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Our Files: 037429-C; 037676-C

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October 23, 2024

BY WEB PORTAL

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In the matter of the *Canada Labour Code (Part I–Industrial Relations)* and a complaint of unfair labour practice filed pursuant to section 97(1) thereof by International Longshore and Warehouse Union Ship and Dock Foremen, Local 514, complainant, alleging violation of sections 50(a), 50(b), 53, and 97 of the *Code* by DP World (Canada) Inc., respondent. (037429-C)

In the matter of the *Canada Labour Code (Part I–Industrial Relations)* and an application for a declaration of unlawful strike filed pursuant to section 91 of the *Code* by British Columbia Maritime Employers Association, applicant; International Longshore and Warehouse Union Ship and Dock Foremen, Local 514, respondent. (037676-C)

Further to the hearing held in the above-noted matters, the parties will find enclosed the decision of the panel of the Canada Industrial Relations Board (the Board) composed of Ginette Brazeau, Chairperson, and Richard Brabander and Paul Moist, Members.

The Board had indicated that it would issue its decision in the form of a bottom-line decision. However, given the number of issues raised and the extensive evidence presented, it has provided its decision with reasons, sufficient in its view to guide these experienced parties in their ongoing bargaining. The Board will deal with any requests from the parties if they arise.

Sincerely,

A handwritten signature in black ink, appearing to read "Ginette Brazeau". The signature is fluid and cursive, with the first letter of each word being capitalized and prominent.

Ginette Brazeau
Chairperson

Encl.

c.c.: Lindsay Foley



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October 23, 2024

2024 CIRB LD **5489**

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Dear Sirs:

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A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Ginette Brazeau, Chairperson, and Messrs. Richard Brabander and Paul Moist, Members, considered the above-noted matters.

The British Columbia Maritime Employers Association (BCMEA) and the International Longshore and Warehouse Union Ship and Dock Foremen, Local 514 (Local 514 or the union) are in negotiations for the renewal of their collective agreement.

Local 514 filed a complaint on February 16, 2024 (Board file no. 037429-C), alleging that the BCMEA and DP World (Canada) Inc. (DP World), one of the member employers of the BCMEA, had breached their duty to bargain in good faith when they failed to engage in bargaining on a manning agreement and that they were violating the bargaining freeze provision of the *Canada Labour Code* (the *Code*) as they purported to have the right to unilaterally implement automated rail operations at Centerm terminal.

On May 10, 2024, the BCMEA filed a bad faith bargaining complaint and an application for a declaration of unlawful strike against Local 514 (Board file no. 037676-C). It alleges that the union took a strike vote among the employees of only one employer despite the parties having engaged in industry-wide bargaining for the renewal of the industry-wide collective agreement. The BCMEA alleges that a strike based on this vote is contrary to the provisions of the *Code* and unlawful.

The BCMEA also alleges that the union breached its duty to bargain in good faith when it presented two new bargaining proposals. On April 3, 2024, the union put forth a new proposal that sought to negotiate a manning agreement for the automated operations at Centerm terminal. Then, on May 9, 2024, it presented a new proposal relating to dispatch for the Nanaimo terminal. The BCMEA alleges that these late proposals create a receding horizon and are evidence of bad faith bargaining on the union's part.

The Board has already dealt with part of the BCMEA's complaint (see *British Columbia Maritime Employers Association*, 2024 CIRB 1148). In particular, it found that the union failed to bargain in good faith and to make every reasonable effort to reach a collective agreement in violation of section 50(a) of the *Code* by taking a strike vote only among its members at DP World. Accordingly, the Board declared that the union's strike notice was invalid. Further, the Board found that the Nanaimo dispatch proposal presented by the union on May 9, 2024, amounted to a failure to bargain in good faith and directed it to withdraw that proposal.

There are three remaining issues in dispute from these complaints:

1. Whether DP World violated the duty to bargain in good faith when it refused to engage in bargaining regarding the union's manning and pay proposal in February 2024.
2. Whether DP World breached the statutory freeze by implementing changes to the staffing and manning model for foremen at Centerm terminal due to the automation of the terminal.
3. Whether the union violated its duty to bargain in good faith when it presented its manning and pay proposal regarding Centerm to the BCMEA on April 3, 2024.

