

## FETCO Submission to federal inquiry into work stoppages.

FETCO is pleased to make comments to the inquiry established by Labour Minister Jean-Pierre Blackburn into methods to reduce work stoppages under federal labour jurisdiction (FJ). We will first make some general observations about the inquiry followed by specific recommendations.

What is federal jurisdiction? Harry Arthurs, in his report on labour standards in the federal sector estimated that of the 13.5 million workers in Canada about 840,000 are covered by Part III of the Canada Labour Code. ("Fairness at Work", p8). This same number would apply to Part I of the Code.

Virtually all FJ employees work in one of three business sectors - transportation, communications and banking. The US government, in its ranking of importance to the US of industry in the event of a national emergency, ranks these three sectors right after national security. This is not surprising. These sectors constitute the infrastructure for industrialized countries as a whole; it is logical, therefore, that the original framers of the Canadian constitution put these sectors under federal jurisdiction with the other 90% of Canadian employees to be governed by provincial laws.

All business managers want to run competitive, efficient operations. This is crucial in Canada's open, trade-dependent economy. In the federal jurisdiction we have the added knowledge that service disruptions can harm

the public and shut down industries relying on our services. Therefore, we have experienced over the years a number of instances of government intervention to end work stoppages. While efforts have been made to reduce this need it always lurks in the background at the bargaining table.

Change in the federal labour sector. Since the late 1970s a sophisticated consultation process has developed to deal with changes in the Canada Labour Code. From this resulted the amendments to Part I in 1999, Part II in 2002 and the Arthurs report on Part III which is still under review.

A proper approach to reviewing Part I is crucial. It is the Part of the Code that can give rise to problems affecting other industries and Canadians as a whole. Prior to the establishment of the Sims task force, a secretariat, headed-up by a former Assistant Deputy Minister, did the preparatory work - which included consultations as to who might conduct the review and what should be in the terms of reference. As a result the Sims review was conducted expeditiously - seven months from appointment to report. This was an extraordinarily short period of time and was only possible because of the work done before the task force was established.

Sims operated on two unassailable principles - buy-in and balance. His report was entitled "Seeking a Balance". It was his approach that allowed much of his report to be turned into law with minimal problems.

The current inquiry. The rationale for looking at work stoppages is some data produced by the OECD and reproduced in the British publication,

"Economic and Labour Market Review". (April, 2007, page 24). This is clear from both the Minister of Labour's own comments and from the first recital in the inquiry's terms of reference.

Statisticians are wary of international comparisons due to different methodologies used in different countries. However, even if one was to accept the data as valid (over the 1996-2005 period, Canada was second only to Iceland in days lost due to work stoppages) it does not explain why an inquiry would be established covering such a small segment of the Canadian work force. For example, in the 2005-2007 period, according to data published by HRSDC, there were 90 major (over 500 employees) work stoppages in Canada. Four were under federal jurisdiction. This inquiry is therefore excluded from looking at 86 of them.

We took a broader look at work stoppages in Canada - from 1998 (the year before the last changes to Part I) to 2007. This covers ALL stoppages not just major ones. It should be noted that bargaining units under FJ tend to be larger than provincial ones so a few work stoppages can result in proportionally more days lost. (Source: HRSDC. Link at end of submission)

- From 1998 until 2007 on average, FJ accounted for 7.5% of all time lost due to work stoppages in all jurisdictions in Canada. This ranged from a low of 3.7% in 1998 to 34.9% in 2005, a year in which two major federal employers had work stoppages.
- There is no trend, one way or the other. Since 2005 the figures have been 4.3% in 2006 and 7.4% in 2007. 2002, often cited by proponents of those in favor of replacement worker bans due to the work

stoppage at Videotron, the number was 5.8%. However, 2002 was a very bad year for work stoppages in the non-FJ jurisdictions - 3<sup>rd</sup> worst over the period.

