UNITED STEELWORKERS
UNITY AND STRENGTH FOR WORKERS
LOCAL 1-424

Steelworkers, Local 1-424

Serving the Northern Interior of British Columbia

Suite 100, 1777 3rd Avenue, Prince George, BC, V2L 3G7
TEL.250.563.7771 FAX.250.563.0274 TOLL FREE 1.800.565.3641
WEB SITE www.steelworkers1-424.ca EMAIL: info@usw1-424.ca

September 24, 2015

Dear Members:

As most of you know we have been in a battle with Walter Energy for sixteen (16) months now over our application to the Labour Relations Board dealing with Section 54.

As you know we were successful July 2014 with our application to the Labour Board in regards to Section 54. As a result of this, the Labour Board ordered Walter Energy to pay all members of Steelworkers Local 1-424 for all wages lost between April 17th, 2014 through to June 17th, 2014 , less any monies received by the member.

Walter Energy asked the Labour Board for reconsideration to the decision and this was granted. The Labour Board then ordered a hearing and that hearing was set for May 4th & 5th, 2015.

Local 1-424 was again successful and the board again ordered Walter Energy to pay all members of Local 1-424 for all monies lost between April 17th, 2014 through June 17th, 2014.

Walter Energy on June 29th of this year again asked the Labour Board for reconsideration citing a number of issues.

On Wednesday, September 23rd, 2015 the Labour Board has "denied" Walter Energy's application for reconsideration. Which again mean they are to pay all members of Local 1-424 all money owed from April 17th, 2014 to June 17th, 2014 less any monies received by the members.

Walter Energy may choose to now refer this issue to the courts if and they choose this avenue they have 60 days to do so.

We have contacted the Employer to meet with us and go though the process of determining what monies are owed to the membership. The Company has not responded to our request.

The other outstanding issue we have is the arbitration award dealing with our $500 working in the North Allowance. We lost this grievance and we have referred this issue to the courts as we believe the arbitrator has made an error in law.

We will keep you informed on both these issues as they progress

In Solidarity,

Dan Will
Business Agent

BRITISH COLUMBIA LABOUR RELATIONS BOARD

WOLVERINE COAL PARTNERSHIP

(the "Employer")

-and-

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL NO. 1-424

(the "Union")

PANEL:	Brent Mullin, Chair Bruce R. Wilkins, Associate Chair, Adjudication Ken Saunders, Vice-Chair
APPEARANCES:	Thomas A. Roper, Q.C. and Drew Demerse, for the Employer Craig Bavis and Stephanie Drake, for the Union
CASE NO.:	68683
DATE OF DECISION:	September 23, 2015

DECISION OF THE BOARD

1 The Employer applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B106/2015. The decision in B106/2015 has been referred to as the "Remittal Decision" in these proceedings. It arose after the original decision in this matter, BCLRB No. B154/2012, was overturned and the matter was remitted to a new panel of the Board as a result of the unavailability of the previous panel.

2 The Remittal Decision found that the Employer's layoff of approximately 300 employees without a definite time for the recall of the employees fell within Section 54 of the Code. The Remittal Decision concluded that the Employer was in breach of that provision as the Employer had not given notice of the layoff or engaged in adjustment plan discussions with the Union as required under Section 54. As the Employer had agreed to damages in lieu of notice being an appropriate remedy if a breach of Section 54 was found (Remittal Decision, para. 80), the Remittal Decision ordered damages equivalent to sixty days' pay for each of the affected employees, subject to mitigation.

3 The Employer applies for leave and reconsideration of the Remittal Decision on the following grounds:

(a) The Original Panel made palpable and overriding errors in concluding:

i. that the experts were forecasting a decline in Canadian coal production in 2014;

ii. that layoffs in 2014 were likely and predictable based upon market forecasts; and

iii. that price levels in the fall of 2013 were "unsustainable" for the Employer and caused "alarm" as to the "viability" of the Wolverine Mine.

(b) The Decision is inconsistent with the principles expressed or implied in the Code because the Original Panel:

i. concluded that the layoff was indefinite, not temporary;

A. based on irrelevant factors not tied to the true nature of the layoff; and

B. by giving no consideration to the fact the Union did not call one of its Officers to testify about the contents of an important conversation between the Employer and the Union;

ii. expanded the application of section 54 to include circumstances where an employer is "likely" to implement a change, or where a change "may be" necessary when the section on its face only applies if "an employer introduces or intends to introduce" a change;

iii. expanded the application of section 54 to require employers to give 'notice' of future events outside the employer's control; and

iv. adopted an interpretation of section 54 notice that is inconsistent with labour relations expectations and which leads to uncertainty.