The Board held 11 days of hearing between July 2 and September 17, 2024, and heard 14 witnesses. After careful consideration of the evidence and the parties' written and oral submissions, the Board has reached the following conclusions.

I. Bargaining in Bad Faith—DP World

The union contends that DP World failed to bargain in good faith by its refusal to engage in any bargaining with respect to its proposed manning requirements flowing from the implementation of semi-automation of rail mounted gantry cranes (RMGs).

DP World Canada cannot be found to have violated its duty to bargain in good faith when it refused to accept the union's manning and pay proposal in January and February 2024. The Board is of the view that the union's demands at that time were not presented in the context of collective bargaining or as a bargaining proposal. Accordingly, DP World had no duty or obligation under section 50(a) of the *Code* to engage in bargaining with respect to the union's demands presented in January and February 2024.

Further, it is apparent that the union's demands for manning guarantees and additional pay flowed from its acquired knowledge of the details of an agreement reached in November 2023 between DP World and the longshore workers represented by the International Longshore and Warehouse Union, Local 500 (ILWU Local 500).

DP World's approach of engaging in discussions with one unionized group but not the other to negotiate a side agreement relating to manning and pay adjustments may not be conducive to harmonious labour relations. However, there was no legal requirement for the employer to offer a similar side agreement to Local 514 nor an obligation to engage in discussions to implement similar terms. In the absence of an existing agreement that required renewal (as was the case with ILWU Local 500) and in the face of the language at article 11 of the collective agreement giving discretion to the employer to determine manning (subject to certain criteria which may be debated in the context of a grievance), the Board is unable to conclude that DP World violated the duty to bargain in good faith.

II. Violation of the Freeze Provision

The rationale for the existence of a freeze period during the period of collective bargaining is two-fold. It prohibits the employer from minimizing the union's authority in the eyes of its membership by altering the terms and conditions of employment beyond what is already provided for in the collective agreement. It also allows both parties to commence bargaining on an even keel. The essence of the freeze provisions of section 50(b) of the *Code* is to maintain a balance between the parties at the bargaining table by removing the employer's right to change employees' working conditions, rights or privileges. The only exception is where the union gives its consent or where the change is one that is consistent with the "business as usual" principle (see *Canadian National Railway Company*, 2004 CIRB 272).

The union argues that DP World proceeded to unilaterally implement changes to manning and proceeded to implement continuous operations during the period of collective bargaining. It alleges

that the change in staffing from a “gang” model to a “desk” model is a breach of the freeze on terms and conditions of employment. It also alleges that the adoption of continuous rail operations and the elimination of scheduled coffee breaks does not meet the threshold for the “business as before” test.

The Board disagrees and finds no violation of the freeze provision in this case.

After careful review of the evidence, the Board finds that the shop stewards and the union executives had to be aware that automation of operations at Centerm terminal was being developed and would be implemented. The union had knowledge of DP World’s plans to operate the RMGs from a remote room and could simply not ignore that remote and automated operations of those RMGs were the ultimate end state.

The Board accepts that the union was not necessarily aware of the detailed implications for manning, however, manning adjustments had been made in previous months and, as indicated above, manning decisions are within management’s discretion under article 11 of the collective agreement, subject to the grievance procedure.

Further, the Board is not persuaded that the change to the manning model in this case amounts to a change that violates the statutory freeze as there is no reduction in the number of foremen and the duties of the foremen remain the same. The change from a gang model to a desk model does not appear to the Board to be a change in the terms and conditions of employment as there is no entitlement to a certain model of staffing. If there are legitimate concerns regarding the safety of the operations, there are more appropriate mechanisms to address those issues under the collective agreement or under Part II (Occupational Health and Safety) of the *Code*.

