BCLRB No. B183/2007

BRITISH COLUMBIA LABOUR RELATIONS BOARD

EMCON SERVICES INC.

(the "Employer" or "Emcon")

-and-

B.C. GOVERNMENT AND SERVICE EMPLOYEES' UNION

(the "Union")

PANEL:	Philip Topalian, Vice-Chair
APPEARANCES:	Joan Young and John Heaney, for the Employer Chris Buchanan, for the Union
CASE NO.:	56705
DATES OF HEARING:	August 3 and 7, 2007
DATE OF DECISION:	August 9, 2007

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Union alleges that the Employer has breached Sections 6(3)(e) and 68 of the *Labour Relations Code* (the "Code") by using replacement workers to perform the work of bargaining unit members during a strike.

2 In order to provide a decision expeditiously, my reasons will be as brief as the issues allow.

II. BACKGROUND

3 The Employer has a road maintenance contract with the Ministry of Transportation for an area described as Service Area 9.

4 There are four road maintenance yards in the service area, located at Beaverdell, Birchbank, Grand Forks, and Midway. These yards have each been designated as marshalling points for employees for the duration of the strike.

5 The Union representing the employees has been on strike since June 29, 2007. An essential services order was issued June 18, 2007. An amended order was issued on July 26, 2007 and remains in effect.

6 On August 1, 2007, a bargaining unit member observed two subcontractors working on 9 Mile Road ("9 Mile") in Fruitvale. 9 Mile is located in the Birchbank service area.

7 One of the subcontractors, operating under the name Impact, was operating a water truck on the road. The other, operating under the name Cham Grading, was grading the road.

8 The Union subsequently discovered that the same subcontractors had performed work on the Cascades Road ("Cascades") on July 29 and 30, 2007. Cham Grading had graded Cascades and Impact had provided a water truck and operator for the work.

9 Cascades is also located in the Birchbank service area.

10 The Employer has admitted that it subcontracted the work as alleged by the Union.

11 The Collective Agreement between the Employer and the Union contains an article dealing with contracting out. It includes the following:

ARTICLE 24-CONTRACTING IN AND CONTRACTING OUT

24.1 Recognition and Notification of Contracting Out Requirement

(a) The Union recognizes that the Employer must utilize hired equipment and subcontractors to meet its obligations to the Ministry of Transportation and Highways and/or Project Owners.

(b) The Employer and the Union are committed to productive utilization of bargaining unit employees so as to minimize the requirement for contracting out of work….

(c) The Employer will provide, once annually, on or before April 1st, a written notification of major portions of the work to be contracted out or hired out. The notice shall include the nature of the work and the proposed contract. The Employer shall provide quarterly statements providing a running year to date total of work subcontracted or hired equipment utilized.

(d) The Employer agrees to notify the Union at such time as utilization of subcontacting and hired equipment reaches 12% of the Road and Bridge Maintenance Contract.

24.2 Contracting Out

(a) The Employer agrees not to contract out any of the Employer's work presently performed by employees covered by this Agreement which would result in the laying off of such employees.

(b) The parties agree that contracting within the limits contained in 24.1(a) and (d) of this Agreement, while auxiliary employees are laid off, will not be a violation of 24.2(a) above….

12 Article 24.1(d) has been amended by a Memorandum of Agreement between the parties, dated December 18, 2002. The figure of 12% in the Article has been increased to 20%.

13 The Employer provided a summary of subcontracts in Service Area 9 for the period July 1, 2006 through to June 1, 2007. The summary shows that slightly more than 17% of the maintenance contract value was subcontracted during that period. There were 378 subcontracts in that period, of which winter grading accounted for 25 and summer grading only one.

14 Joe Mottishaw, the Division Manager for Emcon in Service Area 9, testified for the Employer. He testified that 9 Mile is generally graded once in the Spring, after the snow has cleared and the ground has firmed up, and once in the Fall. The Spring and Fall grading have been done, in the past, by bargaining unit members.

15 Mottishaw testified that a water truck is always required when grading in dry conditions. No subcontracts for water trucks are included in the summary provided. I conclude that bargaining unit employees have operated the water trucks when they are required.

16 Mottishaw did not identify any case in which Spring or Summer grading had ever been contracted out in the past with the single exception of one day of work at Deer Park in March 2007. Mottishaw did not offer any explanation why this particular work was contracted out.