4 In its leave and reconsideration application, the Employer submitted detailed arguments in respect to each of these grounds. The Union responded in detail to the Employer's arguments.

5 We have reviewed and considered the parties' submissions in a manner corresponding to the care and detail with which they have been put forward.

6 An application under Section 141 must meet the Board's established test before leave for reconsideration will be granted. An applicant must establish a good, arguable case of sufficient merit that may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 C.L.R.B.R. (2d) 44 ("*Brinco*").

7 The Employer's primary argument before the remittal panel was that temporary layoffs do not fall under Section 54 of the Code. That argument forms the basis of grounds (b) i and iv in the present leave and reconsideration application. We will address those arguments first below.

8 Along with its determination in respect to that position, however, the Remittal Decision went on to conclude, "The evidence does not establish the Employer was not in a position to advise the Union at some point prior to April 15, 2014, that an Indefinite Layoff was likely or would be implemented" (para. 141). The explanation earlier in paragraph 141 and in the second sentence of paragraph 144 make it clear that the evidence being referred to is the previous nine month period from July 2013 to the end of March 2014. That conclusion in paragraph 141 of the Remittal Decision has prompted grounds (a) i - iii and (b) ii - iii of the leave and reconsideration application. We will address those grounds for review after dealing with the temporary layoff grounds.

9 We turn first to ground (b) i of the leave and reconsideration application. It states:

> (b) The Decision is inconsistent with the principles expressed or implied in the Code because the Original Panel:

i. concluded that the layoff was indefinite, not temporary;

A. based on irrelevant factors not tied to the true nature of the layoff; and

B. by giving no consideration to the fact the Union did not call one of its Officers to testify about the contents of an important conversation between the Employer and the Union.

10 In this ground for leave and reconsideration, the Employer challenges the determination in the Remittal Decision that the layoff was for an indefinite period of time, not temporary. In its argument, the Employer says that this issue raises a question of labour relations policy. The Employer says "it cannot be the case [as concluded in paragraph 46 of the Remittal Decision] that whether or not a layoff is temporary or indefinite in nature depends on whether the Employer 'clearly communicated' its intentions with respect to recall to employees and to the union". The Employer says that it "is the actual subjective intention of the Employer, at the time of the layoff, that is relevant to this determination".

11 In the facts of the case the layoff was decided upon and implemented within a short period of time in early to mid-April 2014. As such, the facts quickly moved beyond the potential subjective intentions of the Employer in respect to whether it intended to introduce a measure or change that would fall within Section 54 of the Code: see the initial language in Section 54 of the Code, "if an employer introduces or intends to introduce a measure, policy practice or change...". The change was in fact decided upon and implemented. The question is the nature of the change. That is not a policy question. That is a factual determination to be made based upon the evidence in the case.

12 The factual determination made in that regard in the Remittal Decision has not been challenged on a palpable and overriding error basis. In considering the grounds that are advanced, for the purposes of our determination here we will accept, without deciding, that an adverse inference should be drawn in respect to Will's evidence as a result of the Union not calling a fellow Union officer, George Rowe, in respect to a conversation among Kingwell, the Director of Human Resources for the Mine, Will and Rowe. In doing so, we do not see the resultant evidence of that conversation impugning the overall factual determination in the Remittal Decision that the layoff was of an indefinite nature. Among other matters, that determination rested on the Q&A given to the employees by the Employer on the date of the layoff, April 15, 2014: Remittal Decision, para. 37. That communication clearly left the possibility of recall in an indefinite status, subject to "coal prices and positive future indicators strong enough to continue sustainable operations". The intent was to resume, but that was subject to "coal prices and positive future indicators".

13 As well, the nature of that communication was consistent with what the then President of the Company's Canadian Operations, Dan Cartwright, said that same day to the employees: Remittal Decision, para. 45. Cartwright was part of what is referred

to in the Remittal Decision as the Company, with the Company being the decision maker in the matter, as opposed to the local management of the Mine, which was identified as the Employer: see Remittal Decision, para. 4. The decision to idle the Mine was made by the Company, not the Employer: Remittal Decision, para. 29. As a result, in terms of the factual determination to be made regarding the nature of the layoff, it is clear that the evidence of what the Company had to say through Cartwright and the Q&A given to the employees would in any event outweigh in the circumstances what Kingwell, as a member of the non-decision making local Employer, had to say to Will and Rowe.

