Saskatchewan
Labour Relations Board

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

LRB Files No. 173-20 and 133-21; December 2, 2021
Chairperson, Susan C. Amrud, Q.C.; Board Members: Aina Kagis and Clive Tolley

For the Applicant, Unifor Canada Local 594:	Jana Stettner Greg Fingas
For the Respondent, Consumers' Co-operative Refineries Limited:	Eileen V. Libby, Q.C. Matthew Klinger

Application for Interim Relief Granted – Union established arguable case that Employer breached duty to bargain in good faith by not disclosing unsolicited *de facto* decision to eliminate master operator position.

Application for Interim Relief Granted – Balance of convenience favored granting of Interim Order – Both parties agreed that there was a risk of danger to health and safety of employees if layoffs proceeded now.

Application for Interim Relief Granted – Notice of permanent layoff to master operators in middle of hearing where remedies requested include an Order that a master operator be present on each shift during the term of the collective agreement, is an improper interference with the Board process.

Application for Interim Relief Granted – Employer did not satisfy Board that it would suffer any irreparable harm if the Interim Order was granted.

Application to Amend Main Application Granted – Proposed amendments are necessary to ensure real question in dispute is before the Board – No prejudice to Employer, who has not yet commenced case.

Application to Re-open Case Granted – Employer has not yet called any evidence – Evidence sought to be called addresses developments since hearing adjourned.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On November 13, 2020, Unifor Canada Local 594 ["Union"] filed an Unfair Labour Practice Application[1] ["Main Application"] against Consumers'

[1] LRB File No. 173-20.

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"]. A hearing of the Main Application commenced, and evidence from the Union was heard, on August 16 to 20, 2021. That hearing is scheduled to resume on December 13, 2021.

[2] These Reasons address two applications filed with the Board by the Union against the Employer on October 20, 2021: an Application for Interim Relief[2] and an Application to Amend the Unfair Labour Practice Application and Re-open the Union's Case.

[3] Many of the allegations in the Main Application and much of the evidence heard to date revolve around two matters that were at issue in the negotiation of the collective agreement that was reached between the parties in June 2020 ["MO issues"]. While the Employer at many times throughout bargaining toward the current collective agreement put forward the following proposals, in the end the Employer agreed to a collective agreement that did not adopt them:

(a) Eliminate the Master Operator position from the bargaining unit and shift the duties of this position to an out-of-scope supervisory position; and

(b) Removal of the limitation found in Article 2 on the Employer's ability to assign work customarily performed by employees covered by the collective agreement to other employees.[3]

[4] The latest round of collective bargaining between the parties was contentious and protracted. The previous collective agreement expired on January 31, 2019. The Union and the Employer met on 19 different days in 2019 in an attempt to negotiate a new collective agreement. When they reached an impasse, a conciliator was appointed and met with them on four more days. On December 3, 2019, the Union provided 48-hour strike notice to the Employer and one hour later, the Employer provided 48-hour lockout notice to the Union. On December 5, 2019, the Employer locked out the employees represented by the Union. The parties met for bargaining on January 31, 2020 with no success. 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, then issued a report on March 19, 2020, providing their

[2] LRB File No. 133-21.
[3] This is the description of the Employer's proposals at pages 13 and 14 of the Report of the Special Mediators.

recommendations for resolving the dispute. The Union accepted all of the recommendations; the Employer did not.

[5] With respect to the MO issues, the special mediators recommended against the Employer's proposals.

[6] 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 the Employer's last offer[4]. 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 MO 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*	

[7] The vote was held and the offer was rejected. The Employer and Union continued to negotiate, particularly with respect to a return to work agreement, until they reached a tentative agreement on June 18, 2020. That collective agreement, which adopted the special mediators' recommendations on the MO issues, was ratified by Union members on June 22, 2020.

[8] After the Union members returned to work, the Union became concerned that the Employer was not complying with the collective agreement with respect to the MO issues. The actions it took issue with are set out in the Main Application, summarized in paragraph 37:

> *Further, Local 594 is concerned that CCRL is moving towards eliminating the Master Operator position entirely.*

[9] On May 27, 2021 the Employer advised the Union that it planned to eliminate the master operator position. On October 4, 2021, the Employer advised the Union that it was proceeding with permanent layoffs that included the elimination of the master operator classification. On October 5, 2021, the Employer started the process of contacting employees in master operator 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. The Employer

[4] LRB File No. 061-20.

indicated that the layoffs could begin as early as December 2021, but potentially extend into April 2022.

[10] The Application for Interim Relief asked the Board to issue an Order prohibiting the Employer from proceeding with the permanent layoffs. In the Application to Amend and Re-open the Union's Case, the Union asked for leave to amend the Main Application to reflect developments since it was filed. The Union also asked for leave to lead evidence respecting events since the hearing adjourned on August 20, 2021, particularly on October 4 and 5, 2021. Orders granting the Union's applications were issued by the Board on November 18, 2021. These are the Reasons for those Orders.

Applicable Legislative Provisions:

[11] The following provisions of the Act are applicable to the determination of the two applications before the Board:

> *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.*
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> *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:*
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> *. . .*
>
> *(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(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
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> *. . .*
>
> *(d) make an interim order or decision pending the making of a final order or decision.*
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> *6-112(2) At any stage of its proceedings, the board may allow a party to amend the party's application, reply, intervention or other process in any manner and on any terms that the board considers just, and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings.*

[12] The following provisions of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* ["Regulations"] are also applicable:

> *15(1) An employer, union or other person that intends to apply to the board for an interim order or decision pursuant to clause 6-103(2)(d) of the Act shall file:*
>
> *(a) an application in Form 12 (Application for Interim Relief);*

(b) an affidavit of the applicant or other witness in which the applicant or witness identifies with reasonable particularity:

(i) the facts on which the alleged contravention of Part VI of the Act, the regulations made pursuant to Part VI of the Act or an order or decision of the board is based, including referring to any provision of the Act or regulations that is alleged to have been contravened;

(ii) the party against whom the interim relief is claimed; and

(iii) any exigent circumstances associated with the application or the granting of the interim relief;

(c) a draft of the order sought by the applicant in Form 13 (Draft Interim Order); and

(d) any other material that the applicant considers necessary for the purposes of the application.

(2) Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or witness's own knowledge to prove.

(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the board may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.

(4) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.

(5) Before filing an application pursuant to this section, the applicant shall contact the registrar and, on being contacted, the registrar shall set a date, time and place for the hearing.

