BRITISH COLUMBIA

LABOUR RELATIONS BOARD

MULTIPLE FAX TRANSMITTAL SHEET

Re: Mount Polley Mining Corporation -and- United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local Union Number 1-2017 (formerly Local 1-425)
(Section 54 - Case No. 71844/18T)

DATE: July 10, 2018

SENDER: **LABOUR RELATIONS BOARD**

OPERATOR SENDING: Susan Noble, Senior Executive Assistant to Jennifer Glougie, Associate Chair, Adjudication

TELEPHONE NO: (604) 660-1329

INTENDED RECEIVER:	**FAX NUMBER:**
To: Mount Polley Mining Corporation **Attention: Peter Cameron**	**250.790.2268**
To: Victory Square Law Office LLP **Attention: Jeffery Sanders**	**604.684.8427**

NUMBER OF PAGES: 11 **(Including this page)**

SPECIAL INSTRUCTIONS:

Board Decision BCLRB No. B98/2018 dated July 10, 2018 is attached. A hard copy will follow by mail.

****NOTE:** **FACSIMILE OPERATOR, PLEASE CONTACT THE ABOVE INTENDED RECEIVER AS SOON AS POSSIBLE. THANK-YOU**

SUITE 600 - OCEANIC PLAZA, 1066 WEST HASTINGS STREET, VANCOUVER BC V6E 3X1
TELEPHONE (604) 660-1300 FACSIMILE: (604) 660-1892

BRITISH COLUMBIA

LABOUR RELATIONS BOARD

July 10, 2018

To Interested Parties

Dear Sirs/Mesdames:

Re: Mount Polley Mining Corporation -and- United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local Union Number 1-2017 (formerly Local 1-425)
(Section 54 - Case No. 71844/18T)

Enclosed is a copy of the Board's decision (BCLRB No. B98/2018) rendered in connection with the above-noted matter.

Yours truly,

LABOUR RELATIONS BOARD

Susan Noble, Senior Executive Assistant to
Jennifer Glougie, Associate Chair, Adjudication

Enclosure(s)

Interested Parties:

Mount Polley Mining Corporation
P.O. Box 12
Likely BC
V0L 1N0
ATTENTION: Peter Cameron

Victory Square Law Office LLP
710 - 777 Hornby Street
Vancouver BC
V6Z 1S4
ATTENTION: Jeffery Sanders

BCLRB No. B98/2018

BRITISH COLUMBIA LABOUR RELATIONS BOARD

MOUNT POLLEY MINING CORPORATION

(the "Employer")

-and-

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 1-2017

(the "Union")

PANEL:	Jennifer Glougie, Associate Chair, Adjudication
APPEARANCES:	Peter Cameron, for the Employer Jeff Sanders, for the Union
CASE NO.:	71844
DATE OF DECISION:	July 10, 2018

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Union alleges the Employer breached Section 54 of the *Labour Relations Code* (the "Code") by failing to give 60 days' notice when it laid off a significant amount of its workforce in January and February 2018.

2 The Employer says the Board should relieve it of the obligation to provide 60 days' notice under Section 54 because the layoff resulted from circumstances completely outside of its control. In the alternative, the Employer says the 60 day notice requirement should not apply because its only effect would be to increase the layoff notice to individual employees who were already compensated in accordance with the collective agreement and the *Employment Standards Act*, R.S.B.C. 1996, c, 113 (the "Act"). Finally, the Employer says any monetary award to individual employees must be subject to the duty to mitigate.

3 The material facts are not in dispute. As a result, I am able to decide the Union's application on the basis of the written submissions filed by the parties. I summarize below only those assertions of fact and arguments necessary to decide the Union's application.

II. BACKGROUND

4 The Employer operates the Mount Polley mine, a copper and gold mine approximately 56 kilometres north of Williams Lake (the "Mine"). The Union is certified to represent a bargaining unit comprised of approximately 280 of the Employer's employees.

5 On December 29, 2017, the Employer provided the Union with notice that, in January 2018, it would begin taking steps to suspend pit operations. It said its goal was to suspend pit operations by June 2018 and resume operations by the end of December 2018. In its notice to the Union, the Employer indicated there was some doubt as to whether notice was necessary because, in its view, the layoff may not meet the Board's test for whether Section 54 applied. It nonetheless indicated a willingness to meet and endeavour to develop and adjustment plan as required by Section 54.

6 In early January 2018, the Employer hand-delivered letters of layoff to 26 employees. All of those employees were laid off between January 17 and February 21, 2018; 22 employees were laid off on January 17, 2018 and an additional employee was laid off on each of January 23, January 31, February 14, and February 21, 2018.

7 As a result of the layoffs, other employees in the bargaining unit have been displaced and have been bumped into lower wage-rated classifications. The Employer told the Union that, by February 27, 2018, 19 employees had left the Mine entirely, 10

had bumped into a lower classification, and 3 had moved into a lower paying job in the Employer's mill operation.

8 The Union says, and the Employer does not challenge, that it is unaware of any prior shutdown by this Employer.

9 The Employer says the layoffs were caused by the financial loss resulting from a tailings pond breach in or about August 2014. It says in the three and a half years since the breach, it has expended approximately $205 million on remediation activities and new equipment, while having net earnings of only $50 million. It says its parent company decided that further losses in 2018 were unacceptable. The Employer says:

> The tailings pond breach was completely outside of the control of the Employer. The tailings pond berm was constructed entirely in accordance with the recommendations of a respected engineering firm. However, the recommendations were inappropriate with respect to characteristics of the glacial geology of the base of the berm. This resulted in the breach and consequential cost of remediation.
>
> Mine management submitted an operations plan for 2018 to Imperial Metals [its parent corporation]. The plan would have maintained full operations but with continuing losses. The plan was rejected by the board of Imperial Metals, which directed the management of Mount Polley to come up with an operations plan that would avoid further losses in 2018. The only plan with the potential to accomplish this result was a reduction of pit operations while continuing to mill from existing stockpiles. Moreover this strategy needed to be implemented as soon as operationally possible in order to have a chance at avoiding losses in the current year.

10 While the parties did engage in Section 54 discussions, they have not reached an agreement with respect to an adjustment plan. The Union says, as of the date of the application, the Employer has provided no definitive commitment as to when the employees will be recalled to work. The Employer does not challenge that assertion but says its plan is to resume operations by the end of 2018 when the stockpile is eliminated and the pit has been returned to a mineable condition.

11 The parties acknowledge they agreed in the current collective agreement to extend the recall period for the purposes of layoff from six months to one year. The Employer says that agreement resulted from Section 54 discussions and says it constitutes a significant change to the collective agreement language in terms of employment security for junior workers. The Union says the only agreement reached during the Section 54 discussions was a letter extending recall; the amendment to the collective agreement occurred later, through the normal course of bargaining.

III. POSITION OF THE PARTIES

12 The Union says a layoff of this nature is a change or measure that affects the terms, conditions, or security of employment of a significant number of employees to whom the collective agreement applies and, therefore, clearly falls within Section 54 of the Code. It relies on *Wolverine Coal Partnership*, BCLRB No. B106/2015 ("*Wolverine*") to argue that temporary layoffs trigger Section 54. In this case, the Union says, more than 9% of the bargaining unit has been laid off for an undetermined amount of time and, because of bumping, 11% have been significantly affected by either layoff or demotion. The Union says the application of Section 54 in these circumstances is consistent with the purpose of the Code and, by failing to give the 60 days' notice, the Employer has breached Section 54. By way of remedy, it seeks an order requiring the Employer to make whole all of the employees who were not provided the required notice and relies on *Money's Mushrooms Ltd.*, BCLRB No. B82/2005 to that effect.

13 The Employer concedes that the layoffs resulting from its decision to temporarily reduce pit operations affected the terms, conditions or security of employment of a significant number of employees. However, it relies on *University of British Columbia*, BCLRB No. B371/94 ("*UBC*") to argue the Board should relieve it of its obligation to provide 60 days' notice because the cause of the layoff was entirely outside of its control. The Employer says, in the present case, the Mine had experienced a $155 million loss in the previous two years and its original operations plan for 2018 would have resulted in further losses. Understandably, it says, its parent corporation rejected the proposed operations plan and demanded a plan that would not result in further losses in 2018. With the alternative being a complete shutdown of the Mine, the Employer says, it had no choice but to develop a plan which would allow it to break even in 2018. It says the only option available to it that had a chance of achieving that goal was to reduce pit operations "beginning almost immediately". The Employer submits the degree of loss it has sustained and it has caused its parent company to sustain is an exceptional circumstance.

14 The Employer agrees that the consequences to employees of being laid off for almost a year should not be trivialized, but it notes their employment security is less drastically affected than it would have been in the case of a total shutdown. It also points to the fact that loss is mitigated by the parties' agreement to expand recall rights to one year. It further says the graduated nature of the layoff ensured that the deficiency in Section 54 notice affected only a minority of the employees ultimately affected. For all of those reasons, the Employer says, the Board should relieve it of its obligation to provide 60 days' notice under Section 54 of the Code.

15 Alternatively, the Employer says the 60 day notice requirement should not apply if its only effect is to lengthen the notice period for individual employees. It says the purpose of Section 54 is not to deal with appropriate periods of layoff notice for individual employees; those notice periods are legislatively determined in Sections 63 and 64 of the *Employment Standards Act* (the "Act"). In the present case, it says, the

employees who got less notice than required under Section 54 nonetheless received notice that was in full compliance with the collective agreement and Sections 63 and 64 of the Act. They should not be entitled to additional notice because of a breach of Section 54 of the Code.

16 Finally, the Employer says, if the Board decides a remedy is appropriate in the present case, it says employees who effectively elected voluntary layoff should not be compensated. Specifically, the Employer points to employees who refused to take opportunities to bump. It says those employees are the "authors of the biggest part of their loss, and they should not benefit by being paid, without working, for any differential to which they might have been entitled had they exercised their bumping rights".

17 In reply, the Union says the Employer's financial loss was not beyond its control and, therefore, it should not be relieved of its Section 54 obligations. The Union relies on *Wolverine* and *UBC*, where the Board said such relief will only be granted in exceptional circumstances. The Union points out that the Employer does not say its preparation of the operations plan, the parent corporation's rejection of that plan, or its subsequent plan to suspend pit operations did not leave it sufficient time to provide notice as required by Section 54. In any event, the Union says, the Employer did not just become aware of the financial difficulties caused by the tailings pond breach. The breach occurred almost four years ago and the cost of remediation has likely been known since shortly after the breach occurred. The Union says the Employer does not explain why the rejection of its operations plan, although "understandable", was not also foreseeable. It says, regardless of the degree of loss, the Employer provides no explanation for its inability to plan ahead, anticipating its parent corporation's distaste for further losses.

18 The Union relies on *Pacific Pool Water Products Ltd.*, BCLRB No. B324/2000 ("*Pacific Pool*") to argue that one of the purposes of Section 54 notice is to provide an assurance to individual employees that they will receive wages while at the same time they are put on notice they will need to explore alternatives. It would be inappropriate, the Union says, to deny a remedy that would compensate individual employees for the loss of that notice period as the Employer suggests.

19 Finally, the Union says the layoffs were in no way voluntary. It says none of the employees should have been in a position to bump (or to elect not to bump) until after the 60 day notice period mandated by Section 54. Since proper notice was not given, the Union says, any loss suffered by individual employees was caused by the Employer's breach, not their failure to bump. It relies on *Pacific Pool* and *Re 0715980 B.C. Ltd.*, BCRLB No. B158/2013 to argue that, in light of the Employer's breach, employees should not be required to demonstrate any other efforts to mitigate or penalized for failing to make such efforts.

IV. ANALYSIS AND DECISION

20 Section 54 of the Code provides as follows:

> 54 (1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,
>
> (a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and
>
> (b) after notice has been given, the employer and trade union must meet, in good faith, and endeavour to develop an adjustment plan, which may include provisions respecting any of the following:
>
> (i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;
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> (ii) human resource planning and employee counselling and retraining;
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> (iii) notice of termination;
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> (iv) severance pay;
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> (v) entitlement to pension and other benefits including early retirement benefits;
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> (vi) a bipartite process for overseeing the implementation of the adjustment plan.
>
> (2) If, after meeting in accordance with subsection (1), the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.
>
> (3) Subsections (1) and (2) do not apply to the termination of the employment of employees exempted by section 65 of the *Employment Standards Act* from the application of section 64 of that Act.

21 The Employer concedes the layoffs affected the terms, conditions or security of employment of a significant number of employees and, therefore, Section 54 applies in

the circumstances. The Employer asks, however, that it be relieved of its obligation to give Section 54 notice because the incident precipitating the layoffs was beyond its control.

22 As the Board held in *UBC*, where a change is contemplated which will affect the employment of a significant number of employees, an obligation presumptively arises to discuss the proposed change with the union before it occurs. Although in some circumstances an employer may be relieved of this obligation where the decision is outside of its control, this will be the exception: *UBC,* at p. 25. The Board takes a case-by-case approach to determining whether, on a particular set of facts, an employer was unable to give notice under Section 54 for reasons beyond its control.

23 I am not persuaded on the facts asserted by the Employer in the present application that it was unable to comply with the notice requirements set out in Section 54 for reasons beyond its control. The tailings pond breach, the cost of remediating that breach, and the significant financial losses the Employer suffered as a result are not new or unforeseen. The fact the parent corporation was unwilling to accept further losses may have been understandable, but I agree with the Union; the Employer has not asserted any facts to suggest the parent corporation's decision was unexpected or unforeseen. In any event, the Employer has not asserted any facts to establish when it presented its 2018 operations plan to the parent corporation, when the parent corporation rejected that plan, or when it decided to implement the alternate plan suspending pit operations. As a result, I am unable to conclude the Employer did not have time or was otherwise unable to comply with the notice requirements of Section 54 for reasons beyond its control. Accordingly, I refuse to exercise my discretion to relieve the Employer of its obligations under Section 54.

24 The Employer breached Section 54 of the Code when it failed to give 60 days' notice of the January and February 2018 layoffs.

25 With respect to remedy, I am not persuaded by the Employer's argument that the 60 day notice requirement should not apply if its only effect is to lengthen the notice period for individual employees. In *Wolverine*, the Board held the purposes of Sections 63 and 64 of the Act on the one hand and Section 54 of the Code on the other are distinct: at paras. 117-119. The fact the Employer may have complied with its obligations under the Act and the collective agreement (and I make no findings in that regard) is not determinative of the Union's application.

26 In any event, the Board has specifically held that damages in the form of lost wages to individual employees are appropriate to remedy a failure to provide notice as required by Section 54: *UBC*, at p. 35; *Wolverine*, at para. 149; *Pacific Pool*, BCLRB No. B43/2000, at para. 62; *Peace River School District*, at para. 18; *Money's Mushrooms*, at para. 82/2005; *CanWest*, at para. 100. In *Pacific Pool*, the Board held:

> Damages are an appropriate remedy for a breach of Section 54 so as to compensate for the loss of any wages resulting from the failure to provide the required notice. The purpose of an award of

> damages is to ensure an individual is returned to the position he or she would have been in, had no breach occurred. The expectation under Section 54 is that a period of 60 days notice is to be provided so as to allow a union and employer an opportunity to explore possibilities of avoiding closure or at the very least ameliorating its effects. That notice also allows employees a period during which they will continue to receive wages while exploring alternatives in the face of the Employer's decision to close.
>
> Accordingly, the remedy of damages flowing from a breach of Section 54 may both compensate a union for lost opportunities to negotiate a means of preventing a closure or to reduce its effects, and compensate employees on the basis of lost wages which would have been earned had proper notice been provided. (at paras. 21-22)

The Board has awarded damages to individual employees as a result of a breach of the notice requirements of Section 54 even where the union has failed to establish a claim for damages for the lost opportunity to negotiate: see, for example, *Money's Mushrooms*; *Peace River North School District*; *Wolverine*.

27 I am satisfied on the facts of this case that the affected employees lost a valuable right, the right to be assured of income for a period of 60 days, when the Employer failed to comply with the notice provisions of Section 54. I am not persuaded the parties' agreement to extend the recall period from six months to one year, however that agreement came about, is sufficient to compensate employees for the loss of wages during the 60 day notice period mandated by Section 54. The Employer has not established a compelling basis which persuades me to depart from the Board's policy of awarding damages to individual employees as a remedy for such a breach. I order that the Employer make whole any employee who lost wages as a result of its failure to comply with the notice requirements of Section 54 with respect to the January and February 2018 layoffs, including those employees who were required to bump into lower wage-rated classifications.

28 The Employer says the damages owing to individual employees should be subject to the duty to mitigate. In particular, the Employer says employees who chose not to bump into lower classifications should not be entitled to damages for lost wages on the basis they failed to mitigate their losses. Unlike in *Pacific Pool*, the Employer in the present case has not asserted any facts on which I might conclude any part of that 60 day notice period should be subject to mitigation. Accordingly, I find the affected employees were under no obligation or duty to take any steps to reduce their losses. I decline to order that the damages owing to individual employees as a result of the Employer's breach of Section 54 be subject to the duty to mitigate.

V. CONCLUSION

29 For the reasons given above, the Employer breached Section 54 of the Code by failing to provide 60 days' notice in advance of the layoffs in January and February 2018 and the Employer's request that it be relieved of its obligations to provide that notice is dismissed. Accordingly, the Union's application is allowed.

30 I order that the Employer make whole any employee who lost wages as a result of its failure to comply with the notice requirements of Section 54 with respect to the January and February 2018 layoffs. I remain seized of the matter should the parties be unable to agree on the amounts owed to the individual employees affected.

LABOUR RELATIONS BOARD

JENNIFER GLOUGIE
ASSOCIATE CHAIR, ADJUDICATION