- Over this period numbers of work stoppages in FJ ranged from 5 in 2005 to 22 in 2002. For all jurisdictions the numbers ranged from 151 in 2006 to 413 in 1999.

This inquiry will not be examining the provincial situation but there is a wide range of work stoppage experience across the country. Above we talked of 90 major work stoppages in Canada over the 2005-2007 period. Of these 34 were in one jurisdiction, Quebec. Quebec has the worst work stoppage problem in the country and also has the most draconian laws against replacement workers. It is FETCO's belief that if Quebec law were to be superimposed on FJ we would have more work stoppages and more situations where Parliament would be called upon to intervene.

Getting back to the OECD data. If we were to remove all FJ figures from the Canadian data the figure of 208 for Canada (working days lost per 1000 employees) would go down to the 185-190 range, still leaving Canada as second worst country - we would be on a par with Spain at 186. The average for OECD countries is 42. This clearly shows that the FJ is not driving Canada's OECD standing.

So, while FETCO will work with the inquiry to look at ways to improve labour relations in federal jurisdiction we categorically reject the suggestion that the federal area is the cause for the figures in the OECD report.

## Recommendations.

Strike & Lockout Notification: We do not believe that Section 87.3 is effective as written. A strike authorization from the employees needs context in which to be held, something the Code does not currently provide for. Prior to a strike taking place the union should be required to hold a vote on the employer's last offer. This creates transparency in the system, and ensures that the membership endorses (or rejects) a strike knowing what they have been offered.

FMCS and Conciliation: We support the 60-day conciliation period in the Code that was put there in 1999 - it has brought discipline to the process. However, it has been subject to abuse. We do, for example, have cases of unions making application under Section 71 even as they serve notice to bargain. Section 71 needs to be applied only where there is clear evidence that the parties have done everything possible to obtain a settlement themselves. Where, in the opinion of FMCS, the process is being abused, they should not act on a Section 71 notice of dispute.

FMCS should therefore create a threshold for applying for conciliation. This would prohibit either party from filing prematurely and when not necessary. This would force the parties to exhaust meaningful discussions prior to seeking assistance, and would make better use of FMCS resources. When an

application is properly made, the other party should be provided with 72 hours notice.

Create a provision allowing parties jointly to request formal FMCS conciliation assistance without triggering the timelines set out in the code. This should be for a limited period (eg 30 days) and, to prevent abuse, could only be invoked once. If after that the parties need assistance it would activate the 60 day period.

We believe that FMCS overall provides an effective preventative mediation service. However, given its importance in the operation of Part I of the Code it would be desirable for the stakeholders to review with FMCS its operation to see where improvements could be made. (Sims recommended the establishment of an Advisory Committee on Labour Relations to perform just this task. See below. It was never implemented for FMCS).

This could entail, for example, officials from FMCS looking at the issue in industry specific terms and would require consultation with appropriate people involved in the industry's collective bargaining.

Also, the payment for, and selection, of FMCS staff should be reviewed to ensure that FMCS is able to attract and retain high quality conciliation Officers.

The parties would benefit from their involvement throughout the life of the collective agreement so as to help parties build/maintain an effective

working relationship that would allow them to enter into negotiations with a less confrontational approach. However the programs and support available are not well publicized and resources are too limited to allow FMCS staff to maintain ongoing relationships between bargaining cycles.

CIRB: It was agreed by the stakeholders meeting during the Sims process that one of the big problems was the operation of the CLRB. Amendments were made to the Code along with a name change. We therefore had high hopes of improvements. But this was not to be. The first real effort to run the Board professionally did not occur until Warren Edmondson was appointed chair in 2004.

We clearly need a review of CIRB operations and practices. In a number of instances ongoing CIRB cases have had a negative impact on collective bargaining. Mr. Edmondson instituted a consultative committee, the CIRBCC, chaired by Mike McDermott. This was a recommendation of Sims which had not been acted upon by any previous government:

Recommendations:

- An Advisory Committee on Labour Relations should be created and operate as a partnership between labour, management and government.
- The Committee should be mandated to promote healthy, effective labour relations and to make useful recommendations on subjects it raises itself or that are referred to it by the Minister of Labour.
- The Committee should annually review the activities of the Canada Labour Relations Board and the Federal Mediation and Conciliation Service with the Heads of those agencies.

(Sims, p 175)

It has met on several occasions and has made suggestions about how to improve the operation of the CIRB. The most important of these is creating a mechanism to have stakeholder input into the selection of CIRB vice-chairs.

Not only has FETCO made numerous recommendations in the past but Sims himself saw the need for a new appointment process:

#### Recommendations

- All candidates for membership on the Board must have extensive and recognized experience and respect in labour relations. Equity, language, regional and sectoral balance should be considered in making appointments from among experienced candidates.
- All proposed appointments or re-appointments should be made by the Governor in Council on the recommendation of the Minister of Labour, but only after the Minister has reviewed the potential appointees with the Advisory Committee on Labour Relations and with the Chair of the Canada Labour Relations Board.
- The appointment or re-appointment of representative members should be made from names included on lists provided by the parties.

(Sims, p201)

All candidates for membership on the Board must have extensive and recognized experience and respect in labour relations. Equity, language, regional and sectoral balance should be considered in making appointments from among experienced candidates. This is a priority issue that needs to be acted on quickly.

Other problems include the very long delays encountered by the parties in getting a decision from the Board. Strict timelines should be put in place for the rendering of decisions. When one or both parties file a request to the CIRB at time of bargaining it generally requires a quick response. The application by the Board of the provisions of the Code on "Maintenance of Activities" is a good example of an area where delays for rendering decisions can have a direct impact on the bargaining process.

Finally, lack of consistency in the decisions is another area for improvement in general.

Legislative Interference: We are opposed to giving the Minister unilateral powers to end or suspend work stoppages; this would open the process to political abuse.

We are also opposed to making all disputes subject to compulsory arbitration in the event of an impasse.

Expanded recourse to arbitration, although a good measure for limiting the number of work stoppages, is not a preferred way to promote sound labour-relations and to implement the changes requires in our fast-changing work environment. Arbitration is better suited for the settlement of a first collective agreement as provided under the Code but we believe that the current bargaining system that allows parties to settle their disagreement with the help of mediation services, where required, is still the most appropriate model even if, at times, conflicts are going to happen. It is

through the education and preparation measures that we have described previously that the parties have a better chance to limit the conflicts. The settlement of a collective agreement by a third party must remain a very exceptional measure.

Back-to-work legislation must only take place in extreme circumstances. Since 1999 this has only occurred once, in 2007, where it was not occasioned by a substantive issue but because of the disintegration of the union, making a settlement impossible.

Such legislation must provide guidance to any interests arbitration that might result from it. This was done in the *Maintenance of Railway Operations Act, 1995*:

*Guiding principle:*

- *12. Each Commission shall be guided by the need for terms and conditions of employment that are consistent with the economic viability and competitiveness of a coast-to-coast rail system in both the short and the long term, taking into account the importance of good labour-management relations.*

Such language should be incorporated in all back-to-work legislation. Also, such legislation should provide for mechanisms to make the resolution process more efficient, such as the requirement for final-offer-selection arbitration in the *Railway Continuation Act, 2007*.

The Code also still provides for the appointment of conciliation

commissioners and the appointment of conciliations boards - both connoting the possibility of formal reports. Guidelines such as those above should also apply to these bodies.

Comments on managing the process:

Pre-Collective Bargaining: The parties should be encouraged to start preparing bargaining jointly sufficiently in advance of the official bargaining schedule. Joint initiatives to improve the relationship or sensitize bargaining committees on specific issues such as competition, industry trends could be part of the preparation agenda but at the very beginning of the process.

Preventive Mediation: Preventive mediation is a mechanism that the parties might wish to consider. This should help reduce positioning and open an opportunity for open dialogue.

Collective Bargaining: Skills and competence of negotiators for both parties are material to the success of collective bargaining. Since there are no basic requirements in the Labour Code to ensure such skills or competency exist, it is important that some mechanisms (training programs) be put in place or made available to the parties to improve communications and learn more about the bargaining process in advance of the start of negotiations, where appropriate. Such mechanisms could be made available through FMCS assuming that they can get additional resources.

Tools need to be developed so that both employers and employees can find creative solutions to problems created by the work disruptions generated by changes in competitive conditions.

Concluding Observations:

Canada's economic prosperity depends on many issues beyond work stoppages. In an increasingly global marketplace, Canadian companies must be able to compete on the quality, innovation and cost of their product and services offerings, and must have sufficient flexibility to meet quickly changing market conditions. Thus, there is a need to ensure future and ongoing economic viability for companies and industries. This must be an objective for any legislation or procedural changes.

Changes to the Canada Labour Code in the past have been made following impartial reviews (Woods, Sims) and/or after extensive consultation with the parties in order to arrive at a consensus. This has worked since over the years there has been a significant reduction in the numbers of labour disputes causing any form of inconvenience to the public or disrupting the economy.

Part I of the Code was last amended in 1999 following the implementation of many of the recommendations of the Sims task force. In our opinion, these changes have improved the labour relations environment at the federal level, have reduced the need for intervention by Parliament and we see no need for significant legislative change at this time.

If the Code is to be modified it should be done using a tri-partite process similar to the Sims process used previously that considers all ramifications of proposed change,

Any change has the potential to change the balance of power at the bargaining table, and create unintended consequences. As such, any change must be carefully thought through and a cautious approach taken.

The data show that the federal sector is not strike prone. Whatever the reasons are for showing Canada as having a high incidence of work stoppages it is not because of problems in the Canada Labour Code or the industries that fall under it.

Strikes and lockouts are an integral part of the labour relations system and they will happen. At best, government can create the legislative framework to attempt to reduce them. However they cannot be prevented entirely.

Work stoppages are a potential outcome of bargaining that moderate the behaviours of the parties during bargaining. Generally, neither side wants a work stoppage and works to avoid one. Thus, the possibility of a work stoppage actually drives the parties closer together.

Data source:

[http://www110.hrdc-drhc.gc.ca/millieudetravail\\_workplace/chrono//index.cfm?doc=english](http://www110.hrdc-drhc.gc.ca/millieudetravail_workplace/chrono//index.cfm?doc=english)

## Summary of Recommendations:

1. Prior to a strike taking place the union should be required to hold a vote on the employer's last offer.
2. FMCS should not appoint a conciliation officer under Section 71 until it is clear that the parties have exhausted all efforts to obtain a settlement.
3. When an application for conciliation is made the other party should be provided with 72 hours notice.
4. Create a one-time opportunity for the parties to request a 30 day conciliation period without activating the 60 day timeline.
5. Establish the Advisory Committee on Labour Relations recommended by the Sims task force.
6. Establish the appointment process for Vice-Chairs recommended by the Sims task force.
7. The CIRB to urgently address the problem areas identified by the CIRB Consultative Committee.
8. The Code should not be amended to provide the Minister the authority to suspend work stoppages.
9. Compulsory arbitration for all disputes would not improve labour relations at the federal level.
10. All back-to-work legislation should include the Guiding Principle as found in Section 12 of the *Maintenance of Railway Operations Act, 1995* and should provide for an expedited resolution process as was included in the *Railway Continuation Act, 2007*
11. The parties should be encouraged to start preparing bargaining jointly sufficiently in advance of the official bargaining schedule.
12. Preventive mediation is a mechanism that the parties might wish to consider.
13. It is important that some mechanisms (training programs) be put in place or made available to the parties to improve communications and learn more about the bargaining process in advance of the start of negotiations