(6) On being notified pursuant to subsection (5) of the date, time and place of the hearing, the applicant shall serve a copy of the application and all other material mentioned in subsection (1) on the party against whom the interim relief is claimed at least 3 business days before the date set for the hearing.

(7) Before the hearing, the applicant shall file with the board proof of service of the application and the material mentioned in subsection (1) in accordance with subsection (6).

36(1) If an employer, union, labour organization or other person intends to apply to the board respecting a matter that the Act authorizes or requires to be submitted to the board and no Form is prescribed in these regulations for making the application, the employer, union, labour organization or other person shall file a written document that sets out all of the following with reasonable particularity:

(a) the nature of the application being made and the facts relied on by the applicant;

(b) the name of the applicant and of any other employer, union, labour organization or person directly affected by the application;

(c) the relief being sought;

(d) the provisions of the Act on which the applicant relies to make the application.

Argument on behalf of Union:

Application for Interim Relief:

[13] The Union agrees that on the Application for Interim Relief it must establish first, that the Main Application demonstrates an arguable case and second, that the balance of convenience favors the issuance of the interim orders it requested.[5]

[5] *International Brotherhood of Electrical Workers, Local 2038 v Active Electric Ltd.*, 2018 CanLII 38245 (SK LRB); *Alumasafway, Inc. v International Association of Heat & Frost Insulators and Asbestos Workers*, 2020 CanLII 19808 (SK LRB).

[14] The Union need not prove at this stage that the Main Application is likely to succeed, simply that it has an arguable case. The Union argues that it has established an arguable case that the Employer contravened its duty to bargain in good faith. The issue raised in the Main Application is the Employer's breach of its duty to bargain in good faith by failing to disclose during bargaining its then *de facto* decisions to: take key duties away from master operators and instead give them to out-of-scope shift supervisors; implement a minimum staffing policy that would mean that in cases of short notice absence, shifts would run without master operators; and move toward unilaterally eliminating the master operator position altogether.

[15] The Employer had a duty to disclose these *de facto* decisions during bargaining first because they would have a significant impact on the bargaining unit and second because it had tried unsuccessfully to negotiate the removal of the master operator classification from the bargaining unit and, by signing the new collective agreement, had agreed to the master operator position remaining in the bargaining unit.

[16] The Employer's duty to disclose pertinent information arises both on request and on an unsolicited basis. Where the Employer has made a *de facto* decision that will have a significant impact on the employees in the Union, there is a duty on the Employer to disclose that decision to the Union during negotiations, even if the Union has not asked about it. To not disclose a decision with a major impact on the bargaining unit is tantamount to a misrepresentation.[6]

[17] The duty to engage in collective bargaining in good faith includes duties both not to materially misrepresent the matters being bargained and also to disclose matters that materially affect the negotiations. The Union states that it has established an arguable case that the Employer contravened these duties.

[18] The Employer made a proposal during bargaining to eliminate the master operator position, leaving no room for dispute that the status of the position was the subject of collective bargaining and seen as a vital issue by the parties. The Union argues that the Employer was able to achieve other major concessions at the bargaining table by conceding its position on that demand. Then, once the Union was no longer in a position to exert economic pressure on it, the Employer acted as if it had been successful in negotiating the position of master operator out of the bargaining unit. It first implemented policy changes reducing the duties and hours of master

[6] *Alberta Union of Provincial Employees v Shepherd's Care Foundation*, 2016 CanLII 23192 (AB LRB).

operators, then gave notice of its decision to eliminate the master operator position. All this was done within the infancy of a collective agreement that was reached on the basis that it had withdrawn its proposal to take those actions. The effect of the Employer's nondisclosure during collective bargaining was to procure an outcome that would not have been reached if it had fulfilled its duty to bargain in good faith and made adequate disclosure of its intentions.

[19] The Union argues that it has provided significant evidence that indicates that the Employer had made a *de facto* decision during bargaining to eliminate the master operators. On their return to work after the lockout, master operators found that there was no longer a position guide for master operators, and the position guides for other Process Department employees had been amended to remove the statement that they reported to the master operators. The Safe Work Permit Program document was amended effective June 9, 2020 to move the master operators' duties to the shift supervisors. Immediately following the lockout the Employer increased the number of shift supervisors in the Process Department from 16 to 28. While the Employer argues that its evidence indicates that it had not yet made a decision to eliminate master operators during bargaining, the Union argues that what the Employer's evidence actually demonstrates is that it had made the decision during bargaining. In the time period ending October 4, 2021 it was just working out the logistics of how it would implement that decision.

[20] The second onus on the Union is to establish that the balance of convenience favors the issuance of an interim order. The Union argued that the labour relations harm in not issuing an interim order outweighed the labour relations harm in issuing the requested order. The Union argued that it had demonstrated three kinds of irreparable harm that would result if the requested interim order was not granted.

[21] First, the Union argues that eliminating the master operator classification poses a significant safety risk to employees, who will be forced to work without the full complement of employees needed to safely operate the refinery and carry out emergency response measures when required. The Union argues that the elimination of the master operator position raises real risks of injury or death to workers based on the position's role in permitting and emergency response. The danger to the health and safety of workers arising from the Employer's actions represents irreparable harm that cannot be compensated in damages. The Union is not required to demonstrate a high degree of probability that injury or death will occur; a lesser probability of

death or personal injury is sufficient to establish irreparable harm.[7] The Union argues that it has put forward substantial evidence regarding the safety-sensitive nature of the workplace, including a history of fires, explosions and emergencies that Union employees have had to respond to in the course of their careers. The master operator position has been minimized and then eliminated without the Employer making any provision for alternate staff capable of adequately responding to emergencies when they arise and without updating its emergency response plan.

[22] Second, the Employer's decision to eliminate the master operator classification jeopardizes the Union's ability to obtain its requested relief in the event the Main Application is successful. Once positions have been eliminated and employees have either bumped into other positions or been laid off altogether, it will be very difficult for the Board to turn back the clock. The effect of the proposed layoffs would be to undercut the decision-making process of the Board respecting the Main Application and preclude relief for the unfair labour practices already being considered by the Board. Interim relief is appropriate to ensure that the Employer is not able to unilaterally render the Main Application meaningless.

[23] The Union and its members who are impacted by the layoff notices are being asked to make immediate decisions intended to bind them to severance or bumping. Those choices ought to be made based on full knowledge as to the validity of the layoffs.[8] The affected employees ought to have the benefit of a determination of the Main Application before being required to make the election.[9] Because of the complex and interconnected nature of the bumping, it is appropriate for the Board to prevent any layoffs from occurring until the Main Application has been determined. The Employer's choice to announce the elimination of the master operator positions in the middle of a hearing addressing precisely that issue reflects a deliberate choice to undercut and punish the efforts of Union members to enforce their rights and a reckless disregard for the Board's process.