The union also raises the implementation of continuous operations and coffee on the fly as another breach to the statutory freeze. However, the evidence showed that continuous operations were implemented in June 2022 on a trial basis that continued for over two years without objection or grievance from the union. The shop stewards were involved in the discussions leading to the implementation of continuous operations in June 2022 and the adjustments that were made relating to longshore workers’ obligation to take coffee breaks on the fly. The same operations continue today.

The Board fails to see how continuous operations would amount to a violation of the freeze given that they have been in place for over two years and commenced prior to collective bargaining. What has changed is the fact that DP World negotiated a side agreement with ILWU Local 500 granting extra pay (in the form of extra hours) to longshore workers to formalize the continuous operations model. This is not a change in the terms and conditions, rights or privileges of forepersons that is introduced during collective bargaining. Continuous operations have been in place for over two years.

In any event, it is far from clear that the change to continuous operations has affected the forepersons’ ability to take scheduled breaks. The document related to the rail continuous operations trial specifies that foremen are to “defer coffee breaks or lunch if necessary” but does not appear to impose such a requirement.

III. Bargaining in Bad Faith–The Union’s April 3, 2024, Bargaining Proposal

The Board must determine whether the union engaged in bad faith bargaining and failed to make every reasonable effort to reach a collective agreement when it presented its manning and continuous operations bargaining proposal on April 3, 2024.

It is helpful to review the collective bargaining process that unfolded between the parties up to that date.

On May 26, 2023, Local 514 and the BCMEA exchanged their initial bargaining proposals for changes to the collective agreement. The parties then met in bargaining sessions 10 times between October 12, 2023, and January 10, 2024.

On January 10, 2024, the BCMEA issued a notice of dispute for all its member employers. The parties then met in conciliation discussions with representatives of the Federal Mediation and Conciliation Service for two days in February 2024 and two days in April 2024.

When bargaining resumed on April 3, 2024, the BCMEA presented a global proposal to Local 514. This was the first comprehensive proposal presented by either of the two parties in bargaining. The BCMEA indicates that it expected a similar comprehensive response from the union. Instead, it received a new proposal related to manning and continuous operations at Centerm terminal.

The BCMEA indicates that it made significant concessions and proposals in its global proposal of April 3, 2024, on issues that appeared key to the union in an attempt to move bargaining forward. It alleges that the union’s response in the form of a brand-new proposal related to manning and continuous operations is too late in the process and has the effect of shifting the bargaining landscape after it had made a number of monetary and other non-monetary proposals or concessions. The BCMEA contends that the union was aware of the coming automation and should have put a proposal forward, or at least a placeholder, earlier in the process.

It is important to note that the union’s bargaining proposal contains two aspects: one related to manning (or minimum staffing requirements) and the other related to increased pay for continuous operations.

A. Manning Proposal

Despite the union’s effort to convince the Board that it had no knowledge of DP World’s plans to implement automated or semi-automated operation of RMGs, the Board has concluded that there was sufficient information provided to the union for it to put general proposals forward to address its concerns related to job protection. The Board is of the view that the shop stewards and the union executives were generally aware that automation of operations at Centerm terminal was being developed and would be implemented. The Board also accepts that shop stewards knew of and were involved in previous changes to manning made by DP World in 2022 as a result of the introduction of new RMGs, and by implication, the union ought to have known of these

developments. Despite this knowledge, no efforts were made to include items related to the job protection or minimum manning requirements in the initial bargaining proposals.

Further, it became clear in August 2023 that remote and semi-automated operations of RMGs would result in some changes to the manning model. This information was communicated to shop stewards through a detailed presentation and at least one of them indicated it communicated this information to the union President. Despite this knowledge in August 2023, no bargaining proposal was made to the BCMEA until April 2024.

The Board is unable to accept that the union could not address the manning issues earlier in the bargaining process if it was concerned with job protection in the context of automated operations. The fact that the employer provided its detailed manning matrix in December 2023 does not change the fact that sufficient information was available to the union prior to that time in order for it to formulate minimum manning proposals, or at least put some indication forward that it wished to address job protection in the context of automated operations.

