BRITISH COLUMBIA LABOUR RELATIONS BOARD

VANCOUVER NATIVE HOUSING SOCIETY

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL:	Allison Matacheskie, Vice-Chair
APPEARANCES:	Don Percifield, for the Employer Chris Buchanan, for the Union
CASE NO.:	57609
DATE OF HEARING:	March 7, 2008
DATE OF DECISION:	March 12, 2008

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union filed an application alleging breaches of Sections 6(1), 11, 47 and 49 of the *Labour Relations Code* (the "Code"). It alleges, in part, that the Employer breached the Code when it announced that it will lock out its employees and then invite them back a few hours later under the terms of the Employer's final offer that was previously rejected by the employees. The Union says the parties have a continuation clause in their collective agreement which revives or continues the terms of the collective agreement and therefore precludes the Employer from taking this course of action.

II. FACTS

2 The Union is certified to represent a bargaining unit of certain employees of the Employer. The Union and the Employer are parties to a collective agreement whose term was from April 1, 2002 to March 31, 2007.

3 On January 3, 2007, the Union gave written notice to the Employer of its intention to negotiate a new collective agreement. The parties have met for bargaining sessions on October 30, 31, November 6, 8 and 9, 2007, January 22, 23 and February 1, 2008.

4 On February 1, 2008, the Employer applied under Section 78 for a last offer vote and issued formal notice of lockout.

5 On February 12, 2008, the vote was held and a majority of the employees rejected the Employer's last offer.

6 On February 25, 2008, the Employer wrote to the Union as follows:

> On February 1, 2008, the Employer gave notice of lockout to the Union pursuant to the applicable provisions of the *Labour Relations Code* of British Columbia ("*Code*"). Please be hereby further advised that the lockout will commence at 9:00 A.M., Saturday, March 1, 2008.
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> Please also be advised that starting at 11:00 A.M. on Saturday, March 1, 2008, the members of the bargaining unit will be invited to return to work on the terms of the Employer's offer to the Union dated January 22, 2008 that was the subject recently of a last offer vote under Section 78 of the *Code*. Between 9:00 A.M. and 11:00 A.M. on Saturday, March 1, 2008 no bargaining unit employees will be permitted to work.
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> The Employer continues to be willing to conclude a collective agreement on the terms of its last offer to the Union as described above.

7 By letter dated February 26, 2008, the Union advised the Employer it remained available to continue negotiations. By letter dated February 27, 2008, the Employer advised it shared the desire of the Union to set dates for resumed collective bargaining and proposed early dates which preceded the time when the lockout was scheduled to commence.

8 On February 27, 2008, the Union filed this complaint and the Employer agreed to postpone its lockout until March 14, 2008 in order to have the complaint dealt with prior to the commencement of a lockout.

9 On February 28, 2008, the Union proposed that the parties resume mediation with a Board mediator and the Employer agreed but expressly stated that it would not rescind its notice of lockout.

10 By letter dated March 4, 2008, the Employer declared the parties were at an impasse as the Union was not available to meet with the Employer and mediator at any time during the preceding two weeks.

11 Article 20 of the collective agreement provides:

> This Agreement shall remain in full force and effect for a period of **sixty (60)** months from the **1st day of April, 2002** until the **31st day of March, 2007**, and shall automatically renew itself from year to year unless notice of termination or of amendment is given by either party to the other as hereafter provided.
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> If either party desires to terminate this Agreement or amend the provisions of this Agreement, either by additions thereto or deletions therefrom, such party shall within the period of one hundred and twenty (120) days immediately preceding any subsequent anniversary date thereafter, give to the other party notice in writing to commence collective bargaining which shall be carried out in accordance with Section 50(2)(3) of the *Labour Relations Code* of British Columbia. If such notice is given, this Agreement shall remain in force during the period of negotiations. (emphasis in the original)

III. SUBMISSIONS OF THE PARTIES

12 The Union submits that under Section 57 of the Code the parties cannot strike or lock out during the term of the collective agreement and therefore the parties have to end the term of the agreement to be able to engage in economic sanctions. However, it says the parties can negotiate a continuation clause that continues or revives the terms and conditions of the collective agreement for periods outside of any strike or lockout. It says this is done in anticipation of the continuing relationship between the parties and the renewal of the collective agreement. It says such bridging provisions are negotiated by the parties to give stability to the workplace during collective bargaining.

13 The Union says there are many ways the parties can express their intent to have the terms and conditions of a collective agreement apply while they are negotiating a renewal collective agreement. The Union submits that the words chosen by the parties in this case for their continuation clause are clear and unambiguous. It says the last sentence in Article 20 means that the terms and conditions of employment in the collective agreement remain in force while the parties are engaged in bargaining. It says collective bargaining is a fluid process which contains multiple phases and the term "the period of negotiations" used in Article 20 encompasses the whole period of negotiations for a new collective agreement.