[24] Third, if the Employer is able to proceed with the permanent layoffs before the Main Application is determined, the Union's representation of members will be significantly impacted. If the Employer is able to give immediate effect to the layoffs, particularly while the Main Application remains under review by the Board, the resulting loss of faith in the Union's ability to

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[7] *590470 Alberta Ltd. v. City of Edmonton*, 2004 ABQB 373 (CanLII); *United Nurses of Alberta v. St Michael's Health Centre*, 2003 ABCA 5 (CanLII).
[8] *AlumaSafway, Inc. v International Association of Heat & Frost Insulators and Asbestos Workers*, 2020 CanLII 19808 (SK LRB); *SEIU Local 299 v SAHO*, 2006 CanLII 62950 (SK LRB).
[9] *Bell Canada*, 2001 CIRB 116 (CanLII).

give effect to its members' interests may be irremediable even if aspects of the layoffs are later reversed.

[25] In contrast, the Employer's interest in proceeding with the layoffs is to cut costs. There is no evidence of an imminent need for the layoffs to occur before the Board has had an opportunity to render its decision in the Main Application. The Employer continues to be highly profitable. The harm that the Employer argues would result if the Interim Order is granted is entirely speculative. The Employer has demonstrated no irreparable harm. A desire to control costs is not generally treated as factoring into the Board's evaluation of labour relations harm[10].

[26] Finally, the Union argued that the Board should issue the Interim Order to maintain the status quo until the Main Application is decided.

Application to Amend:

[27] With respect to its application to amend the Main Application, the Union argued that the requested amendments are necessary to ensure that the real question in dispute between the parties can be addressed by the Board. The amendments do not alter the essential nature of the application. The proposed amendments identify and particularize after-acquired evidence of the Employer's failure to bargain in good faith. They also supplement the Main Application by recognizing that the Union's fears about the elimination of the master operator position have crystallized due to the Employer's subsequent action. It would represent an inefficient use of the resources of the Board and the parties to require the Union to file a new application and reiterate in a different hearing the same evidence already led in the hearing of this matter.

Application to Re-open:

[28] With respect to the application to re-open its case, the Union notes that the new evidence proposed to be adduced was not available in August 2021. The application was made as soon as possible after the new evidence was available to the Union. The Employer has not yet called any evidence.[11]

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[10] *Canadian Union of Public Employees Local 5398 v Southwest Crisis Services Inc.*, 2019 CanLII 76929 (SK LRB).
[11] *Catholic Children's Aid Society of Toronto v. M.R.*, 2014 ONCJ 762 (CanLII).

Argument on behalf of Employer:

Application for Interim Relief:

[29] The Employer argued that the Union had not established an arguable case. The onus is on the Union, and it failed to provide evidence to show that the decision to permanently lay off master operators was made while collective bargaining was ongoing. The Employer further stated that it did not make any representations to the Union that dropping its proposals on the MO issues was intended as a representation that the master operator classification would be exempt from layoffs or job eliminations under a new collective agreement. The collective agreement entered into by the parties includes provisions allowing layoffs and job deletions to occur.

[30] The Employer acknowledges that proactive, unsolicited disclosure is required during bargaining when a party has made a major decision affecting the bargaining unit and the parties' relationship under the revised agreement.[12] However, the duty of unsolicited disclosure only applies when a decision has already been made. The duty does not extend to possibilities, even if an employer is thinking seriously about implementing a major change. An employer must have made a *de facto* decision before the duty to disclose applies. The Employer argues that its affidavits demonstrate that, while bargaining was underway, the discussion of potential layoffs remained a discussion of possibilities. It was only on March 26, 2021 that the Employer made a *de facto* decision to proceed to implement layoffs. The shift from evaluation of potential layoffs to taking steps to implement those layoffs demonstrates the point at which a *de facto* decision to proceed with permanent layoffs, including of the master operator, was made. This was approximately nine months after bargaining concluded.

[31] The changes to the permitting system and the implementation of the minimum staffing policy were not part of a larger plan to implement layoffs. The changes reflect efforts by the Employer to improve its business in light of the significant competitive pressures it faces.

[32] The affidavits filed by the Employer in response to the Application for Interim Relief indicate the following. In March 2020 managers began having discussions about ways to capture efficiencies achieved during the lockout once Union employees returned to work. This included the possibility of permanent layoffs. In July 2020 a proposal was presented to the Vice President

[12] *International Woodworkers of America Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, 1983 CanLII 970 (ON LRB); *RWDSU v Temple Gardens Mineral Spa Inc.*, 2002 CarswellSask 860 (SK LRB); *Ontario Public Service Employees Union v. Ontario (Management Board of Cabinet)*, 1998 CanLII 18271 (ON LRB); *Canadian Union of Public Employees, Local 1251 v. New Brunswick*, 2009 CanLII 74885 (NB LEB).

of Refinery Operations to lay off the master operators and instead engage additional shift supervisors. On November 25, 2020 a formal set of business cases and supporting materials were considered by the managers. A Permanent Layoff Committee was established; on March 26, 2021, its proposals for specific permanent layoffs were approved by the Vice President. While he indicates that he was confident that the layoffs could be implemented safely, he directed that a Management of Organizational Change process be undertaken to identify any issues that the changes in the Process Department would cause and develop appropriate action plans to safely implement those changes. That process is not yet complete. The Employer indicates that the work that is necessary for safe operation following the planned layoffs is well underway and is expected to be completed prior to the Employer actually laying off any employees.

[33] It is not sufficient for the Union to make allegations in its application. It must provide evidence supporting those allegations, and it has not done so. A critical element of the Union's allegations is when the *de facto* decision was made by the Employer to permanently lay off master operators. On this point the Union has presented no evidence, just inadmissible speculation not based on first-hand knowledge. Conversely, the Employer has presented evidence of how the decision was made, from managers directly involved in the decision-making process. This evidence clearly shows no *de facto* decision was made until the spring of 2021, well after bargaining ended.

[34] The Employer also relies on an April 24, 2020 letter it sent to the Union discussing its need for temporary layoffs in light of the economic circumstances and operational restrictions caused by the Covid pandemic. The letter also stated: "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". This information was provided even though the Employer had no legal obligation to provide it at that time. The Union did not make any inquiries seeking further detail about this comment, including in further bargaining discussions. This letter provided disclosure beyond what the Employer was legally required to provide, since no *de facto* decision respecting permanent layoffs had yet been made when the letter was sent. This letter provides evidence that the Employer took seriously its duty to provide unsolicited disclosure.