14 Accordingly, we do not accept this ground for leave and reconsideration.

15 In support of its position regarding temporary layoffs and Section 54 of the Code, the Employer submits (b) iv of the leave and reconsideration application. In this ground for leave and reconsideration, the Employer says the Remittal Decision is inconsistent with the principles expressed and implied in the Code because it has "adopted an interpretation of Section 54 notice that is inconsistent with labour relations expectations and which leads to uncertainty". The Employer's arguments before the remittal panel on this point are summarized in paragraphs 75-79 of the Remittal Decision. The Employer says the Remittal Decision has created uncertainty in the law by applying Section 54 of the Code to a temporary layoff. The Employer submits that "[l]egislation should not be interpreted in a way that creates uncertainty and unpredictability".

16 In support of that position the Employer cites comments at paragraphs 88-90 of *Gateway Casinos & Entertainment Inc.*, BCLRB No. B81/2010 (Leave for Reconsideration of BCLRB No. B210/2009) ("*Gateway Casinos*"). Those comments confirm "the need for the Board to provide the parties in the workplaces of British Columbia with as much clarity and certainty as possible" and thus the need for the Board "to be as clear and practically oriented as possible". (paras. 88-90) Those comments in effect deal with the three evils of litigation – cost, delay and complexity – in regard to Board proceedings. Of those three, complexity can be argued to be a driver or enabler of the other two, cost and delay. In turn, uncertainty and unpredictability can be seen to be contributors to complexity. The concerns are real and of general application.

17 However, the specific concerns in *Gateway Casinos* addressed in these comments were in respect to "endless debate and attempted jurisprudential revision". (para. 88) What had occurred in that case, and was further referenced in respect to another case at paragraph 89, was continued, seemingly "endless debate and attempted jurisprudential revision" regarding a recurring issue under the Code, namely who is an "employee" under the Code. In prior cases, that issue had in reality been beaten to death, at great cost to the parties and the Board over a protracted period of time. While the Board may not have achieved the kind of clarity one would hope for in respect to the issue, nonetheless there was and is a need for some practicality in the approach to this recurring issue in the interest of all involved.

18 The current case is different. It is acknowledged by all involved that it is a case of first instance. In that regard, the Employer argues there should be a black and white, or light switch, distinction drawn by the Board that Section 54 of the Code applies to permanent closures of operations, but not any form of layoff absent a permanent closure and formal, issued terminations of employment. The problem of course is that the statute does not say that. It easily could do so. It could, for instance, limit the application of Section 54 of the Code to terminations of employment. The fact that it does not do so gives rise to the interpretation issue in this case, at first instance.

19 The first instance nature of that issue arises in the following context. The facts are that the Employer laid off approximately 300 employees for an unspecified period of time without notice. The recall of the employees was explained to be subject to the recovery of the international price for metallurgical coal. That in fact left the employees with uncertainty in respect to their "security of employment". "Security of employment" is an express concern under Section 54 of the Code. In the circumstances, the issue then becomes whether the Board should interpret Section 54 to categorically not apply to layoffs, thus including this very significant layoff of employees affecting their "security of employment".

20 Section 2(a) of the Code makes it a specific duty of the Board to recognize the "rights and obligations of employees" under the Code, as well as the more usually considered rights and obligations of the two more usual participants in Board proceedings, unions and employers.

21 In our view, the express concern in Section 54 of the Code regarding employees' "security of employment" falls within the Section 2(a) duty of the Board to recognize the "rights and obligations of employees", as well as employers and unions. The black and white certainty the Employer calls for here under Section 54 of the Code would in effect undermine consideration of the "security of employment" of the 300 indefinitely laid off employees, with "security of employment" being an expressly referenced concern under Section 54 of the Code. Interpretively, in terms of the specific provision in Section 54, the Code overall (including Section 2), and purposively, we do not find that would be appropriate.

22 The Remittal Decision was careful to note the specific nature of the layoff in this case. It was identified as being "of a long-term and indefinite nature" and then in fact defined as the "Indefinite Layoff":

> I find the layoff was intended to be lengthy, lasting at least 12 to 15 months. I further find that at the time the layoff was implemented, the recall of employees was contingent on, and subject to, an increase in the global price for coal. As such, I find the layoff in the present case was of a long-term and indefinite nature (the "Indefinite Layoff"). (Remittal Decision, para. 47)

In the circumstances we have identified, we do not find that it would be possible or appropriate for the Board to categorically say that all layoffs of employees are not subject to Section 54 of the Code, including the layoff of the particular nature so

carefully defined in this case. As a result, we do not accept this ground for reconsideration and leave is denied in respect to it.