14 The Union also argues that the last sentence of Article 20 has to mean something. It says if it means that the collective agreement only remains in force during negotiations that precede a strike or lockout, it simply means that Section 45(2) of the Code applies. The Union says to give the sentence in dispute meaning, it must mean more than the normal operation of the Code provisions. Section 45(2) of the Code states:

> 45 (2) If notice to commence collective bargaining has been given and the term of a collective agreement that was in force between the parties has expired, the employer or the trade union must not, except with the consent of the other, alter any term or condition of employment, until
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> (a) a strike or lockout has commenced,
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> (b) a new collective agreement has been negotiated, or
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> (c) the right of the trade union to represent the employees in the bargaining unit has been terminated,
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> whichever occurs first.

15 The Union says the terms of the collective agreement are in force upon lifting the lockout and therefore the Employer has breached Sections 6(1) and 11 of the Code in that it unlawfully altered those terms during bargaining. As the Employer has only announced its intention to change the terms of the collective agreement, the Union also submits that an anticipatory declaration may be appropriate. The Union also seeks an anticipatory declaration under Sections 49(1) and (2) of the Code that the Employer must follow the terms of the collective agreement and will breach the Code if it does not.

16 The Employer submits the language in Article 20 cannot have the meaning that the Union proposes as it would be invalid or inoperative. It says the collective agreement must end upon strike or lockout and cannot be revived. It says that it is an attempt to contract out of provisions of the Code such as Sections 57 and 45(2).

17 The Employer relies primarily on *Bradburn v. Wentworth Arms Hotel Limited*, [1979] 1 S.C.R. 846 ("*Wentworth*") and *Campbellton, City of v. Canadian Union of Public Employees, Local 76*, [1983] N.B.J. No. 267 (C.A.) ("*Campbellton*"). In these

cases, the Courts found that continuation clauses that kept the collective agreements perpetually alive were inoperable because they foreclosed the right to strike or lock out.

18 The Employer also argues that the analysis in *Creston Valley Power Installations Ltd*., BCLRB No. 289/85, 12 CLRBR (NS) 169 should be followed in this case. It says I must find that the parties unequivocally intended to have the collective agreement bind the parties after its expiry and that they conducted themselves in a manner consistent with that intent.

19 At the hearing, the Employer presented portions of 185 collective agreements which represent a random sample over a broad spectrum of industries with different employers and unions. The Employer found that they all fit within seven different categories of continuation clauses. It labelled the categories as follows: collective agreements with no continuation clause; clauses that terminated the collective agreement on notice of strike or lockout; clauses that terminated the collective agreement on commencement of legal strike or lockout; clauses that stated that the collective agreement continues during the period of negotiations; clauses that stated the collective agreement continued during *bona fide* negotiations; and clauses that stated that the collective agreement continued until new collective agreement was concluded. The Employer also included a category for all continuation clauses that it says did not fit into one of its other categories.

20 The Employer submits that no matter what language the parties use or their intention, the parties cannot keep a collective agreement alive during a strike or lockout and also they cannot revive a collective agreement after cessation of a strike or lockout. It says all of these provisions are in conflict with the Code and unenforceable. However, it submitted that the review of different continuation clauses was relevant to its alternative argument that the language must be clear and unequivocal in order to revive a collective agreement or have it continue after a lockout or strike.

21 The following are two examples of collective agreement clauses where the Employer says the parties have used clear and unequivocal language to express their intention to revive or continue the terms of the collective agreement after a strike or lockout:

> During such period of negotiations this Agreement shall remain in full force and effect until a new Agreement has been entered into between the parties.
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> Both Parties shall comply fully with the terms of the Agreement during the period of collective bargaining and until a new or revised Agreement is signed by the Parties, without prejudicing the position of the new or revised Agreement in making any matter retroactive in such new or revised Agreement. Notwithstanding the foregoing, the Parties shall have the right to effect a legal strike or a legal lockout, as the case may be.

22 The Employer submits that the language used in these examples, and others submitted at the hearing, are significantly different than the language used by the parties in this case in Article 20. It therefore says the language in Article 20 is ambiguous or equivocal and cannot be found to express a clear intention to have the collective agreement continue after a strike or lockout.

23 The Employer also says there is a significant difference between clauses that say during "periods of negotiations" and "the period of negotiation". It says Article 20 only refers to a singular period, and therefore, it does not extend the life of the collective agreement to any possible period of negotiations after a strike or lockout.

24 The Employer also argues that "the period of negotiations" cannot be indefinite or infinite. It says there must be an end to the period of negotiations and since that end is not expressly stated, it could be when parties reach an impasse, when negotiations are discontinued or when there is a lockout or strike.

25 The Employer also submits that there is a significant difference between the word "agreement" and "terms of the agreement".

26 The Employer submits that the Union's interpretation does not lead to stability but rather creates chaos.

27 In reply, the Union submits the issue of whether the terms of a collective agreement can be revived after a lockout or strike but before a new collective agreement has been negotiated has been settled: *The Board of School Trustees of School District No. 75 (Mission)*, BCLRB No. B99/93, 18 C.L.R.B.R. (2d) 1 ("*School District No. 75*"); *Forest Industrial Relations*, BCLRB No, B256/2003, 100 C.L.R.B.R. (2d) 21; *BC Rail Ltd.*, BCLRB No. B320/93; *McLaren Forest Products Inc.*, *Babine Division and United Steelworkers, Local 898,* 11 L.A.C. (3d) 21.

28 The Union says there is no conflict with the Code and the parties are not attempting to contract out of the Code provisions. There is nothing in the Code that enables the Employer to unilaterally change terms and conditions. There is only a prohibition against changing terms of agreement until the provisions of Section 45(2) are met. Therefore the parties can make an agreement that limits what the Employer will do after a strike or lockout. The Union says its interpretation of Article 20 is consistent with *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*Paccar*").

29 The Union argues that the majority of the cases relied on by the Employer predate *Paccar* and only establish the undisputed proposition that the parties cannot negotiate away the right to strike or lock out.

30 Concerning the Employer's reliance on other collective agreements, the Union says they do not assist in the interpretation of this collective agreement. It says if the Board does consider them, they support the Union's case.

31 There was no evidence led of bargaining history between the parties. Both parties assert that the notice given by the Union on January 3, 2008 under Article 20 terminates the collective agreement. Both parties submit that the Board should interpret Article 20 based on the plain and ordinary meaning of the words used.

IV. ANALYSIS AND DECISION

32 The legality of a clause in a collective agreement which continues or revives the terms of a collective agreement when a strike or lockout has ended but the parties have not yet concluded a renewal collective agreement has been previously adjudicated by the Board: *School District No. 75*, p. 18:

> The School Board's first argument is that commencement of strike action by the Union terminated the collective agreement for all purposes; once terminated, a collective agreement cannot be revived. This argument is based largely on Section 58 of the *Labour Relations Code* which requires that all collective agreements contain a provision that "there will be no strikes or lockouts so long as the agreement continues to operate".
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> Section 58 of the Code prohibits strikes and lockouts during a term of a collective agreement, as well as during any subsequent continuation – subject, of course, to the right of the parties to resort to lawful economic sanctions: *Wentworth Arms Hotel, supra*; *Corporation of the Township of Esquimalt, supra*. The "corollary" suggested by the School Board is not supportable; i.e., it does not necessarily follow that a strike or lockout precludes continued operation of all terms and conditions found in the expired collective agreement (although the agreement itself is terminated) and, further, precludes revival of some or all of those terms at a later date should economic sanctions be lifted prior to a new agreement.

33 In *Forest Industrial Relations*, BCLRB No. B400/2003, the Union applied for a declaration that the collective agreement remained in effect after the parties ended a one day strike and returned to the bargaining table. At para. 31, the Board briefly addressed the parties' ability to negotiate a term in their collective agreement that would revive its terms after an unsuccessful strike or lock out:

> Lastly, I note that, unlike the collective agreement provision considered in *The Board of School Trustees of School District 75, supra*, there is no provision allowing that terms consistent with the Collective Agreement, be revived after bargaining has been discontinued. *In the absence of such a provision,* it is not open to me to effectively rewrite the parties' agreement by restoring the terms of employment. (emphasis added)

34 I dismiss the Employer's primary argument that Article 20 is unenforceable or an illegal provision of the collective agreement if it continues or revives the terms of the

collective agreement when the parties return to negotiations after an unsuccessful strike or lockout. In *School District No. 75* at page 19 the Board held:

> Further, we concur with the conclusion in *Mclaren Forest Products Inc., supra*, that parties may agree to provisions which will govern their relationship following termination of a collective agreement. There is no justification for limiting such agreements to periods prior to strike or lockout action.

35 I find that there continues to be no justification for limiting the parties' ability to negotiate the circumstances under which the terms of the former collective agreement will apply when the unionized employees are actively working during collective bargaining. In other words, the parties can negotiate terms which will govern their relationship during all bargaining periods including after a strike or lockout. Such agreements are not in conflict with the provisions of the Code or the principles in *Paccar*. In fact, in keeping with the duties of the Board and the parties under Section 2 of the Code, the parties are encouraged to have agreements that self govern the terms and conditions of employment during all stages of the collective bargaining relationship.

36 This finding does not conflict with the court cases of *Wentworth* and *Campbellton*. Those cases established the principle that the parties cannot contract out of the right to strike or lock out. The parties in this case are negotiating what terms and conditions will apply when the parties are in bargaining but are not on strike or locked out. This is in keeping with Section 2 of the Code and previous decisions of the Board such as *School District No. 75*.

37 I turn to the interpretation of the collective agreement language in the case before me. The question is what the parties intended by the words in the last sentence of Article 20. It states "If such notice is given, the Agreement shall remain in force during the period of negotiations". The parties focused their arguments on the words "during the period of negotiations". The Employer's primary position is that the Union's interpretation renders the language illegal or inoperable. It does not assert an interpretation of Article 20 which it says is legal. However, in its alternative argument, it submits that if the parties intended the collective agreement to be alive before and after any strike or lockout, the parties would have used the word "periods" rather than "period". It says as the parties used the singular word "period", the collective agreement can only apply during the period of negotiation that precedes any lockout or strike.

38 I turn first to what the parties meant by the words "the period of negotiations". Collective bargaining for a renewal collective agreement is often a long process with interruptions in the negotiations for various practical or strategic reasons. A strike or lockout is one of the reasons the parties may not be actively negotiating and it does not mean that negotiations will never commence again. It is common for an economic sanction to be lifted and the parties to return to the bargaining table. It is also common for the parties to discontinue meeting, have a cooling off period, commence or stop using a mediator. It is more plausible that the parties intended "the period of negotiations" to mean the period from expired collective agreement to the renewed

collective agreement that is being negotiated. Further, if the parties intended to use the singular form of the word "period" to mean only the period prior to a strike or lockout, they would likely have said "only the period prior to a strike or lockout".

39 Also, the sentence must have some meaning. If it means the period prior to a strike or lockout, it simply has the same result as Section 45(2) of the Code. If this is all the parties intended, it is more likely that they would not have included the last sentence at all.

40 In this matter, the Employer tendered 185 examples of continuation clauses negotiated in British Columbia. I find they do not assist the Employer's case in interpreting the language in its collective agreement. The fact that other parties may have used language that is more clear and detailed in their collective agreement does not mean that the language used in Article 20 is ambiguous. Indeed, though it is not material to my decision, the compilation of continuation clauses if anything would support the Union's position as it included clauses from collective agreements that the Union negotiated with other employers where it agreed expressly to the terms of the collective agreement terminating upon the commencement of a strike or lockout.

41 On a balance of probabilities, I find it is more likely that the parties in this case intended the words "period of negotiations" to encompass the entire period of negotiations rather than just the period (or periods) of negotiations that end upon the commencement of a strike or lockout.

42 While the parties focused their arguments on the issue determined above, I will also determine an issue briefly addressed by the Employer. The Employer submitted there is a difference between "the agreement" and "the terms of the agreement". Despite using only the word "agreement", I find it is clear that the parties intended in Article 20 to continue only the *terms* of the former agreement, not to continue in force the collective agreement itself. The latter interpretation would be nonsensical and would result in an absurdity. In the final sentence of Article 20, the parties would be both terminating and continuing the agreement at the same time. The Board and arbitrators interpret collective agreements, not in a strict, literal fashion, but rather in a way that ascertains the parties' mutual intention and reflects labour relations reality: *University of British Columbia*, BCLRB No. 42/76.

43 I accept the Union's argument that the parties intended the terms of the collective agreement to remain alive during the period of negotiations. The period of negotiations means the entire negotiations from the date notice is given under Article 20 until the parties successfully negotiate a new collective agreement.

V. CONCLUSION

44 I find Article 20 of the collective agreement continues or revives the terms of the collective agreement if a strike or lockout is lifted and the parties have not yet reached an agreement for their renewal collective agreement. I find Article 20 is not in conflict with provisions of the Code or the principles in *Paccar.* It is not illegal or unenforceable.

45 The terms of the terminated collective agreement are in force when the parties are not engaged in a legal strike or lockout. Therefore, if the Employer has employees back to work on the terms of its last offer, it would be violating Section 11 as it would not be bargaining in good faith.

46 The Employer did not dispute that it would be violating Section 11 if the Board accepted the Union's interpretation of Article 20. The Employer also did not dispute the appropriateness in this case of issuing an anticipatory declaration. I declare that it would be a violation of Section 11 for the Employer to have employees return to work under the terms of its last offer.

47 The Union submitted that it is not necessary to determine the other allegations of unfair labour practices or bad faith bargaining contained in its application if it was successful on its primary application and obtained an anticipatory declaration regarding the legality of the Employer's proposed course of action after its lockout commenced. I therefore decline to decide the other matters raised in the Union's application. In order to expedite the publication of this decision, I have not set out the arguments of the parties on the other allegations.

LABOUR RELATIONS BOARD

"*ALLISON MATACHESKIE*"

ALLISON MATACHESKIE
VICE-CHAIR