[35] The Employer submits that, in light of its evidence, and with no admissible evidence from the Union to the contrary, the Union has failed to demonstrate that it has an arguable case.

[36] In the alternative, if the Board were to find that the Union has demonstrated an arguable case, the Employer then submits that the Union has failed to establish any prejudice or labour relations harm that will be experienced by the Union if the Interim Order is not granted. Even if the Board finds that harm to the Union is present, the Employer submits that the labour relations harm that it would suffer if the Order was granted outweighs any harm to the Union if the Order is not granted.[13]

[37] The Employer argues that the assertions of the Union respecting the safety of the refinery if layoffs proceed is speculation and argument. None of the Union affidavits provide first-hand knowledge of the steps the Employer is taking to manage safety issues arising from the layoffs. On the other hand, the Employer's evidence shows that the Employer has a program in place to address safety issues and is taking account of the need to ensure safe operations in planning the layoff process. The Union has not shown a cause and effect relationship between the planned layoffs and the alleged danger. The Union is asking the Board to make determinations respecting occupational health and safety issues that are not within its jurisdiction.

[38] The Employer disagrees with the Union's suggestion that the layoffs may prevent the Board from providing a remedy in the event the Union prevails in the Main Application. It argues that the Board could grant remedies such as damages or reinstatement.

[39] In response to the Union's allegation that interim relief is required to prevent employees losing faith in the collective bargaining efforts of the Union, the Employer states that there is no ongoing certification or decertification application that would give rise to an urgent need for relief to avoid irreparable harm.

[40] On the other hand, delaying layoffs would cause irreparable harm to the Employer's operations. It would result in significant delays to its ability to implement its future state organization, which it has determined is the best course for it to address a challenging competitive and market environment. Depending on the length of delay, decisions to invest in future capital projects may be affected. A delay may also force the Employer to fill some vacancies that are currently available for displaced employees to move into; this would result in increased costs to the Employer and an increased impact of the layoffs on employees when they eventually proceed.

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[13] *U.F.C.W., Local 1400 v. Watrous Cooperative Assn. Ltd*, 2011 CarswellSask 389.

[41] The Employer alleges that a delay in the layoff process would have significant financial implications for the Employer. The Employer argues that while financial costs do not always constitute irreparable harm, they are irreparable in this case. This is because the Union has not filed an undertaking to pay damages in the event that interim relief is granted and the Employer is successful in the Main Application. While the Employer acknowledges that the Board has previously determined that it does not require such an undertaking[14], it argues that the lack of such an undertaking means that financial damages resulting from interim relief become irreparable.

[42] The Employer argues that the Union has demonstrated no urgent or exigent circumstances that necessitate an Interim Order. The bumping process, followed by the need to train employees in their new positions, means the process may extend until April 2022.

[43] The Employer also argues that the Application for Interim Relief is overbroad. The Main Application relates only to master operators, but the relief requested is not limited to master operators. The Union has not presented any evidence to support its broad request for relief.

Application to Amend:

[44] The Employer agrees that the Board has discretion to allow an amendment that is necessary to determine the real question in dispute between parties. However, it argues that the proposed amendments are attempting to change the question. There is nothing about layoffs, Operator IIs or swing operators in the Main Application. The Union is attempting to shift the focus entirely to the permanent layoffs. Amendments can be allowed to clarify allegations, but not to change a case already in progress.[15]

[45] The Board's power to amend an application extends only to procedural not substantive defects in the application[16]. Amendments are allowed only to address technical issues, not substantive issues like the ones proposed here.[17] The Employer argues that the substantive amendments proposed by the Union would transform the Main Application into an entirely different application, significantly expand its scope and prejudice the Employer.

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[14] *U.F.C.W., Local 1400 v. Tropical Inn*, 1998 CarswellSask 909, [1998] Sask. LRBR 218.
[15] *United Foods and Commercial Workers Union, Local 1400 v. Sobey's Capital Inc. (Varsity Common Garden Market)*, 2004 CanLII 65587 (SK LRB).
[16] *United Food and Commercial Workers, Local 1400 v. Saskatoon Credit Union Limited,* 2009 CanLII 21216 (SK LRB).
[17] *Sharon May Strohan v Saskatchewan Government and General Employees' Union and Government of Saskatchewan*, 2019 CanLII 43222 (SK LRB).

[46] The Employer referred to *Hospitality & Service Trades Union, Local 261 v Novotel Canada Inc*[18], where the Ontario Labour Relations Board refused to allow an amendment when a hearing was already underway, to avoid prejudice to the respondent employer. The Employer argues that, if the Union wants to raise an issue with the permanent layoffs, that should be addressed in a separate application. Attempting to add that issue to the Main Application changes the question at the heart of the dispute and expands the scope of the dispute. The Employer's cross-examination of witnesses already called was based on the pleadings as they were at the time.

[47] The Employer also referred to *International Union of Painters and Allied Trades, Local 200 v MacFarlane*[19], where the Ontario Board also refused to allow an amendment on the basis that "it would unduly expand the scope of this case at a time when it was difficult or impossible for the Employers to respond to it."

[48] Finally, the Employer argues that if the Board allows any of the amendments proposed by the Union, the Board should provide the Employer with an opportunity to file an amended Reply.

Application to Re-open:

[49] The Employer also objects to the Union's application to re-open its case. The Union should not be allowed to re-open its case to bolster the evidence it has already provided respecting the Main Application as it was originally filed. If the Board decides to allow the Union to amend the Main Application and then re-open its case, the Union should only be allowed to bring evidence regarding the specific new allegations in the amended application.