23 We turn then to grounds (b) ii and iii in the Employer's overview of its grounds for reconsideration. The Union submits that these grounds overlap. We agree and will consider them in effect together. Grounds (b) ii and iii are as follows:

> (b) The Decision is inconsistent with the principles expressed or implied in the Code because the Original Panel:
>
> ...
>
> ii expanded the application of section 54 to include circumstances where an employer is "likely" to implement a change, or where a change "may be" necessary when the section on its face only applies if "an employer introduces or intends to introduce" a change;
>
> iii expanded the application of section 54 to require employers to give 'notice' of future events outside the employer's control; ... .

24 These grounds, and the Union's response to them, in effect focus on paragraphs 137-144 of the Remittal Decision. In particular, the Employer challenges the conclusion reached in paragraph 141. For convenience, we set out paragraphs 137-144 of the Remittal Decision in their entirety:

> The Board's existing approach under Section 54 of the Code also accounts for those circumstances in which an employer is not able to meet the 60 days' notice requirement. Again, applying a case-by-case approach, the Board will first examine the circumstances before it to determine whether an employer was nevertheless in a position to advise the union that a decision was likely and to discuss the possible effects of the decision on the affected employees: *The Brewster Healthcare Group Inc.*, BCLRB No. B154/2012, 218 C.L.R.B.R. (2d) 142 at paras. 36-37. (para. 137)
>
> As a result of actions or circumstances completely outside the control of an employer, if an employer is unable to provide the required notice, the Board may relieve against all or part of the notice period. However, such relief will be the exception. Where notice is possible, it must be provided; *UBC* at p. 56; *Pacific Pool* at paras. 40-41. (para. 138)
>
> Finally, the Board will have regard to the practical requirements and consequences of Section 54(1) of the Code to take into account a wide variety of workplace arrangements. As the Court of Appeal recognized in *OPEIU* at paragraph 16, this can

involve a delicate balancing between different constituencies with different and competing interests. (para. 139)

The Employer says requiring notice for a temporary layoff requires that an employer predict, 60 days in advance, what markets will be like, or else must risk paying 60 days' wages to produce a product that cannot be sold. It says the viability of a business is put at risk by such an interpretation. It further states that, once it reached the point of losing money in April 2014, it should not be required to continue its operations because of the 60 days' Notice requirements in the Code. (para. 140)

The only issue before me is whether in the circumstances of the present case Notice was required. The Employer accepts that, if so, damages are appropriate. Having adopted a bright line approach, the Employer did not advance arguments that it could not have given the Union Notice in advance of implementing its decision. On the contrary, it relies on what it asserts are the difficulties arising from its failure to do so. For example, the evidence in the present case was that the Employer knew over a period of nine months that the global price for metallurgical coal was at a level that created a lot of concern for the Company and it was "shocked" by the drop in the coal price in July 2013. These conditions remained relatively constant and were well below what the Employer considered sustainable. The Union and employees voiced their own concerns in March 2014. The evidence does not establish the Employer was not in a position to advise the Union at some point prior to April 15, 2014, that an Indefinite Layoff was likely or would be implemented. (para. 141)

Similarly, I find the evidence does not establish that giving Notice to the Union beginning in April 2014 would have put the Employer in the position of being required to "produce a product that cannot be sold". First, the Employer was required to factor into its decision-making its potential obligations under Section 54(1) of the Code. This is particularly so given its knowledge of the long-term nature of the layoff. Among the factors to be taken into account would have been the cost of operating during the notice period and consulting with the Union. As the evidence before me establishes, the Employer was already called upon to make a series of difficult decisions, including maintaining the Mine in a ready state at a cost of $500,000 a month, idling the Mine on an indefinite basis and avoiding a payout of $11.6 million in severance, among a range of other factors. It had existing coal stock that it decided it would not sell until the price went up. Moreover, the existence of coal reserves ready for quick sale once the price went up was identified in the evidence before me as key in that it provided for a quick infusion of funds during any restart of the mining operation. (para. 142)

As the Board stated in *Pacific Pool*:

> [...] The Employer did not bring an application to the Board seeking relief from the Section 54 obligation and in doing so provide evidence of the impossibility of complying with the notice provisions. Instead, the Employer balanced its interest in maximizing its ability to sell its assets by keeping the discussions secret, against the notice requirements under Section 54, which it saw as potentially jeopardizing any sale, choosing the first. Put another way, the Employer balanced the potential costs associated with providing notice against the costs associated with not providing notice, preferring the latter. (para. 43) (para. 143)
>
> The Employer also did not argue exceptional circumstances exist in the present case such as to relieve against all or part of the Notice requirements. While market conditions may be volatile and fluctuating, the evidence before me shows the Employer and the Company were closely monitoring it for nine months while it was within a price range it characterized as raising a lot of concern. (para. 144)

25 Having reviewed the Remittal Decision and the parties' submissions we find that the conclusion to paragraph 141 above is in error. The conclusion to paragraph 141 is inconsistent with the requirements in the statute.

26 Paragraph 141 concludes, "The evidence does not establish the Employer was not in a position to advise the Union at some point prior to April 15, 2014, that an Indefinite Layoff was likely or would be implemented". The conclusion infers that Section 54 notice can be required in circumstances where it may be "likely" that the kind of measures or changes noted in the section may occur. That is clearly incorrect. It does not meet the statutory language requiring that the section is triggered only where an employer "introduces or intends to introduce" such a measure, policy, practice, or change.

27 This is apparent not only from a statutory interpretation perspective, but also important from a practical perspective. It is simply not reasonable or practical that an employer should be required to give Section 54 notice if a change, etc., is "likely". In industries with market volatility, such as in the present case, that could result in the need for ongoing, re-issued, rolling notices. That would make no practical sense, be unfairly onerous, and unhelpful to the parties overall, along with being inconsistent with the statutory language.

28 To the extent that the Remittal Decision relied upon the Board's decision in *The Brewster Healthcare Group Inc.*, BCLRB No. B154/2012 ("*Brewster*") in respect to the relevance of what is "likely", we find that decision is distinguishable. The distinguishable nature of *Brewster* can be gleaned from the first few sentences of paragraph 37:

> The Employer could have advised the Union, under Section 54 of the Code, of the impending change of ownership in August 2010 when the financial difficulties led to foreclosure proceedings, or in April 2011 when the Lender obtained a court order for the sale of Arbor House. The Employer chose not to advise the Union until November 17, 2011 which is the date that it also notified the employees of a layoff effective November 30, 2011. The Employer has not provided any arguments before the Board to justify this choice. ...

Brewster was not subject to reconsideration. It is also apparent that the use of "likely" in the decision was not in an effort to establish a statutorily based test after a careful consideration and explanation of the statutory language. Rather, the panel in *Brewster* was providing an answer in what was very much a fact driven case and, as we have noted, the answer provided was not appealed. As a result, we do not find it is appropriate to attempt to draw from the use of the word "likely" in paragraph 36 of *Barewster* a test that what may be "likely" in certain circumstances meets the statutory test of an employer introducing or intending to introduce the kind of measures or changes noted in Section 54 of the Code. That is particularly the case when the leading decisions to turn to on this point are *University of British Columbia*, BCLRB No. B371/94, 26 C.L.R.B.R. (2d) 33 ("*UBC*") and *Pacific Pool Water Products Ltd.*, BCLRB No. B43/2000.

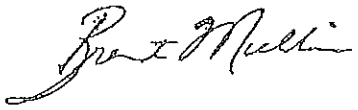
29 The use of "likely" at the end of paragraph 141 of the Remittal Decision is thus in error. However, that error is not material to the bright line statutory interpretation issue regarding Section 54 of the Code and temporary layoffs that the Employer was advancing in this case. In other words, it was not necessary for the Remittal Decision to adopt this use of the term "likely" in order to answer the Employer's temporary layoffs argument and we have found that the Remittal Decision correctly answers that argument in the facts of the case. As a result, the error in respect to "likely" does not result in the Remittal Decision being overturned.

30 We turn to grounds (a) i - iii of the leave and reconsideration application. While the specific assertions in these grounds are in respect to asserted palpable and overriding errors in the Remittal Decision, ultimately all of these grounds refer to the use of "likely" at the end of paragraph 141 of the Remittal Decision. As just noted, we have found error in that regard but also that the error does not affect or obviate the conclusion in the Remittal Decision regarding Section 54 of the Code in the particular facts of this case. This in itself disposes of grounds (a) i - iii.

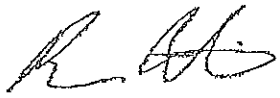
31 However, we add that we do not find that the Remittal Decision in fact made the errors asserted in i and ii. In respect to iii, in any event these points again ultimately speak to the use of "likely" at the end of paragraph 141 and we have concluded "likely" does not meet the statutory test of an Employer introducing or intending to introduce a change, etc. Nonetheless, as explained above, that does not undermine the conclusion in the Remittal Decision which does not accept that a layoff of the nature in this case categorically cannot fall within Section 54 of the Code.

32 In light of the above, leave is denied and the application for reconsideration is dismissed.

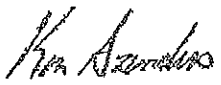
LABOUR RELATIONS BOARD



BRENT MULLIN
CHAIR



BRUCE R. WILKINS
ASSOCIATE CHAIR, ADJUDICATION



KEN SAUNDERS
VICE-CHAIR