, 58 and 65; *Sunnycrest Nursing Homes Ltd v CUPE*, 1981 CarswellOnt 824 (ON LRB), at para 51; *CEP v Rapid Transformers Ltd.*, 1999 CarswellOnt 2933 (ON LRB); *Egg Films, Inc. and IATSE, Local 849, Re*, 2015 CarswellNS 943 (NS LRB); *Residences Kaba & Leonard v Brewery, General & Professional Workers' Union (SEIU, Local 2)*, 2013 CarswellOnt 3692 (ON LRB); *RWDSU v Regina Exhibition Assn. Ltd.*, *supra* note 69.

[87] *Ibid* at para 39.

[88] 1990 CarswellMan 668 (MB LA).

> *by a consideration of the history of the parking discussions which involved repeated Government suggestions followed by withdrawals.*
>
> *. . .*
>
> *54 In the case before us, we are satisfied that whatever reservations, provisoes, or qualifications may have been present in the minds of Mr. Pruden, and later perhaps Mr. Irving, the remarks made by Mr. Pruden on August 12th, coupled with the September 2nd assurance by Mr. Irving, whether face to face or by telephone were taken, and reasonably taken, by the Union representatives as a withdrawal of paid parking from the issues to be negotiated in the then existent collective bargaining process. They were supported in that belief by the total silence on the Government's part respecting paid parking which extended from the beginning of September, 1987, through to the fall of 1988. We have no hesitation in finding that this constituted a representation partially by words, and significantly by conduct, which satisfied the requirements for promissory estoppel, or estoppel by conduct.*
>
> *55 One turns then to the question of whether the other party, in this case M. G. E. A., altered its position as a result of the Government's representation of a abandonment or withdrawal of the paid parking proposition. There can be little doubt that it did. All of the Union negotiators and representatives had made it plain, over and over again, that a quid pro quo was sought before they would agree to a paid parking policy. The Government might indeed implement it, without agreement, but if it did so it would pay the price of conflict and criticism, which the Government clearly, at that point at least, was not prepared to pay. The Union thought the Government was withdrawing, as Governments had so many times before. It may be suggested, with some reason, that it is most unlikely that the Union would have broken off negotiations and called a strike of its membership over the paid parking issue had it not been withdrawn. For the concept of detrimental reliance however, one need not enter upon the fascinating speculation as to whether or not the Union might have gone that distance. it is enough, and more than enough, that had the issue remained a live one the Union would have continued to bargain and agreement might well have failed, either for weeks or completely, on the other vehicle issues or indeed on any number of questions existent between the parties. What matters here is that the Government action deprived the Union of the opportunity to fight for its position of seeking compensatory benefits by inducing in the Union the belief that the fight was no longer necessary.*

The Arbitration Board held that the Union had established the necessary ingredients for estoppel, upheld the grievance, and ordered that the imposition of a paid parking policy was a nullity.

[159] This decision was affirmed at *Manitoba and MGEA, Re*[89]:

> *The Province should not be allowed, during the term of the present collective agreement, to change its long standing practice of allowing employees to park free of charge. This is especially so in light of the conduct of the Province in leading the Association to believe, during negotiations preceding the signing of the collective agreement, that paid parking was being withdrawn from the table as an issue for negotiation.*

[160] Similarly in this case, the Union reasonably believed that the Employer was no longer pursuing the elimination of the master operator or any other process operator classifications, and thus was able to make concessions on other issues to reach an agreement. Further, not only did the Employer try to negotiate the removal of the master operator classification during the most

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[89] 1990 CanLII 11169, 1990 CarswellMan 280 (MB QB) at para 93.

recent round of bargaining, it also sought to do so in the previous round of bargaining. There is no evidence that the Employer ever took the position that it had the authority to unilaterally eliminate the master operator classification. The Union reasonably expected that the removal of job classifications from the collective agreement either needed to be negotiated between the parties or referred to the Board[90]. These factors lead to a conclusion that the proposed remedies are appropriate compensation for the Union and its members in this matter.

Employer Submissions on Remedy:

[161] The Employer did not provide written submissions respecting remedy. In its oral arguments on remedy, the Employer relied on *Moose Jaw Firefighters' Association Local 553 v Moose Jaw (City)*[91], which stated:

> *It is well-established that when structuring a remedy, the Board's over-arching goal "is generally to place the parties into the position they would have been but for the commission of the unfair labour practice." This means the remedy crafted must seek to achieve "a labour relations purpose, that is, generally speaking, to insure collective bargaining and foster[] a good and long term relationship between the parties to the dispute."*

[162] The Employer takes issue with many of the remedies requested by the Union, as noted below. It argues that many are overbroad and have no rational connection to the alleged unfair labour practice. The Union, it argues, is asking the Board to grant it a benefit that it did not negotiate: no layoffs.

Analysis and Decision on Remedy:

[163] In *Royal Oak Mines Inc. v Canada (Labour Relations Board)*[92], in reviewing a provision comparable to clause 6-104(2)(c) of the Act, the Supreme Court of Canada commented on the Canada Labour Relations Board's remedial power as follows:

> *LVI. The requirement that the Board's order must remedy or counteract any consequence of a contravention or failure to comply with the Code imposes the condition that the Board's remedy must be rationally connected or related to the breach and its consequences. . . .*
>
> *LXIV. Section 99(2) of the Canada Labour Code gives the Board jurisdiction to require an employer "<u>to do or refrain from doing any thing that it is equitable</u> to require the employer . . . to do or refrain from doing in order to remedy or counteract any consequence of the*

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[90] See comment by Special Mediators in this regard at page 15 of Exhibit U10. See also *Central Canada Potash and USWA, Local 7656, Re*, 1987 CarswellSask 716 (SK LA); *CNCP Telecommunications v Canadian Telecommunications Union*, 1981 CarswellOnt 3409 (ON LA), affirmed at *Canadian National Railway v Beatty*, 1981 CarswellOnt 1137 (ON SCDC); *Pacific Forest Products Ltd., Nanaimo Division v Pulp, Paper & Woodworkers of Canada, Local 7*, 1983 CarswellBC 2413 (BC LA); *Union Felt Products (Ontario) Co. and CTCU, Re*, 1988 CarswellOnt 4196 (ON LA).

[91] *Supra* note 81 at para 140.

[92] *Supra* note 87.

> *contravention or failure to comply that is adverse to the fulfilment of [the] objectives" of the Code. (Emphasis added.) The duty of the parties to bargain in good faith and make every reasonable effort to reach an agreement is an important precondition to achieving the larger purposes of the Code. The appellant was found by the Board to have failed to comply with this duty. Accordingly, the Board had authority to remedy the effects of that violation. It is significant that the wording "to do or refrain from doing" bestows broad powers on the Board which enables it to impose both positive and negative duties on the party in breach.*

[164] In considering an appropriate remedy in *Rocky View County*, the Alberta Board stated:

> *[64] We grant the first request and declare that the County has violated section 60 of the Code. We decline to grant the Association's request for reinstatement and a prohibition on future layoffs. It is not the layoffs that amounted to a breach of the Code. Instead, it is the failure to disclose the de facto decision to layoff during the collective bargaining process that amounts to a breach. If the decision to layoff had been disclosed in early May, it is not a foregone conclusion that the Association would have been able to avoid the layoffs altogether. In fact, that seems unlikely to us. The Board cannot insulate the full-time firefighters from layoff. That is not consistent with our remedial role. Accordingly, we find remedies (ii) and (iii)* [rescind and prohibit layoffs of full-time firefighters]*, requested by the Association, inappropriate.*

The Alberta Board granted a declaration. It noted that there were only a few months left in the collective agreement (unlike in this matter where more than three years remain). It noted, therefore, that awarding damages as compensation for the lost opportunity to bargain would be a more viable alternative. It then reserved decision on the issue of remedy.

[165] As an appropriate remedy for the university's breach of the duty to bargain in good faith in *University of Manitoba*, the Manitoba Board issued a declaration that the university committed an unfair labour practice, ordered the university to apologize in writing to the association and the employees in the bargaining unit, and pay to the association and each employee who was in the bargaining unit when the unfair labour practice was committed, an amount not exceeding $2,000 each.

[166] The Board must be concerned with remedying the specific breach of the Act, and in so doing there must be a relationship between the unfair labour practice that has occurred, its consequences to the bargaining process, and the remedy imposed. It must provide a constructive settlement to the dispute and effectively redress the contravention of the Act. The goal is to put the parties in the position they would have been in but for the Employer's conduct. If the Employer had advised the Union that it had decided to layoff all of the master operators, the Union would have had an opportunity to seek a compensating benefit at the bargaining table. The breach resulted in the Union agreeing to a collective agreement that it might not otherwise have agreed to had it known of the Employer's plan.

[167] In its Amended Application, the Union requested 12 remedies. The remedies requested and the Board determination on each request follow. The remedies granted will place the Union in the position it would have been in but for the Employer's contravention of its duty to bargain in good faith.

(a) A declaration that the Employer has committed unfair labour practices.

[168] The Board will issue an Order that includes a declaration that the Employer committed an unfair labour practice when it breached its duty to bargain in good faith. It did not bargain in good faith and make every reasonable effort to conclude a collective agreement.

(b) An Order requiring the Employer to return the duties to master operators that have been taken away from them, including the completion of safe work permits.

[169] The Board agrees with the Employer's argument that a decision respecting whether the Employer can remove duties from the master operator and assign them to the shift supervisors requires an interpretation of the collective agreement. This means it is an issue that falls to be determined pursuant to the grievance procedure in the collective agreement. However, in the circumstances of this matter, the Board considers it appropriate to maintain the status quo ante until the issue is resolved.

[170] The Board will issue an Order requiring that, until the grievance filed respecting this issue is resolved by agreement of the parties or an order of a grievance arbitrator, the Employer will return to the master operators the duties previously assigned to the master operators under the job description dated January 6, 2010[93]. This includes, of course, approval of permits and granting access to the Process Department. It also includes the duties set out for master operators in the emergency response plan dated March 21, 2016[94] and any other duties that have been removed from master operators on and after their return to work following the lockout.

(c) An Order requiring the Employer not to remove any further duties from master operators.

[171] Consistent with the finding with respect to the previous request, the Board will issue the requested Order for the same timeframe.

(d) An Order requiring the Employer to ensure that a master operator is present on each shift during the term of the collective agreement.

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[93] Exhibit E16.
[94] Exhibit U23.

[172] The Board will issue an Order requiring the Employer to continue to schedule a master operator on each shift during the term of the current collective agreement. The Board is not requiring the Employer to cease use of the PSSP. Whether implementation of that policy is a management decision that the Employer is entitled to make will be determined in the resolution of the grievance respecting that issue. The Board does not view implementation of the PSSP as being related to the unfair labour practice.

(e) An Order requiring the Employer to ensure that an operator II is present on each shift in sections of the Process Department where an operator II is part of the section complement, in particular sections II, III, IV and V.

[173] As noted above, the Board finds that the unfair labour practice relates only to the master operator classification; this request is denied.

(f) An Order precluding the Employer from eliminating the master operator and operator II classifications, and any swing positions associated with those positions, during the term of the collective agreement.

[174] The Board will issue an Order precluding the Employer from eliminating the master operator classification during the term of the current collective agreement. This Order will hold the Employer to its agreement to maintain the master operator classification.

(g) An Order that any elections made by bargaining unit members to be laid off or to bump into a junior position be declared void and not be implemented by the Employer.

[175] The Employer argues that this request is overbroad, as it applies to other proposed layoffs, and not just the layoffs of the master operators. The Board agrees and will leave it to the Employer to determine if and how to move forward with other layoffs now that the master operators will no longer be part of that process. This request is denied.

(h) An Order precluding the Employer from proceeding with any layoffs that stem from its decision to eliminate the master operator, operator II or relevant swing operator positions, including an order precluding the Employer from implementing elections made by master operators, operator IIs or relevant swing operators to either be laid off or bump into more junior positions.

[176] The Employer will be precluded from laying off any master operators during the term of the current collective agreement. Any elections to be laid off or bump into more junior positions made by master operators are void. The Board does not find the Alberta Board's finding in *Rocky View County* applicable in this matter. The fact situation in that decision is quite different from this matter, in that the parties there were almost immediately commencing bargaining for the next collective agreement. Additionally, the issue of remedy was not resolved by the Alberta Board in

that decision, so there is no information before this Board respecting the final remedy provided to that union. The Board finds *Sunnycrest* and *Manitoba and MGEA, Re*[95] more comparable to this matter.

[177] If the Employer had disclosed its *de facto* decision to the Union, the parties could have addressed the issue at the bargaining table. That is the appropriate place for the issue to be determined; this Order will ensure that is what will occur.

(i) An Order prohibiting the Employer from making any other changes to the conditions of employment that have not been negotiated with the Union.

[178] The Employer argues that this request is not tied to any of the allegations in the Union's application and is overbroad. The Board agrees that this request is too vague and broad to be capable of implementation. It is denied.

(j) An Order requiring a copy of the Board's Order and Reasons for Decision to be posted in conspicuous places in the workplace.

[179] The Board will order that, within 7 days after receipt of the Board's Order and these Reasons for Decision, both documents be posted by the Employer in conspicuous places in the workplace for a period of 30 days.

(k) An Order requiring the Employer to include master operators in morning meetings with out-of-scope management that they had previously been included in prior to the lockout.

[180] The evidence before the Board indicates that this issue has been resolved.

(l) An Order requiring the Employer to return the office spaces taken away from master operators.

[181] The evidence before the Board indicates that master operators have workspaces allotted to them. Whether it is an appropriate workspace is not an issue for the Board to determine in this matter. This issue is not related to the unfair labour practice committed by the Employer.

[95] *Supra* notes 88 and 89.

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

DATED at Regina, Saskatchewan, this **17th** day of **October, 2022.**

LABOUR RELATIONS BOARD

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Susan C. Amrud, K.C.
Chairperson