Analysis and Decision:

Preliminary Issue: Admissibility of Affidavit Evidence

[50] The Employer objects to a number of paragraphs in the Union's affidavits, on the basis that they contain speculation, argument, opinion not based on personal knowledge and hearsay. They do not comply with the requirement in the Regulations that affidavits contain only "facts" that the witness is able of the witness's own knowledge to prove. They are not based on the witness's personal knowledge as section 15 of the Regulations requires. The Employer asks the Board to

[18] 2014 CanLII 47273 (ON LRB).
[19] 2014 CanLII 61258 (ON LRB) at para 54.

strike out the offending paragraphs and disregard them in its determination of the Application for Interim Relief.[20]

[51] As the Employer pointed out, section 15 of the Regulations requires affidavits filed in support of an Application for Interim Relief to be based on facts that the witness is able of the witness's own knowledge to prove. In *Saskatchewan Government and General Employees' Union v Benjamin Hazen*[21], the Board stated:

> *Subsection 15(2) of the Regulations confines affidavits on interim applications to "facts" in the witness's "own knowledge", because the Board has no opportunity at this stage to assess the credibility of witnesses, weigh conflicting evidence or make determinations on disputed facts. SGEU acknowledged that the affidavits contained information that was not based on personal knowledge. Subsection 15(3) of the Regulations allows the Board to accept an affidavit based on information and belief if it is satisfied that it is appropriate to do so because of special circumstances. The Board was not asked to make such an Order or provided with any information of special circumstances on which it could make an Order admitting that information. The Board has no discretion to admit or rely on assertions in affidavits that are not facts, and that instead are opinion, speculation or argument.*

[52] The Board agrees with the Employer that the Union's affidavits contain evidence that does not comply with subsection 15(2) of the Regulations. Subsections 15(3) and (4) of the Regulations allow the Board to admit affidavit evidence that is based on information and belief. The source of the information must be disclosed in the affidavit. The Board must be satisfied that it is appropriate to admit the evidence because of special circumstances. The Union argues that the special circumstances in this matter that lead to a conclusion that the disputed Union evidence could be allowed is that much of it has already been testified to without objection and subjected to cross-examination at the hearing in August 2021. The Board agrees that this is a special circumstance that allows the Board to admit more of the evidence in the affidavits of Avery Riche, Jeff Roffey, Paul Woit and Ryan Dzioba than it normally would. However, several provisions objected to by the Employer in those four affidavits do not satisfy even this lesser test, and are struck out, on the basis that they are argument or unsubstantiated speculation about the Employer's plans and motives:

- Affidavit of Avery Riche: paragraphs 7 and 8; final sentence of paragraph 10; first sentence of paragraph 82; paragraph 129; first sentence of paragraph 130.

- Affidavit of Jeff Roffey: paragraphs 32 and 54; third and fourth sentences of paragraph 75; paragraphs 77 and 78.

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[20] *Unifor, Local 609 v. Health Sciences Association of Saskatchewan*, 2016 CanLII 74279 (SK LRB); *Canadian Union of Public Employees Local 1949 v Legal Aid Saskatchewan*, 2018 CanLII 91940 (SK LRB).
[21] 2020 CanLII 90830 (SK LRB) at para 34.

- Affidavit of Paul Woit: last sentence of paragraph 22; second sentence of paragraph 53.

- Affidavit of Ryan Dzioba: paragraph 30.

[53] Nathan Kraemer did not provide evidence at the hearing. Therefore, the usual, stricter review of his affidavit is appropriate. All of the paragraphs objected to by the Employer are struck out, on the basis that they are argument, unsubstantiated speculation about the Employer's plans and motives, or facts not within his own knowledge: paragraphs 15, 15.1, 15.2, 15.3, 16, 44, 49, 50, 51, 54, 55, 56, 57, 63, 64 and 66.

[54] This is also an issue with the Employer's affidavits, particularly that of Trent Rowsell. None of the Employer's assertions have yet been testified to in the hearing of the Main Application, therefore they have not been subjected to cross-examination. The Union did not engage in the same paragraph by paragraph analysis of the Employer's affidavits as the Employer did with respect to the Union's affidavits. However, it does specifically object to one critical bit of evidence in the Rowsell affidavit, being paragraph 85 and Exhibit U, to which that paragraph refers. This paragraph and exhibit refer to a calculation made by the Employer's Manager of Accounting and Business Analysis respecting the estimated monthly financial loss to the Employer if the layoffs are delayed. The Board agrees that, in the manner presented, the information in paragraph 85 and Exhibit U are not facts that Rowsell is able of his own knowledge to prove and they are struck out.

Application for Interim Relief:

[55] The test applied by the Board on an application for interim relief is well-established. A summary of the general principles that is often relied on is set out in *Saskatchewan Government and General Employees' Union v. Saskatchewan (Government)*[22]:

> *[30] Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether*

[22] 2010 CanLII 81339 (SK LRB).

> *the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application. . . . As with any discretionary authority under the Act, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.*
>
> *[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strength or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case". . . .. The Board has also used terms like whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. . . . . Simply put, an applicant seeking interim relief need not demonstrate a probably violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*
>
> *[32] The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. . . . In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. . . . The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. . . . In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. . . .* [citations removed]

[56] The onus in this matter is on the Union. The first thing the Union must prove is that the Main Application establishes an arguable case of a potential contravention of the Act. The Board finds that the Union has established an arguable case.

[57] The Union argued that the Employer breached its duty to bargain in good faith by failing to comply with its obligation to disclose relevant evidence during bargaining. It referred the Board to many decisions that have established that in Saskatchewan (as elsewhere) employers have a duty to provide unsolicited disclosure in certain circumstances:

> *[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.*
>
> *[86] This duty is applicable both to decisions impacting negotiations for the conclusion of a collective agreement, and to decisions with a major impact on the terms and conditions of employment of certain employees, over which there is an ongoing or impending negotiation. The purpose of the duty to disclose is to ensure that, when negotiating the terms and conditions of employment, the opposing party has pertinent information, and based on that information is equipped to fully assess the impact of any proposals. An*

> *unrestricted duty to disclose information about the possibility of organizational changes, or about a party's proposals to its instructors, may invite evaluation of organizational imperatives and undermine confidentiality in organizational planning. For these reasons, a party is not generally entitled to information about a management decision, in advance, or in order to bargain the merits of that decision.*[23]

[58] The Union also referred to *University of Manitoba Faculty Association v University of Manitoba*[24]. In that decision, the Manitoba Labour Board referred to the following comments by George W. Adams, Q.C. in his text, Canadian Labour Law[25], on the issue of unsolicited disclosure:

> *However, 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 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.*

[59] The Manitoba Board went on to hold:

> *116 An important aspect of the duty to bargain in good faith and to make every reasonable effort to conclude a collective agreement is the requirement of unsolicited disclosure. As former Ontario Labour Relations Board Chairperson George Adams. Q.C. noted in Consolidated Bathurst Packaging Ltd. v. I.W.A., Local 2-69, [1983] O.L.R.B. Rep. 1411 commencing at paragraph 43, the duty to disclose arises both out of the obligation to recognize the bargaining agent and to foster rational and informed discussion between the parties during collective bargaining. Chairperson Adams emphasized that disclosure "encourages parties to focus on the real positions of both the employees and the employer".*
>
> *117 The disclosure requirement is not limited to circumstances in which a party specifically requests information. A duty of unsolicited disclosure has developed in labour law over the course of the past 40 years and is now well-established in this and other Canadian jurisdictions. It has been described as "tantamount to a misrepresentation" for an employer not to reveal during bargaining a decision or de facto decision that it has already made which will have a significant impact on the employees in the bargaining unit.*
>
> *118 The Ontario Labour Relations Board developed much of the early Canadian jurisprudence respecting the obligation of unsolicited disclosure. For example, in Consolidated Bathurst, supra, at paragraph 53, Chairperson Adams indicated that the employer's decision respecting an "impending" plant closing was "so concrete and highly probable in early January and dealt with by the board of directors in such a perfunctory manner…that the company had a minimum obligation" to say during bargaining that unless circumstances changed, a recommendation to close the plant would be made within weeks. The Ontario Board held that the employer's "silence at the bargaining table was tantamount to a misrepresentation within the meaning of the de facto decision doctrine".*

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[23] *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*, 2019 CanLII 98484 (SK LRB).
[24] 2018 CanLII 5426 (MB LB); 2018 CarswellMan 42 at para 115. The decision's paragraphs are not numbered in CanLII; the paragraph numbers used are those found in the CarswellMan citation.
[25] Second Edition, Chapter 10, Unfair Labour Practice Proceedings at page 10-109.

[60] The Employer referred the Board to two decisions that are quite similar to this matter. In *Ontario Public Service Employees Union v. Ontario (Management Board of Cabinet)*[26], the Ontario Labour Relations Board found that no actual or *de facto* decision to eliminate certain employees was made before the conclusion of bargaining. While elimination was being considered, other options continued to be actively considered until a decision was made, more than four months after collective bargaining concluded.

[61] In *Canadian Union of Public Employees, Local 1251 v. New Brunswick*, the New Brunswick Labour and Employment Board found no contravention of the duty to bargain in good faith because, while bargaining was underway, elimination of the job classifications in issue was "but one of a number of ideas, many of which never became decisions at all"[27].

[62] What all of these cases emphasize is that, as the New Brunswick Board stated, in every case the question of when the *de facto* decision was made is a question of fact that the Board must determine based on the evidence before it:

> *46. The difficulty in any complaint over an alleged failure to disclose occurs in determining at what stage of a planning exercise mere ideas move to the verge of implementation. It is only when the latter occurs that any disclosure requirement can reasonably be seen to arise.*

[63] On the Main Application the Board will determine when the Employer made a *de facto* decision to eliminate the master operators: at what point in time this plan became sufficiently concrete to conclude that a *de facto* decision had been made. On the Application for Interim Relief, the Board must determine whether the Union established that it has an arguable case that the *de facto* decision was made before or during the course of bargaining toward the collective agreement that was ratified on June 22, 2020. The Employer argues that, on this point, the Union has provided only inadmissible speculation not based on first-hand knowledge. The Board disagrees.

[64] The Board had no difficulty in finding that an arguable case was established, based on evidence including the following:

(a) The Employer's Bargaining Brief to the Special Mediators, dated March 9, 2020, indicates that the master operator classification is to be deleted and that maintaining supervisory tasks in the shift supervisor role "continues to be a high priority for the

[26] 1998 CanLII 18271 (ON LRB).
[27] 2009 CanLII 74885 (NB LEB), at para 47.

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.

(b) By the letter dated April 24, 2020 the Employer advised the Union: "the Employer is considering permanent layoffs to achieve operational efficiencies."

(c) Immediately on the return to work of the Union employees, the Employer began using changed position guides that do not reference the master operators, and there is no position guide at all for master operators.

(d) Following the lockout, the Employer has been trying to get process operators to report directly to the shift supervisors and bypass the master operators completely.

(e) Effective June 9, 2020, the Safe Work Permit Program was revised to move the master operators' responsibilities to the shift supervisors.

(f) The Employer admits that, following the return to work, shift supervisors rather than master operators are completing the review of safe work permits.

(g) Responsibility for determining access to the Process Department also remains with the shift supervisors instead of being returned to the master operators.

[65] All of this evidence supports the Union's argument that the Employer had made the decision during or prior to bargaining to eliminate the master operator classification and that the process described in the Employer's affidavits is merely evidence of them working out logistics respecting how to implement the decision.

[66] The second part of the test requires the Board to weigh the balance of convenience. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of the Main Application, the Board will balance the relative labour relations harm that is anticipated to occur prior to the hearing of the Main Application without intervention by the Board compared to the harm that could result should a remedy be granted. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm.

[67] Both parties claimed that they would suffer irreparable harm if the Board did not decide in their favour.

[68] The first type of harm raised by the Union was worker safety. In *590470 Alberta Ltd v City of Edmonton*[28], the court refused to grant the requested injunction on the basis of both the weakness of the plaintiff's case on its main application, and "the undeniable importance of the public interest in traffic safety":

> *[36] . . .The potential for loss of life or personal injury is a potential for the most irreparable form of harm, and damages would not be adequate compensation.*

[69] In *United Nurses of Alberta v St Michael's Health Centre*[29], the applicant union was granted an injunction preventing the employer from proceeding with a reconfiguration of staff that would reduce the number of registered nurses and increase the number of licensed practical nurses. In its affidavit evidence, the union suggested that the reconfiguration would cause the nurses to suffer physical and emotional harm as a result of the doubling of their workload. The employer's affidavits contradicted the evidence in the union's affidavits. The Court of Appeal upheld the following finding by the chambers judge in determining it was an appropriate case in which to grant the requested injunction:

> *I do not accept that in all such cases a high degree of probability of harm must be shown. In my view, the assessment must always be a matter of assessing the nature of the harm against the risk of occurrence. For example, clearly, risk of fatality would require a lesser probability than loss of a prospective monetary award or opportunity. In my view, evidence of a reasonable probability of personal injury is sufficient justification for concluding that the irreparable harm test has been satisfied.*

[70] Both parties agree that: the refinery is a highly safety sensitive worksite; the emergency response plan has not been revised to reflect a workplace in which a master operator is not present; and employees have not received training on how to respond to an emergency if no master operator is present. The most the Employer was able to say was that it has identified issues and is developing plans to address those issues. The Employer's affidavits state that its current plan is that the revised emergency response plan and other policies and procedures that are necessary to safely operate following the layoffs will be finalized before it actually starts laying off employees. In other words, both parties agree that proceeding with the layoffs at this time

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[28] 2004 ABQB 373.
[29] 2003 ABCA 5 at para 11.

would present a risk to the employees' safety. The potential for loss of life or personal injury is a potential for the most irreparable form of harm, and damages would not be adequate compensation.