17 Fred Planidin testified for the Union. He has been working in highways maintenance since 1977 and been employed with Emcon in Area 9 since 1991. He is an EO2 (equipment operator 2) employed at Birchbank. Planidin is a Union steward and is a picket captain. He testified that both 9 Mile and Cascades have been graded by bargaining unit members in the past. He could recall no instance of the Spring or Fall grading work on either road being subcontracted in the time he has been employed with Emcon. He testified that both roads were graded by bargaining unit members this Spring.

18 Planidin testified regarding several conversations he had with Gerry Popoff, the Road Superintendent in charge of the Birchbank yard. Mottishaw also testified regarding what Popoff told him following his conversations with one or the other of the picket captains at Birchbank.

19 It is clear that there has been, and continues to be, a difference between the parties regarding the provision of grader operators. In an e-mail to Mottishaw from Popoff dated August 2, 2007, the issue is summarized:

> When I talked to Mark [Tomasini, a Birchbank picket captain] last week about a grader operator, he said that I was only to have 1 EO1 and 1 EO2. I was not allowed to have a grader operator unless we paid overtime rates as a callout. At that time I told him that we were not paying ot callout rates for grader operator but we would pay substitution. He told me several times that we only get an EO1 and EO2 at straight time rates. He did not care about substitution rates. During conversations yesterday on 9-mile road, Mark advised me to request a grader operator in writing for today. I

> did request the grader operator in writing on the standard Essential Services Request form.

20 In a lengthy e-mail from Popoff to Mottishaw, dated July 30, 2007, the second day of the grading at Cascades and two days before the 9 Mile grading, Popoff states in part:

> Fred [Planidin] advised me that we could not have 2 EO2 operators. The LRB ruling was for 1 at EO1 and 1 at EO2. Anything over and above this would be considered callout and would have to be compensated at overtime rates. I asked what would happen if we needed a grader operator. He said that would be an EO3 and would be considered a callout. I did not argue the point.

Nowhere in his e-mail does he make any reference to the subcontracting of the grading work.

21 Mottishaw testified that he, personally, had been informed by the picket captain at Grand Forks that the Union believed that the Employer would have to pay callout to a grader operator if one is required and that he had advised the Union that the Employer's view is that only if more than two EO's were required would callout pay apply.

22 No steps have been taken by either party to resolve the dispute. Neither has sought clarification of the Essential Services Order.

23 Mottishaw testified that Emcon's practice in Service Area 9 has been to subcontract work that can't be done by employees; either because of the specialized nature of that work or because no employees are available to do the work (i.e. because the core group of 36 employees is fully utilized).

24 In the case of 9 Mile and Cascades, Mottishaw testified that there was a safety hazard, washboarding, and that his view was that the necessary work was work required to be done under the terms of the Essential Services Order.

25 Mottishaw described the process the Employer has put in place for requesting that the Union provide employees to perform essential services. The Employer has designed a form entitled "Contract Area 09 Essential Services Request BCGEU/Emcon". The form specifies the number of employees required, the qualifications required, and the date and hours of work. There is a space on the bottom of the form to indicate the name of the picket captain to whom the form has been delivered and the date and time of delivery. A copy of the form is retained in the Employer's files.

26 Popoff did not ask the picket captain at Birchbank if the Union would provide workers to do the grading at Cascades and 9 Mile and no written request for a grader operator was delivered to the picket captain at the Birchbank yard before the grading of 9 Mile and Cascades.

III. POSITIONS OF THE PARTIES

27 The Union says the work performed by the contractors is work that has not typically been contracted out before the strike and that it is work that bargaining unit members would routinely perform.

28 The Union argues that, if the Employer cannot contract out work under the terms of the Collective Agreement, then any contracting out would clearly be work that, but for the strike, would be carried out by bargaining unit members.

29 Further, the Union argues that it does not follow that because the Employer is permitted to contract out work under the Collective Agreement there will be no violation of the Code if work is contracted out during a strike. The Union submits that the proper question to ask is not whether contracting out is permitted under the terms of the Collective Agreement but whether, but for the strike, the work contracted out would have been performed by bargaining unit members.

30 The Employer submits that it has not violated any Code provision regarding the use of replacement workers because the Collective Agreement allows it to contract out up to 20% of the value of its maintenance contract, so long as the contracting out does not result in the layoff of any of its regular workforce.

31 The Employer argues that where contracting out is permitted under the terms of the Collective Agreement, and the work performed Falls within the limits prescribed in the Agreement, the "but for" test has no application.

32 Alternatively, if I find that the Employer has contravened Section 68 of the Code, the Employer argues that I should exercise my discretion under Section 71 of the Code to refuse to make an order because of the Union's improper conduct.

IV. ANALYSIS AND DECISION

33 The relevant sections of the Code are as follows:

> 6\. (3) An employer or a person acting on behalf of an employer must not
>
> (e) use or authorize or permit the use of the services of a person in contravention of section 68, …
>
> 68\. (1) During a lockout or strike authorized by this Code an employer must not use the services of a person, whether paid or not,
>
> (a) who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins,
>
> (b) who ordinarily works at another of the employer's places of operations,

(c) who is transferred to a place of operations in respect of which the strike or lockout is taking place, if he or she was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins, or

(d) who is employed, engaged or supplied to the employer by another person,

to perform

(e) the work of an employee in the bargaining unit that is on strike or locked out, or

(f) the work ordinarily done by a person who is performing the work of an employee in the bargaining unit that is on strike or locked out.

(2) An employer must not require any person who works at a place of operations in respect of which the strike or lockout is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the consent of the person.

(3) An employer must not

(a) refuse to employ or continue to employ a person,

(b) threaten to dismiss a person or otherwise threaten a person,

(c) discriminate against a person in regard to employment or a term or condition of employment, or

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all of the work of an employee in the bargaining unit that is on strike or locked out.

34 The Employer relies on the Board's policy regarding shared work during a strike or lockout as set out in *Corporation of the City of Vernon*, BCLRB No. B506/94 ("City of Vernon"):

> The Board's policy on shared work during a strike or lockout is set out in *V.I. Care Management Ltd.*, BCLRB No. B112/93; *Westmin Resources Limited*, BCLRB No. B387/93; and *Nanaimo Times Ltd.*, BCLRB No. B232/94. These cases stand for the proposition that, during a strike or lockout, replacement workers can perform the portion of shared work that was performed by persons outside the bargaining unit prior to the strike or lockout; they cannot do more. Replacement workers are prohibited under Section 68(1)(e) from performing any shared work which, but for the strike or lockout, would have been performed by an employee

in the bargaining unit. In *Nanaimo Times*, *supra*, the Board's approach is described as follows:

> ...the Board will carefully examine the facts of each case to determine whether the work performed by replacement workers would have actually been performed by an employee in the unit but for the labour dispute. If this question is answered in the affirmative the performance of the work by replacement workers will be prohibited by the Board…(p. 14)

35 While the Employer suggested that the history of subcontracting for the July 2006 to June 2007 period showed that it is routine to subcontract for grading services, I find that it was not routine to subcontract Spring and Summer grading.

36 The single example of grading in the Spring and Summer offered by the Employer as evidence of its practice falls far short of demonstrating that contracting out of Spring and Summer grading has been a routine occurrence.

37 The Employer's primary argument is that any subcontracting up to the 20% limit specified in the Collective Agreement is permissible and would not be a violation of Section 68.

38 I disagree with the Employer's argument. Regarding the alleged violation of Section 68 of the Code, the issue I have to decide is whether grading of Cascades and 9 Mile is work that would have been performed by members of the bargaining unit but for the ongoing dispute. I have no difficulty in finding that it is such work.

39 Mottishaw testified that he was advised by Popoff that Cascades and 9 Mile required grading. His explanation for authorizing Popoff to use a contractor was that Popoff said he wasn't getting responses when he made requests to picket captains. However, there is no evidence that Popoff at any time spoke to anyone from the Union, picket captain or otherwise, about grading Cascades and 9 Mile before subcontracting the work.

40 Popoff was providing daily e-mail reports to Mottishaw regarding essential services at Birchbank, including summaries of his discussions with the picket captains. In none of these reports did he state that he had asked the Union to provide a grader operator to do the grading at Cascades and 9 Mile or that the Union had refused to supply operators for that work.

41 The first written request for a grader operator at Birchbank was made on August 2, 2007; after the Cascades work had been completed and the Union had filed a complaint over the 9 Mile work.

42 I am satisfied that, but for the strike, the work on Cascades and 9 Mile would not have been subcontracted. It would have been done by employees in the bargaining unit.

43 I reject the Employer's argument that during the strike it was free to subcontract any work so long as it did not exceed the 20% cap in the Collective Agreement. It is clear from the *City of Vernon* and the *Nanaimo Times Ltd*. case cited therein that replacement workers can only continue to perform shared work during a strike or lockout if it is work they would have done if there had not been a strike or lockout. Spring and Summer grading are not work which has been subcontracted in the past. The single instance cited by the Employer occurred after notice to bargain had been served on the Employer and, in any case, falls far short of being evidence of a practice.

44 I find that the Employer violated Sections 6 (3)(e) and 68(1) of the Code by using replacement workers.

V. REMEDY

45 The Union is seeking a number of remedies for the breach of Sections 6(3)(e) and 68 of the Code. It seeks a declaration that the Employer has breached Sections 6(3)(e) and 68 of the Code and an order that the Employer cease and desist the breach. The Union also seeks an order that the Employer disclose to the BCGEU details of any contract, or other agreement, between the Employer and any other company for any work covered by the agreement between the Employer and the Ministry of Transportation. For services already commenced or completed, the Union seeks the details forthwith. For services not yet commenced, it seeks an order that details be provided at least seven days before commencement. Finally, the Union seeks an order that the Employer pay to the Union the same amount that it paid to the contractors.

46 In support of its argument that, notwithstanding my finding that it violated Section 68 of the Code, I should exercise my discretion under Section 71 and refuse to make an order under Part 9, the Employer made numerous general allegations of misconduct by the Union. Those allegations mainly related to refusal by the Union or its members to supply employees to provide services considered by the Employer to be essential.

47 The Employer submitted a list of particulars regarding what it referred to as denial of essential services. However, it is apparent, when the list is read in conjunction with the e-mails produced by the Employer, that many of the instances related to disputes over whether the work required was, in fact, work which was required to be done under the terms of the Essential Services Order. This is also evident when the testimony of Planidin and Mottishaw is taken into account.

48 In my view it is significant that the Employer's witness was unable to specify one instance of the Union failing to make available 1 EO1 and 1 EO2 in accordance with the schedule to the Essential Services Order. Additionally, before July 29, 2007, the day the grading started on Cascades, there was no instance of the Union refusing a written request to provide an EO3 to operate a grader.

49 The Board set out the test for application of the "clean hands" doctrine under Section 71 of the Code in *British Columbia Public School Employers' Association*, BCLRB No. B185/2006, an application for leave and reconsideration of BCLRB No. B295/2005:

> We turn now to the "clean hands" issue under Section 71 of the Code. The test for the application of the provision is that the conduct in question relates directly to the relief sought and the improper conduct of the applicant must be illegal or unconscionable and particularly egregious. In addition, the Board has said that a relevant factor in the exercise of discretion to withhold relief is the availability of an alternate legal recourse. It is not essential to find a breach of the Code before exercising the discretion to refuse relief: see *Can-Am Produce & Trading Ltd.*, BCLRB No. B497/2000 (Leave for Reconsideration of BCLRB No. B408/2000) at paragraph 18. (para. 61)

50 The Employer argues that the Union has been guilty of illegal and egregious conduct in refusing to supply workers in accordance with the terms of the Essential Services Order. The Employer says that if the Union considered that the work it was being asked to supply employees to do was not work captured by the Essential Services Order, the proper course was for the Union to supply workers as requested and to file a grievance disputing the right of the Employer to require the work to be done.

51 As I have stated above, it is evident that the parties had differing views regarding their respective obligations under the terms of the Essential Services Order. In the circumstances I do not consider the Union more or less guilty than the Employer for failing to take appropriate steps to clarify matters. Accordingly, I do not find the conduct of the Union meets the test set out above and decline to exercise my discretion under Section 71.

52 Regarding the claim for damages, the Board is generally very reluctant to order damages. In *Fletcher Challenge Canada Limited,* BCLRB No. B255/97, the Board set out the guiding principles for awarding damages:

> 1. A remedy is to be compensatory not punitive.
>
> 2. A remedy provided by the Board seeks to place the injured party in the position it would have been had there been no breach.
>
> 3. A remedy seeks to rectify the consequences of the violation of the Code in a manner commensurate with the nature and effect of the violation.
>
> 4. Remedies other than damages must be inadequate and there is no other practical avenue for providing effective and meaningful relief.

* * *

> In an appropriate case and applying the relevant remedial principles in the context of Section 68(1), the Board might consider it proper to impose an order for damages. Such an order would reflect the reality that the Union has suffered a diminished bargaining power (or loss of opportunity) as a result of the Employer's violation of Section 68 and where the Board was persuaded that the nature of the Employer's conduct was such that it clearly had the effect of prolonging the conflict. (paras. 38 and 40)

53 In the circumstances, I do not find that an order for damages is appropriate. I am satisfied that a declaration that the Employer has breached Sections 6(3)(e) and 68(1) of the Code and a cease and desist order are appropriate remedies in this case.

54 Regarding the Union's request that I order disclosure to the Union of any contracting out the Employer has done or intends to do, in my view it would be prudent for the Employer to make such disclosure to the Union before subcontracting any future work so that the Union may raise any concerns before the work is done. By doing so, the Employer may avoid another complaint such as the one which led to this proceeding. However, I do not consider it necessary to make any order in this regard.

55 A formal Order confirming the above determination is attached.

LABOUR RELATIONS BOARD

PHILIP TOPALIAN
VICE-CHAIR

BRITISH COLUMBIA LABOUR RELATIONS BOARD

IN THE MATTER OF AN APPLICATION PURSUANT TO
THE *LABOUR RELATIONS CODE*, R.S.B.C. 1996, c.244

BETWEEN:

EMCON SERVICES INC.

(the "Employer")

AND:

B.C. GOVERNMENT AND SERVICE EMPLOYEES' UNION

(the "Union")

BEFORE THE LABOUR RELATIONS BOARD	)	THURSDAY THE 9TH DAY OF AUGUST, 2007
PHILIP TOPALIAN, VICE-CHAIR	)	

O R D E R

WHEREAS the Labour Relations Board (the "Board") received an application from the Union alleging that the Employer has violated Sections 6(3)(e) and 68 of the *Labour Relations Code* (the "Code");

AND WHEREAS the undersigned was established as a Panel of the Board pursuant to Section 117 of the Code to deal with this matter;

AND WHEREAS the Board has read the application dated August 2, 2007;

AND WHEREAS the Board is satisfied that notice of the application and the hearing referred to below were adequately effected on the Employer;

AND WHEREAS the Board convened a hearing at its office at 1066 West Hastings Street, Vancouver, BC on August 3, 2007, on which date the Union and the Employer appeared;

AND WHEREAS the parties were afforded a full opportunity at the hearing to present evidence and make submissions;

AND WHEREAS the Employer and the Union were party to a collective agreement which has expired;

AND WHEREAS notice to commence collective bargaining for a renewal of the collective agreement was given by the Union to the Employer on or about December 21, 2006 and the parties subsequently engaged in collective bargaining;

AND WHEREAS the Union is engaged in a lawful strike which commenced on June 29, 2007;

AND WHEREAS the Board was satisfied following the hearing that the Employer had used the services of persons to perform the work of employees in the Union's bargaining unit which is on strike, and that such persons were engaged after notice to commence collective bargaining was given, the Board accordingly issues an Order in the form set out below;

NOW THEREFORE, PURSUANT TO SECTIONS 6(3)(e), 68, 133, 139 AND 143 OF THE *LABOUR RELATIONS CODE*, THE LABOUR RELATIONS BOARD MAKES THE FOLLOWING DECLARATIONS AND ORDERS:

1. The Employer has breached Sections 6(3)(e) and 68(1) by subcontracting grading and water truck work on 9 Mile Road and Cascades Road, which is the work of Employer's striking employees.

2. The Employer shall refrain from using the services of persons, whether paid or not, to perform the work of employees in the Union's bargaining unit contrary to Section 68 of the *Labour Relations Code*; without limiting the generality of the foregoing, the Employer shall refrain from using the services of subcontractors to perform the work of employees in the Union's bargaining unit other than such work the employer can demonstrate would routinely have been performed by subcontracters before the strike.

3. This Order shall remain in effect for the remainder of the Union's strike or until otherwise ordered by the Board.

DATED AND EFFECTIVE at Vancouver, British Columbia, this 9th day of August, 2007.

LABOUR RELATIONS BOARD

"***PHILIP TOPALIAN***"

PHILIP TOPALIAN
VICE-CHAIR