IN THE MATTER OF AN ARBITRATION UNDER
SECTION 104 OF THE
LABOUR RELATIONS CODE, R.S.B.C. 1996, C. 244

BETWEEN:

AMBULANCE PARAMEDICS OF BRITISH COLUMBIA, CUPE,
LOCAL 873

UNION

AND:

EMERGENCY AND HEALTH SERVICES COMMISSION OPERATING AS
BC EMERGENCY HEALTH SERVICES

EMPLOYER

Temporary Positions

Counsel for the Employer:	Pam Costanzo Sabrina Anis
Counsel for the Union:	Michael Shapiro
Arbitrator:	John McConchie

Introduction

This Award arises from a proceeding under Section 104 of the Labour Relations Code. The Award is written in compliance with the requirement in that provision that it be limited to seven (7) pages in length. Accordingly, this Award contains an abridged view of the positions, facts and submissions which were presented to me by the Parties at the Zoom hearing. Although this is so, I can assure the Parties that I considered all of their evidence and arguments in reaching my decision.

The Dispute

In this proceeding, the Union seeks an award of general damages against the Employer in the amount of $100,000 for the Employer's violation of the parties' existing Collective Agreement and egregious conduct by the Employer surrounding the violation. The nature of the violation is that the Employer has paid compensation in excess of the compensation prescribed by the Collective Agreement to several bargaining unit members without the Union's consent or agreement.

The Union acknowledges that the Employer's breach of the Collective Agreement has not resulted in any identifiable monetary harm to itself or its members. It says that the kind of harm that a violation of representation rights causes to unions and its members is presumed at law without proof, and so there is no impediment to to this Board awarding a substantial monetary damages award without proof of damages or specific proof of harm. For these propositions, it relies on a growing number of case authorities that make that point, as well as Section 89 of the Labour Relations Code.

Turning to the Employer's case, it is fair to say that in perhaps all but one respect, this is an uncontested proceeding. The Employer admits it has paid compensation to certain bargaining unit members beyond that prescribed by the Collective Agreement and without first securing the Union's agreement or consent to the payments. It concedes that in doing so it has violated the Collective Agreement. It agrees it cannot contest a declaration to that effect.

However, the Employer says that a damages award is not automatic where there is a breach of the Collective Agreement, and that the Arbitration Board should look deeply into the facts of the case to determine whether a damages award is appropriate.

The Employer points out that the case law takes the conduct of the collective agreement violator into account in determining whether damages are appropriate. It asks me to conclude that it acted in good faith throughout and, if this Board will give appropriate weight to the impact of the extraordinary circumstances surrounding the breach, this Board should restrict the Union's remedy to a declaration that the Employer has breached the Collective Agreement. In the alternative, it submits, if damages are ordered, the Award should be for nominal damages, not the substantial damages claimed by the Union.

Facts

The parties presented their evidence and legal submissions orally but with the aid of comprehensive and very helpful written statements of fact and law, accompanied by relevant documentation. There were no witnesses called at this proceeding. What follows in this section are my findings of fact based on the above-noted materials and inputs.

The Employer administers a 24/7 ambulance service across the province, which include operating approximately 183 ambulance stations and annexes across metropolitan, urban, rural,

and remote service areas. Providing emergency services in British Columbia, a province of approximately one million square kilometres, requires the system to have ambulance stations in many communities which, being remote and/or rural, are often isolated communities – not only from a geographic perspective, but from a logistical perspective. This presents special challenges to the Employer as an organization, to those of its roughly 4000 paramedics in the field, and to the Union which is tasked with representing the paramedics.

This is a uniquely 2022 story. The Employer submits that in early 2022 it was faced with a health care crisis in British Columbia brought on by seriously inadequate paramedic staffing in certain locations in British Columbia. This was not a totally new problem; I think the Union would say it had been on the forefront of trying to rectify staffing problems for a long time, without final success. But 2022 provided no respite. At that point, the environmental and economic conditions had, in the world of health and emergency services, gathered into something of a "perfect storm" (my use of the phrase, not theirs). For one, the economy was presenting a rare situation in which there were many more jobs than candidates to fill them. If employers across BC were finding it difficult to attract recruits to their urban and suburban locations, there was a substantial additional level of difficulty facing employers trying to recruit skilled people (paramedics amongst them) to relocate to rural and remote communities. There was, of course, also a deadly pandemic which imposed extraordinary burdens on skilled workers in the health care industry. There were extreme weather patterns rarely before seen, including a heat dome during the previous summer, which created unexpected emergency situations across the province. There was the continuation of the health care crisis involving drug addiction.

There was one more salient problem that can be fit into the foregoing list. In 2019, the Collective Agreement introduced a new service delivery model in certain rural and remote ambulance stations. This service model – the "Scheduled On-Call" ("SOC") model – contemplated the creation of additional regular positions in rural and remote communities. Despite their efforts, both Parties were reluctantly concluding by sometime in early 2022 (I do not know the precise timing of this) that the SOC initiative had failed. From the Union's perspective, the failure of the SOC plan meant they were "back to square one". It was obviously a bad time for the SOC plan to demonstrate its failure and a worse time to be back to square one. These were important concusions and signalled the need for discussions between the Union and the Employer. Absent wrinkles, very important discussions between the Employer and the Union would be held during the coming collective bargaining year, with a view to finding a real solution to these concerns.

But this was the winter-spring of 2022, and bargaining was far away in the future. It seemed that the future would wait. That changed. For the Employer, the event that brought matters to an early head was a "near-miss" involving a two-year-old child in a remote community.

The critical incident occurred in March, 2022. It occurred in Anahim Lake, a small community between Bella Coola and Williams Lake. Anahim Lake had managed to fill only one out of 4 SOC positions allocated to it. On the night shift of March 21, 2022, the sole SOC paramedic in the community was on a day off. There were two other "on call" paramedics in the location who provided availability for shifts but neither was available to do so at the critical time. In short, there was no paramedic on duty and the nearest paramedic team that could assist was about 2 hours away in another remote community.

The situation passed without tragedy. A nurse and an RCMP officer in the location provided aid to the child, and the child survived. I must not fail to mention the paramedic who came in while off-duty to drive the child to the remote hospital.

From this incident, the Employer drew the following conclusions:

1. Inadequate staffing in certain stations was “inhibit[ing] BCEHS’s ability to carry out its purpose[s]”,

2. This inadequate staffing was also “creating dangerously low levels of emergency health services in such stations”,

3. The reality now was that if it did not take immediate steps to get paramedics into ambulance stations there was a real risk of injury or loss of life, and

4. It could not wait to come up with the solution – it needed to do something immediately.

The solution that it decided on was to work out a temporary plan that would relieve the situation long enough to permit HEABC (on the Employer’s behalf) and the Union to work out an effective and sustainable fix to the staffing situation in the upcoming collective bargaining that would begin on or around October 3, 2022.

It is worth pausing here to note that the “purposes” of the Employer that it felt were being inhibited are set out in Legislation, namely, the Emergency Health Services Act. The first three subsections of Section 5.1 of the EHSA are the most pertinent, and set out the purposes of the Employer as being:

(a) to provide, in British Columbia, ambulance services and emergency health services;

(b) to provide, in areas of British Columbia that the corporation considers advisable, any urgent health services or ancillary health services the corporation considers advisable; and,

(c) to establish, equip and operate, in areas of British Columbia that the corporation considers advisable, centres and stations for the purposes of providing ambulance services and emergency health services, and urgent health services or ancillary health services.

The first-mentioned purpose of the Employer, therefore, is to provide emergency health services in BC. The term "emergency health services" is specifically defined in Section 1 of the legislation, and demonstrates that there is a clear element of timeliness to the performance of an emergency health service. It defines such a service as:

“first aid or other health care provided in circumstances in which it is necessary to provide the first aid or other health care <u>without delay</u> in order to

(a) preserve an individual's life,

(b) prevent or alleviate serious physical or mental harm, or

(c) alleviate severe pain …

(my emphasis)

Turning back to the nature of the Employer’s initiative, its desire was to put a temporary plan into action to incentivize paramedics to take jobs and work assignments until the Employer and Union could attack the entire problem in bargaining. It was particularly concerned for the upcoming summer. There was the possibility of another heat dome. And summer was of course also the time when many paramedics would be expected to use their earned vacation time.

The Employer’s subsequent plan focused on the 26 communities that it determined urgently needed extra staffing support for the summer.

It considered and drew up a Temporary Plan. Described as emergency staffing measures, the Plan outlined two temporary staffing measures which provided incentive payments to be put in place in each of the 26 communities: (1) the Temporary Scheduled On-Call position ("TSOC") and (2) the Locum positions. The primary temporary staffing measure was the creation of temporary Kilo/Scheduled On-Call positions ("TKP"). Under the TKP measure, paramedics would receive an incentive payment of $100 for every on-call shift worked. (There are other details that could be included here but they add nothing. The payments, unless agreed to by the Union, were violations of the Collective Agreement.)

On April 4, 2022 the Employer met with the Union and sought the Union's agreement to "discuss some immediate measures to put into place to solve the most acute staffing shortages in rural BC." (email of April 4, Skinner/Twells, et al). It presented the Union with a Memorandum of Agreement setting out its changes. This was discussed and there was some dialogue that led the Employer to make a change to the Memorandum and, during a break in the discussions, send it to the Union. The Memorandum had a "Whereas" provision which identified the purpose of the Memorandum as being to "implement a temporary incentive structure to provide regularized Kilo coverage in the affected communities".

Another of the "Whereas" clauses in the MOA noted that: "The Parties have a joint interest in implementing temporary measures to address this staffing shortage." That may have been true at some undetermined point in the discussion but it was not true by the end of the day on April 5. As the Union saw it, the Employer told the Union that it would have to agree with the Memorandum within 24 hours or it would go ahead and implement it without an agreement. The Employer did not deny giving this message. The Employer was beyond anxious to get the word out on the changes because it expected it would take up to two months to get the program staffed and underway. This would bring them right up to the beginning of summer. They had to start right away to get value from the program. However, as the Union put it in their submissions, it neither agreed with the Employer's proposals nor its manner of negotiating. It did not make any counter-proposals or suggestions. Now that it was clear that the SOC plan was a failure, its interest was in main table bargaining where they could get something useful and concrete agreed to between them.

That was the end of the discussions.

It was time for the Employer to make the decision that has led to this proceeding. As it saw the matter, it had made attempts to get Union agreement and the Union refused to agree or to provide any input.

As the Employer put it in its written submissions:

"[B]alancing the risk of breaching the Collective Agreement with the risks to the community associated with understaffed ambulance stations, [it] made the decision to implement the Temporary Positions nonetheless."

On April 6, 2022, the Employer announced to all staff that it would be proceeding to implement the measures.

The Employer again met with Union in early June to say they intended to implement the locum and on call positions. It again asked the Union for input. The Union refused and filed the grievance leading to this Award.

When it appeared that there would not be enough time in the early stages of bargaining to resolve the crisis, the Employer extended and expanded its "fix" for several months.

The Union saw this as an aggravation of the violation of its rights.

Brief Submissions

Union

The Union submits that the Employer's implementation of its Temporary Plan without Union Agreement has done considerable harm, even if not monetary harm. The scope has been enormous, it says. As of September 8, 2022 some 62 paramedics were appointed to TSOC and Locum positions. All of them received "massive amounts of compensation" in excess of what was prescribed by the collective agreement; a total expenditure of hundreds of thousands of dollars.

The Temporary Plan has also left some employees working shoulder to shoulder with others who were being paid much more than them, says the Union. This is very damaging as it strikes at the heart of Union rights. Arbitrators and labour boards have long held that employers cannot negotiate directly with employees except in limited circumstances at the point of hiring.

The Union says that it is indeed an aggravating factor that the Employer knew all along that it was in violation of the Collective Agreement but went ahead anyway with its plans. When it sent the memo of September 13, 2022, to the employees about the expansion of the program, the Employer was in effect telling the membership it would do whatever it wants to do, regardless of the presence of the Union. This was only shortly before the beginning of major, important negotiations intended to resolve tremendously challenging issues.

The Union submits that the implementation of an incentive program to pay select employees higher compensation than others for the same work severely erodes, if not completely compromises the Union's status as a bargaining agent. This, among other effects, justifies an award of damages in addition to a declaration of breach.

The issue here, says the Union, is the size of the damages award. It is the Union's position that the size of the bargaining unit, the scope of the breach, and the Employer's conduct in this case warrant significant damages. It supports its submission with a review of the case authorities, including in particular the *Canada Safeway*, infra case.

The Union relies on the following cases: *Canada Safeway Ltd. v. United Food and Commercial Workers Union, Local 401 (Return to Work Grievance)*, [1999] A.G.A.A. No. 88; *Canada Safeway Ltd. v. United Food and Commercial Workers, Local 312A, 373A and 401,* [2001] A.J. No. 204; *CKF Inc. v. Teamsters, Local 213 (Hiring Incentive Grievance)*, [2022] B.C.C.A.A.A. No. 82; *Porti Construction Inc. v. Drywall Acoustic Lathing and Insulation (United Brotherhood of Carpenters and Joiners of America), Local 675 (Extra Payment Grievance)*, [2006] O.L.A.A. No. 238; *Rogers Foods Ltd. v. United Food and Commercial Workers Union, Local 1518 (Millwright Wage Rates Increase Dispute) Award*, [2007] Mervin I. Chertkow; *Westar Timber Ltd. (Re),* [1986] B.C.L.R.B.D. No. 58

Employer

The Employer encourages me to consider its good faith and important responsibilities when it comes to deciding the issue of damages. This is certainly not a case which justifies damages, it says. There is no "wrong", apart from its admitted violation of the Collective Agreement, and that has been fully explained.

The Employer says that all of the cases it has submitted have supported reasonable and rational remedies, but the Union has not proposed such.

The Employer relies on the following cases:

BC Rail Ltd v UA, 2004 CarswellBC 3467; *British Columbia Hydro & Power Authority v COPE, Local 378,* (2006), 150 LAC (4th) 281.; *CKF Inc v Teamsters, Local 213 (Hiring Incentive Grievance)*, [2022] BCCAAA No 82; *Inco Ltd and USWA, Re* (2006), 153 LAC (4th) 183; *Motor Coach Industries Ltd v IAM And AW Lodge 1953,* 2007 CarswellMan 825; *Overwaitea Food Group Limited Partnership and UFCW Local 1518 Re,* 2008 CarswellBC 3412; *St Joseph's Hospital, London v ONA* (1989), 8 LAC (4th) 144; *Toronto Police Services Board v Toronto Police Assn* (2008), 178 LAC (4th) 153

Decision

It was my choice to use much of my available space in this Award to ensure the story of these two parties was in some measure adequately told. That leaves me with little time to pronounce my Award and so I will be much briefer than I wished and come directly to the point.

My reading of the cases has led to me to conclude that I will be guided by the *CKF* decision (supra) and *In Re Inco Ltd. and United Steelworkers of America (Retirement Incentive Grievance)*, [2006] O.L.A.A. No. 540 (Rayner). Some of the other cases are helpful. I am sorry to say that I was not assisted by the Canada Safeway case despite the excellent argument during which Union counsel sought to persuade me to it.

I take the bottom line consideration in these cases to be that proper redress is measured by the "wrong done". They should be in balance.

What was the wrong done in this case by the Employer? Putting aside the things that provide context to what I will say, it is a fact that the Employer knowingly breached the Union's Collective Agreement in a most fundamental way, namely, by recruiting employees with incentive agreements and paying pursuant to these incentive agreements while seeking Union agreement or consent and not succeeding in getting it. It did put the Union under an extreme time-frame for making a decision, did give the Union little scope for changing what was in the Memorandum because of the work that had already been done and the urgency of the timing. Later, knowing it was not going to get the consent it was seeking, it continued its incentivizing efforts up to the point of a cease and desist order taking effect on October 21. It even extended and expanded the program, fearing that it and the Union would not get to an agreement soon enough to save the Temporary Plan.

On the flip side of the story, nothing that the Employer did in this case was in pursuit of usurping or calling the Union into disrepute or injuring the Union's reputation with its members.

In short, the evidence in this case does not support a finding of bad faith Employer conduct.

The Employer determined that there was a health care crisis surrounding emergency health services. I accept it as a sincere and serious conclusion made by the Employer with an intention of meeting its purposes under legislative authority. The Employer did not argue that it was compelled at law to take actions that would put it in violation of its Collective Agreement, but neither did it consider itself free to avert its eyes from the problem and carry on. Its actions were not a defiance of the Union's rights; they were a desperate attempt to find ways to manage an ambulance service safely in the midst of a serious staffing shortage exacerbated by a pandemic, floods, fires, heat domes, continuing drug addiction problems on the streets, and so forth.

I believe that this case does justify a damages award. This is consistent, I believe, with the

standard we are setting in British Columbia which emphasizes balance and the maintenance of good labour relations.

I declare that the Employer has violated the Collective Agreement. A cease and desist order has previously been issued.

I set the monetary value of the damage to the Union at $10,000.

Friday, October 21, 2022

John McConchie

Arbitrator