[71] The Union also argues that the effect of the proposed layoffs would be to undercut the decision-making process of the Board with respect to the Main Application. The Board shares this concern. The Employer argues that if the layoffs proceed and the Union is successful on the Main Application, the Board could still provide appropriate remedies. The Board does not share that optimism. This is not a situation like *Canadian Union of Public Employees Local 1949 v Legal Aid Saskatchewan*[30], where six employees were to be laid off, five of whom had been provided with other employment pending the determination of the application. In this workplace hundreds of employees will potentially be affected as bumping decisions are made and implemented. The Board is of the view that the Employer's actions in purporting to move forward with the permanent elimination of the master operators, while the Board is in the midst of hearing and determining the Main Application, is inappropriate and disrespectful to the Board.

[72] The Board also finds that the following rationale in *Bell Canada*[31] is equally applicable to this matter:

> *[36] The labour relations purpose of interim relief is to stabilize the labour relations situation or, in other words, to neutralize the potential harm of an alleged labour practice complaint pending its final determination.*
> . . .
> *[39] The Board recognizes that monetary compensation could repair in part some of the harm to individual employees should the interim relief be denied and the main application be allowed. However, determining which additional employees would have applied for a negotiated VSP or what other options could have been negotiated between the parties and how to reinstate already terminated employees are, in the Board's opinion, serious potential difficulties that can still be avoided at this time.*

[73] The Interim Order will maintain the status quo pending a decision on the Main Application. Serious potential difficulties in providing appropriate remedies are avoided. This is particularly important in this matter. Since the master operators are senior employees, unless they choose to be laid off, they will bump other employees, either in the Process Department or other departments, who will in turn have the option to bump other employees, etc. Accordingly, the employees who are laid off would not be the employees whose positions the Employer is proposing to eliminate. Because of the complex and interconnected nature of the bumping, the

[30] 2018 CanLII 91940 (SK LRB).
[31] 2001 CIRB 116 (CanLII) at para 37, 41.

Board determined that all layoffs would be prevented from occurring until the Main Application is determined.

[74] The Employer argues that any delay to the layoff process would cause irreparable harm to the Employer in the form of increased expenses. The Employer was not able to point the Board to any case in which the Board has determined that financial cost would be considered irreparable harm. The Board also questions the Employer's claim that an Interim Order would cause it additional expenses, given its statements that it is not ready to proceed with the layoffs from a safety perspective, and has no intention of proceeding with the layoffs until the safety issues are resolved. The Employer argues that there are no urgent or exigent circumstances that necessitate an Interim Order because the layoff process is lengthy in order to provide employees an opportunity to access bumping rights and to ensure that the appropriate training is in place to implement employee movements. The Employer suggests that the process may extend until April 2022. This is also confirmed by the news release issued by the Employer when it announced the layoffs on October 5, 2021. It stated: "The Company anticipates that the layoff process will be completed within the next six months". Rather than undercutting the Union's case, these statements by the Employer confirm for the Board that the Interim Order will not cause the Employer to suffer irreparable harm.

[75] At this stage, the Board considered in detail the interim orders requested by the Union:

> *(a) CCRL shall be prohibited from implementing any position eliminations and reductions of bargaining unit members pending this Board's decision in LRB File No. 173-20, including but not limited to prohibiting CCRL from eliminating the Master Operator, Operator II and corresponding Swing Operator Classifications, pending this Board's decision in LRB 173-20;*
>
> *(b) CCRL shall be prohibited from requiring bargaining unit members to make decisions respecting bumping, displacement or separation arising out of its planned position eliminations and workforce reductions, pending this Board's decision in LRB 173-20;*
>
> *(c) CCRL shall be prohibited from implementing any decisions already made by bargaining unit members respecting bumping, displacement or separation, pending this Board's determination in LRB 173-20;*
>
> *(d) CCRL shall be prohibited from making any other changes to the conditions of employment that have not been negotiated with the Union, pending this Board's determination in LRB 173-20.*[32]

[32] Draft Interim Order filed in support of Application for Interim Relief.

[76] The Employer referred the Board to *R.W.D.S.U. v. Sakundiak Equipment*[33], where the Board held that, since the underlying application named only one employee, it did not have jurisdiction to issue an interim order that addressed other affected employees. The Employer argues that this means that the Board cannot grant the relief sought by the Union because, it says, the Union has not presented any evidence to support its request that layoffs of employees other than master operators should be prevented.

[77] The evidence before the Board indicates that the Employer's current plan is to eliminate 159 positions. It expects this will result in 53 layoffs. These position eliminations and expected layoffs are planned in seven departments:

Department	***Position Eliminations****	***Expected Layoffs***
Process	*69*	*26*
Maintenance – Trades	*60*	*19*
Maintenance – Equipment Integrity and Reliability	*5*	*2*
Supply and Distribution (PDD)	*12*	*0*
Business Performance	*6*	*2*
Planning & Economics	*2*	*0*
Health, Safety, Security and Environment (HSSE)	*5*	*4*
Total	*159**	*53*[34]

[78] The layoffs most pertinent to the Main Application are those planned in the Process Department, where the master operators work. The 69 positions to be eliminated in that department include 32 master operators, 16 rover operators IIs/Op IB and 21 swing operators. However, the Employer has chosen to deal with all position eliminations and corresponding bumping together:

> *Q. 35 Can an employee with more plant seniority in a different Process section bump / displace a person with section seniority? Can an employee use plant seniority to secure a vacant position in another Process section?*
>
> *A. 35. In accordance with LOU 2, Article 4(b), employees may use their process seniority to bump between sections of the Process Department, provided they are able to meet the minimum qualifications for a position, and have more process seniority than the employee they are displacing. Employees within the Process Department may use plant seniority to bid for positions outside the Process Department. Employees who do not have process seniority may use plant seniority to enter the Process Department.*[35]

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[33] 2011 CarswellSask 542 (SK LRB).

[34] Co-op Refinery Complex (CRC); Notice of Reduction in Force to In-scope Employees; Established Number of Reductions (by department and by classification); posted Monday, October 4, 2021.

[35] 2021 CRC In-Scope Reduction in Workforce; Bumping and Displacement Process – Questions and Answers; Updated October 9, 2021.