Further, there was no existing agreement with Local 514 related to manning of operations. The employer is allowed, under article 11 of the collective agreement, which is subject to the grievance procedure, to determine the staffing levels necessary for its operations. If the union wanted to put parameters around the employer's right to determine manning, it had sufficient information to do so at the outset of bargaining.

The Board concludes that the union did not make every reasonable effort to reach a collective agreement by waiting until April 2024 to put forward a manning bargaining proposal, and that this was contrary to its obligations under section 50(a) of the *Code*.

B. Pay for Continuous Rail Operations

The union's proposal of April 3, 2024, also includes demands for increased pay (in the form of additional hours) related to the implementation of continuous operations at Centerm terminal.

As discussed above, continuous operations had been implemented on a trial basis in June 2022 and continues today. At that time, some adjustments were made to hours paid for longshore workers, and some minor changes were made to the foremen's schedule.

The employer contends that the union accepted these changes without grievance or objection and is therefore barred from putting forward any proposal related to additional pay for continuous operations.

It is important to note that on April 3, 2024, the employer had put forward its first comprehensive proposal which included its first monetary proposal.

The Board is cognizant of the fact that parties make strategic decisions as to the timing and content of their proposals. It is also keenly aware that those decisions depend on the parties having a clear understanding of the scope of the issues in dispute.

At the same time, the Board is generally reluctant to assess the content of the parties' proposals and interject itself in the give and take that is necessary between the parties to achieve a collective agreement. Compensation and monetary proposals are items that are normally left to the end of the bargaining process and on which parties find compromise to settle their dispute. Both parties have the fundamental duty to bargain in good faith on these issues and the Board should refrain from intervening unless there are proposals that are clearly offside. In this case, the Board is not prepared to prevent a party from advancing pay proposals, particularly since the employer had presented its first global offer which included its monetary proposals.

Further, there is no dispute that in response to the union's demands presented in February 2024, DP World invited the union to provide further information as it relates to the pay structure. It also invited the union to present its proposal at bargaining to the BCMEA as evidenced by its response to the union's complaint in March 2024. On the one hand, DP World and the BCMEA now say that the union's proposal was not properly presented in bargaining when it was made to DP World directly in January 2024 and, on the other hand, it is too late because it was presented at the bargaining table to the BCMEA in April 2024.

The Board previously stated that the union cannot take advantage of one bargaining structure versus another as it pleases or as it advantages it most. It cannot by its conduct pursue the path of industry-wide bargaining and at the last minute, revert back to bargaining based on its single employer certification. The Board described it as "riding two horses at the same time" (see *British Columbia Maritime Employers Association*).

The same applies to DP World and the BCMEA. DP World and the BCMEA cannot refuse to negotiate pay issues on the premise that they are not proper collective bargaining proposals made at the industry-wide bargaining table and then reject them outright when the union puts forward a proposal to the BCMEA at a time when the parties are exchanging monetary proposals. Unlike the proposal related to dispatch at Nanaimo, the parties were not on the eve of acquiring the right to strike or lockout and there was still a reasonable prospect for the parties to do the necessary and difficult work to achieve a resolution. The Board is not a substitute for the parties' difficult task ahead.

For these reasons, the Board does not consider the union's pay proposal, even if it relates to continuous operations, to be unreasonable.

The Board therefore grants, in part, the BCMEA's complaint. It directs the union to remove its bargaining proposal related to manning at Centerm terminal, but allows the union to put proposals forward related to pay for continuous rail operations.

IV. Conclusion

After careful consideration of the evidence and the parties written and oral submissions, the Board has decided to dismiss the union's complaint of bad faith bargaining against DP World and its complaint alleging a violation of the statutory freeze. The Board has also decided to grant, in part, the employer's complaint of bad faith bargaining against Local 514 and directs it to remove its

bargaining proposal related to manning but allows it to put proposals forward related to pay for continuous rail operations.

This is a unanimous decision of the Board, and it is signed on its behalf by

A handwritten signature in black ink, appearing to read 'Ginette Brazeau', written in a cursive style.

Ginette Brazeau
Chairperson

c.c.: Ms. Lindsay Foley