[79] As the Union argued, the layoffs as planned by the Employer are so intertwined it is impossible to separate them. This led the Board to the determination that the Interim Orders requested by the Union would be granted. All of the Orders granted by the Board on the Application for Interim Relief address the need to make clear that the Employer is to maintain the status quo until the Board has considered and determined the Main Application.

Application to Amend the Main Application:

[80] The next issue for the Board to address is the requested amendments to the Main Application. Pursuant to subsection 6-112(2) of the Act the Board may allow a party to amend its pleadings "and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings". Nothing in this provision limits this power to procedural or technical amendments.

[81] The Board agrees with the Union that to require the Union to file a different unfair labour practice application respecting the conduct of the Employer since the current hearing adjourned in August 2021 would be an inefficient use of the resources of the Board and the parties. The proposed amendments identify and particularize after-acquired evidence of the Employer's alleged failure to bargain in good faith. This is the issue at the heart of the Main Application.

[82] In opposing this application, the Employer relied on two decisions of the Ontario Labour Relations Board. The Board has determined that they are not comparable to this matter.

[83] In *Hospitality & Service Trades Union, Local 261 v Novotel Canada Inc*[36], the Ontario Board stated:

> *35. Each of these amendments sought by the Union raises similar issues. Shortly after the filing of the initial application, counsel for Novotel made a detailed request for particulars. Since the reverse onus applies, Novotel called its evidence first. Hearings took place on July 22, November 28 and December 13, 2013. Novotel has already called a number of witnesses who were subject to cross-examination. The amendments sought by the Union raise allegations against some of these same witnesses which would necessitate them having to be recalled.*
>
> *36. Novotel is entitled to know the case it has to meet before calling its evidence. That knowledge permits Novotel to assess and plan its strategy, both in respect of the witnesses it calls and the questions that are asked. That is the rationale behind the Board's Rules with respect to pleading. Allowing the amendments sought by the Union at this stage of the proceeding would prejudice Novotel in the presentation of its case, and, for this reason, the Board concludes it is not appropriate to permit these amendments sought by the Union.*

[36] 2014 CanLII 47273 (ON LRB).

That is not comparable to the current stage of this matter. Here, the Employer has not commenced to present its case. The Employer will suffer no prejudice from the amendments proposed by the Union. It will know the case it has to meet before it begins calling its evidence.

[84] In *International Union of Painters and Allied Trades, Local 200 v MacFarlane*[37], the Ontario Board stated:

> *Life moves on and new events occur that one party or another feels is relevant in some way to what has passed. Fairness involves two elements: knowing the case a party has to meet, and knowing that the case will someday come to an end. To be surprised with additional facts that could and should have been disclosed earlier makes it difficult to know the case one needs to meet. Further it is not appropriate to have litigation that is extended endlessly as one party or the other seeks to add a few more facts discovered during a break in the hearings, that will itself require more evidence and more replies. This does raise the prospect of a case that would never end and might require endless recommencement at any point.*

In that case the Ontario Board placed great reliance on the fact that allowing the amendment would cause significant prejudice to the respondent. The respondent's instructing party was in the process of being cross-examined. This meant that he could not discuss the new evidence with his counsel. His counsel would have to deal with the issues raised by the proposed amendments without being able to take instructions from him.

[85] In this matter, the Employer has not provided the Board with any evidence of prejudice; inconvenience maybe, but not prejudice. The Employer is not surprised by the additional matters sought to be addressed in the proposed amendments, since they are about its own conduct.

[86] The Union's application to amend the Main Application was granted as requested. The Employer was also granted leave to file an amended Reply. The Union volunteered to recall any of its witnesses that the Employer wanted to cross-examine further in light of the amendments to the Main Application. The Board issued an Order requiring it to do so.

Application by Union to Re-open its Case:

[87] The final question was whether the Union should be granted leave to re-open its case.

[88] On this issue, the Union relied on *Catholic Children's Aid Society of Toronto v. MR*[38]. The Board agrees that it sets out an appropriate test for the Board to apply in considering this

[37] 2014 CanLII 61258 (ON LRB) at para 54.
[38] 2014 ONCJ 762 (CanLII).

application. First, with respect to the timing of an application to re-open, the Ontario Court of Justice stated:

> *[16] Justices Fuerst and Sanderson suggest that the framework of the test applied in criminal cases on motions to reopen should be applied to civil cases—that "the test for re-opening should be increasingly onerous as the stage of the trial progresses." Within that framework, the test would be least restrictive if a plaintiff's motion to re-open was made after the plaintiff had closed its case, but before the defendant began to lead evidence, tightening after the defendant's case had gone in, and tightening much more after judgement was announced, but before the order was entered. Within that framework, "the essential principle which arises is that….the trial judge should give significant consideration to the concepts of diligence and discoverability", but not be bound by those considerations if a serious miscarriage of justice would occur if the motion to re-open was not allowed.*

[89] Second, with respect to the factors to be considered on an application to re-open, the Court continued:

> *[17] Factors which a court will consider in civil cases in determining whether to allow a plaintiff to re-open are set out below:*
>
> - *At what stage of the trial is the motion made?*
> - *Why was evidence not adduced during the party's case? Did the party intentionally omit leading the evidence earlier? Or did the evidence only recently come to the party's attention, despite diligent earlier efforts?*
> - *What is the prejudice to the defendant? A defendant might have conducted his case differently if he had known and had an opportunity to investigate the evidence which is the subject of the motion.*
> - *Can any prejudice be remedied in costs?*
> - *How would a reopening of the case affect the length of the trial? How much evidence would have to be revisited?*
> - *What is the nature of the evidence? Does it deal with an issue which was important and disputed from the beginning, or with a technical or non-controversial point? Does it merely "shore up" evidence led in chief?*
> - *Is the proposed new evidence presumptively credible?*

[90] In this matter, while the Union technically closed its case on August 20, 2021, nothing further has happened since that occurred. The Employer has not yet called any evidence or even made its opening statement. Further, the Union cannot be faulted on the concepts of diligence and discoverability, as the evidence it is applying for leave to tender is with respect to the Employer's conduct since the adjournment of the proceedings in August. The Employer will know the case it has to meet before it begins calling its evidence.

[91] The Union was granted leave to re-open its case to introduce further evidence to address the amendments and developments relevant to the Main Application that have occurred since the hearing adjourned.

[92] The Board thanks the parties for the comprehensive oral and written submissions they provided, which the Board has reviewed and found helpful. Although not all of them may have been referred to in these Reasons, all were considered in making this decision.

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

DATED at Regina, Saskatchewan, this **2nd** day of **December, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson