

USW-COASTAL FOREST INDUSTRY HEALTH AND WELFARE PLAN**THRID PARTY DECISION RE:****BENEFIT COVERAGE DURING LABOUR DISPUTE****JANUARY 24, 2020****HEARING****JANUARY 9-10, 2020****VANCOUVER, B.C.****THIRD PARTY****SHAWN HATCH****COUNSEL****SANDRA I. BANNISTER Q.C.****FOR THE UNION TRUSTEES****AND****CHRIS LEENEER & CARLY STANHOPE****FOR THE EMPLOYER TRUSTEES**

BACKGROUND

The USW-Coastal Forest Industry Health and Welfare Plan (**the "Plan"**) is a jointly trustee health and welfare plan managed and administered by a board of eight trustees appointed pursuant to the USW-Coastal Forest Industry Health and Welfare Plan Restated Agreement and Declaration of Trust effective January 1, 2010 (**the "Trust Agreement"**). The parties to the Trust Agreement are Forest Industrial Relations Limited ("**FIR**"), bargaining agent for its member employers, United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied and Service Workers International Union ("**USW**"), bargaining agent for employees and eight individual trustees ("**Trustees**" or the "**Board**"), four of whom are designated by FIR (**each an "Employer Trustee" or collectively "Employer Trustees"**) and four of whom are designated by USW (**each a "Union Trustee" or collectively "Union Trustees"**).

Under the Trust Agreement the Employer Trustees and the Union Trustees each have equal voice and vote with each group entitled to cast one vote collectively. In the event of a deadlock questions shall be submitted for the decision of a third person selected by the Board. I have been selected as the third person by the Board in respect of a deadlock regarding benefit coverage for Plan members who are on strike.

In particular, I have been asked to answer the following four questions:

1. Are plan members who are engaged in a lawful strike covered under the Plan during the duration of that lawful strike on the basis set out in the April 1, 1993 Trustees' Resolution?
2. If the answer to the first question is yes, can the Trustees compel the employers of plan members who are engaged in a lawful strike to pay for those members' coverage under the Plan on the basis that, as set out in April 1, 1993 Trustees' Resolution, the affected plan members will repay the employers after the strike?
3. If the answer to each of the first two questions is yes, are the Trustees compelled to initiate collection proceedings against any employer who fails to maintain its striking employees' coverage under the Plan in accordance with the April 1, 1993 Trustees' Resolution?
4. If an employer pays benefit premiums for an employee who is on strike, can the employer recover those premiums from the employee after the strike?

To arrive at a determination a hearing was held with counsel for each of the Union Trustees and the Employer Trustees. Also present were representatives of the Union Trustees and the Employer Trustees. Counsel provided an Agreed Statement of Facts covering 48 items and an accompanying document brief. Where I refer to a Tab number it is a reference to the document at the Tab number in the document brief. Written submissions from counsel were also received. At the hearing no oral evidence was given.

THE 1993 RESOLUTIONS

During a labour dispute (strike or lockout) work stops and naturally the compensation package, being wages and benefits, is no longer payable. Historically during forest industry strikes or lockouts in British Columbia (at least in 1981 and 1986) management and the union reached an agreement that provided for the employers to continue paying the cost of certain benefit coverage during the labour dispute on the understanding the cost would be recovered from the employees upon return to work.

This accord was formally documented in an agreement among I.W.A., F.I.R. and the I.W.A. – Forest Industry Health & Welfare Trustees signed July 29, 1986 (**the "1986 Agreement"**) (Tab 8) for any strike or lockout consequent on the cancellation of the 1983-86 Coast Master Agreement. It provided for the employers to continue paying premiums for group life and group accidental death and dismemberment. Weekly indemnity benefits would continue for those disabilities incurred prior to the work stoppage. Special rules were prescribed for weekly indemnity for disabilities incurred during the work stoppage. Similar advance payment for basic medical, extended health and dental as provided for in the 1983-86 Coast Master Agreement was also agreed to.

In 1992 the Labour Relations Code was amended to include section 62 which requires employers to continue health and welfare benefits during a strike or lockout provided the trade union tenders the amount required to continue benefits on or before the regular due date for payment. Parties to a

collective agreement are free to agree to exclude the operation of section 62. I note that section 62 continues in force.

The Plan as presently constituted is the merger of separate health and welfare plans established pursuant to collective bargaining in the forest industry. While there is presently one trust agreement and one plan text governing the Plan, an examination of the various reorganization documents indicates that the underlying plans were in each case being continued, albeit under a new governance structure and funded by a trust fund resulting from the merger of each plan's trust fund.

The first plan had its origins in the Forest Products Industries Coast Region British Columbia Master Agreement for 1961-1962 to provide group life, weekly indemnity and accidental death and dismemberment coverage. A few basic details and principles were laid out in the agreement with a trust agreement between the bargaining agents to follow. In fact separate plans were established for FIR employers and their employees, referred to as "**Plan No. 1**", and a second for independent employers and their employees "**Plan No.2**".

On March 31, 1993 the trustees of Plan No. 2 met. The minutes of the meeting (Tab 7) contain the following resolution:

"to formally adopt the past industry practice (as in the 1981 and 1986 strikes), and to endorse the agreement for continuation of the benefits during the recent Bayside Sawmills lockout."

AMEDED JUNE 14, 1993

The key features of the past practice are:

- The local union and the employer must first agree that coverage will continue.
- Premiums continue to be paid for all benefits except WI.
- Premiums are paid by the Employer, reimbursed by employees after return to work.
- Benefit coverage continues as usual except WI:
 - For disabilities beginning before work stoppage, WI payments continue;
 - For disabilities beginning during the work stoppage, WI waiting period starts on the day the other employees return to work."

(the "Plan No. 2 '93 Resolution")

On April 1, 1993 the trustees of Plan No. 1 met and the minutes of that meeting were also apparently amended on June 14, 1993 (Tab 6). The minutes contain the following resolution:

"to formally adopt the past industry practice (as in the 1981 and 1986 strikes), for the period that Section 62 of the Labour Code remains in effect."

The key features of the past practice are:

- Premiums continue to be paid for all benefits except WI.
- Premiums are paid by the Employer, reimbursed by employees after return to work.
- Benefit coverage continues as usual except WI:
 - For disabilities beginning before work stoppage, WI payments continue;

-For disabilities beginning during the work stoppage, WI waiting period starts on the day the other employees return to work."

(the "Plan No. 1 '93 Resolution")

I pause to observe that both sets of minutes on their face state they are amended minutes and that the date of amendment was June 14, 1993. The Plan No.2 minutes indicate that the amendment made June 14, 1993 involved the addition of the description of the key features of the past practice being adopted. The minutes of the Plan No. 1 meeting do not specify which aspect of the minutes were amended but it is reasonable to assume that the amendment to the Plan No. 1 minutes also involved the addition of the description of the key features of the past practice being adopted.

I also observe that the Plan No. 1 '93 Resolution and the Plan No. 2 '93 Resolution differ in some material respects. Plan No. 1 adopted the past practice for the period that section 62 of the Labour Code remains in effect. Plan No. 2 did not include a tie in to section 62 being in force. Also, in describing the key features of the past practice which they were adopting, Plan No. 2 specified that "The local union and the employer must first agree that coverage will continue". This is absent from the Plan No.1 '93 Resolution. Interestingly, the Plan No. 2 minutes also endorsed an agreement, presumably between the employer and local union, to continue benefits during a recent lockout at Bayside Sawmills.

As the composition of the two boards was different, though both shared the same administrative support staff who were in attendance at both meetings, and the amendments to the two set of minutes were made on the same day, it is reasonable to assume that the differences between the 2 resolutions was deliberate and purposeful, particularly keeping in mind that the two plans were established for FIR employers and independent employers respectively.

In *Schmidt v. Air Products Canada*, [1994] 2 S.C.R. 611, at para 133 Mr. Justice Cory observed:

"Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do will depend on the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees."

While the Plan No. 1'93 Resolution and the Plan No.2 '93 Resolution do not appear to have ever been reflected in an amendment to the Plan text (which would have been the better practice) I am of the opinion that these resolutions were intended to and do form part of the benefit package offered by these two plans. FIR issued an advisory to all FIR member companies dated July 6, 2007 outlining the key features of the Plan No. 1 '93 Resolution (Tab 9). They were also referenced in the Plan Administration Manual up until early 2012 (Tab 18).

THE 2007 STRIKE

The forest industry strike in 2007 resulted in a number of employers failing to continue making contributions notwithstanding FIR's advisory to employers dated July 6, 2007 (Tab 9). Financial difficulties of some employers resulted in creditor protection proceedings.

Trustee minutes of Plan No.1's board meeting of September 13, 2007 (Tab 10) discussed the resulting risk to the plan in that premiums of \$40,000 per month covering 738 members were in arrears. Various options including terminating coverage were discussed. After heated discussion the minutes show the matter was tabled for four weeks and the action item was the that Plan Office would advise employers who consider benefits to be ended or suspended during the strike that:

- The Plan does not have a provision for benefits to end during a strike, we consider them still covered and will continue to bill and assess interest, and
- If they do not pay during the strike, then when the strike ends they will be expected to recover the amounts owing from their employees and submit them to the plan.

A fuller recounting of the September 13, 2007 meeting is found at Tab 11 taken by Harvey Arcand. The notes indicate that advice from the Plan's legal counsel was that if no decision was made during the meeting the status quo will have to prevail until some other decision is made.

The January 2, 2009 Letter

The Plan No. 1 Board met again on February 22, 2008. Revised minutes are at Tab 13. The Board received a report that the plan office had sent a memorandum to employers found at Tab 12 outlining the policy on "Continuation of Benefits During Labour Strike". The February 22, 2008 minutes go on to include the following:

There was recognition that the historical method of benefits continuation was less than satisfactory in the recent strike, and also that a solution does not fall within the scope of this Board.

ACTION: Doug will prepare a letter for signature by the co-chairs, to FIR and the Steelworkers IWA Council, asking that these matters be addressed.

Tabled.

The Plan No. 1 Board met again on April 24, 2008. There was no quorum so the minutes had to be ratified later by unanimous written consent resolution dated September 23, 2009 (Tab 14). At the April 24, 2008 meeting the minutes of the February 22, 2008 meeting were approved subject to revising the item on "Standard plan procedure during strike" to reflect that this will be referred to the negotiating parties and a consequential action item was noted being, the Plan office to prepare the letter to the negotiating parties as agreed.

At the November 6, 2008 meeting the letter to the negotiating parties had not yet been prepared. It was resolved to defer the item to the next meeting with an action item for Doug to draft the letter and forward to Tom & Gerry (the co-chairs) for comment (Tab 15).

As per the Agreed Statement of Facts, the letter to the bargaining agents was eventually approved by the co-chairs and is dated January 2, 2009 and is at Tab 16. The letter noted the Trustees of Plan No 1 have recognized the historical method of benefits continuation was not followed by some employing companies in the 2007 strike and the results of that action were not satisfactory. The letter went on to state:

"It is FIR's position that the negotiating parties need to devise an alternative method for 2010 negotiations and the Trustees' position is that the issue is beyond the scope of the Board of Trustees."

At the May 5, 2009 Plan No. 1 Board meeting, it was reported that the letter of January 2, 2009 had been sent (Tab 17). The report was simply received. In addition it was noted Plan No 2 had requested a copy of legal counsel's 2007 report on the issue and it was resolved to share the report.

As discussed above, the governance structure of the Plan requires both the Union Trustees and the Employer Trustees to cast their respective block vote to approve any decision.

In my opinion, after carefully reviewing the Plan No.1 Board proceedings between February 22, 2008 and May 5, 2009, together with the contents of the January 2, 2009 letter, I do not find there was Board approval to set aside the practice of continuing benefit coverage during a work stoppage as approved by the Plan No. 1 '93 Resolution. The Trustees certainly recognized the real risks to the Plan by virtue of multiple employers going into arrears during the 2007 strike. The option of discontinuing benefits was definitely on the table but clearly rejected by the Union Trustees.

The January 2, 2009 letter states FIR's position that an alternative method needed to be devised by the negotiating parties. In the context, a statement in a piece of correspondence that "the issue was beyond the scope of the Board of Trustees" is far from sufficient evidence to conclude the Board had agreed to set aside the Plan No.1 '93 Resolution. On the contrary, the statement infers the Board had not been able to agree upon an alternative method thereby signaling the status quo prevails. The invitation to the bargaining parties to deal with this issue was natural enough as the Board's powers under the Trust Agreement are subject to the provisions of any applicable collective agreement so the Trustees would be duty bound to implement any arrangement reached through collective bargaining.

The subsequent amendment to the Plan Administrative Manual (Tab 18) and the August 13, 2019 Memo to Plan employers drafted by the Plan administrator (Tab 23) were based on FIR's position that the January 2, 2009 letter "effectively cancelled" the Plan No.1 '93 Resolution (Tab 24), which I have determined was not the case. The August 13, 2019 memo also referred to "*Lanyon, WFP vs. USW, BCCCA 159, 2008*" as authority for the proposition that a struck employer is free to terminate all benefits and benefit plan contributions. However, as discussed below this case and

the case referred to therein (*Crown Life v OTEU*) clearly indicate that a collateral contract or statute could require premiums to continue.

THE RESTATED TRUST AGREEMENT

Over the years the forest industry benefit plans and the trusts which fund them have undergone a number of reorganizations. The history is set out in recitals to the current Trust Agreement (Tab 1).

The Plan Assumption and Conveyance Agreements referred to in those recitals were not included in the document brief. However, at the hearing counsel for the Union Trustees provided me a draft of the Plan Assumption and Conveyance Agreement dated December 31, 2009. As I expected, under that agreement the continuing board of trustees receives a transfer of the assets of the terminating plan and assumes the benefit obligation by continuing the predecessor plan. The rights, duties or obligations of the transferring trustees in respect of providing health and welfare benefits under the transferring plan are assumed by the receiving board of trustees. Thus, any entitlement to receive benefits under the transferring plan is recognized under the plan going forward by the continuing board of trustees.

Once the conveyance of assets and assumption of plan liabilities is documented the trust agreement of the receiving trust is restated to reflect the transaction. This restatement however does not alter or amend the benefit entitlement under the plans involved in the transaction.

Furthermore, the Plan Assumption and Conveyance Agreement and the Trust Agreement (section 1.6 b&c) both expressly provide that any participation agreement entered into with the pre-existing trust shall be deemed to have been entered into by the continuing board of trustees.

I would add that section 1.4 of the Plan text expressly provides that:

"...any entitlement to receive benefits that any member had prior to November 6, 2008 is recognized by the Trustees pursuant to the terms of this Plan as fully and effectively as if such entitlement had arisen under this Plan on or after the Effective Date."

In my opinion the plan mergers, reorganizations and restated trust agreements do not, in and of themselves, alter any benefit entitlement under the benefit plans involved in the transaction, including the right to continued benefit coverage during a strike or lockout as provided for in the Plan No. 1 '93 Resolution and the Plan No.2 '93 Resolution. In addition, participation agreements entered prior to the reorganization with the transferring board are deemed to have been entered into with the continuing board.

STATUS OF PARTICIPATION AGREEMENTS DURING STRIKE OR LOCKOUT

It is common ground that a collective agreement terminates upon a legal strike or lockout. That is not to say the employment relationship is terminated but that the terms and conditions of employment contained in the expired collective agreement have no further application.

I also accept that in the normal course a strike or lockout will result in the termination of the employers' obligation to pay wages and benefits (*Western Forest Products v. USW Coastal Locals*, [2008] B.C.C.A.A.A. No. 159, adopting *Crown Life and OTEU*, BCLRB No. 52/81 at page 10).

However, as noted in *Crown Life and OTEU*, it is entirely possible a cut-off of premium or benefit coverage would constitute a violation of some contractual relationship between the parties. Arbitrator Lanyon states at page 11 of *Western Forest Products v USW*, that if there is no obligation at law or under the collective agreement to the payment of premiums, the payment and recovery of premiums must then be a matter of either a collateral contract or statute.

As noted above I have concluded that the Plan No.1 '93 Resolution and the Plan No. 2 '93 Resolution have not been revoked and therefor presently form part of the benefit package under the Plan. Thus the remaining question to be answered is whether or not, based on an interpretation of the Plan documents, the obligations created thereby survive a strike or lockout under the participation agreement and Trust Agreement, being a "collateral contract" of the sort referenced in *Western Forest Products v USW* supra.

Counsel for the Employer Trustees refers to the definitions of "Participating Employer", "Participation Agreement" and "Contributions" in the Trust Agreement.

The definition of Participating Employer specifies that a Participating Employer must be a party to both a collective agreement and a Participation Agreement. The terms of the Participation Agreement (section 7) states that it remains in effect as long as any Union member is employed and any collective agreement with the Union remains in effect. Counsel for the Employer Trustees argues that since a strike ends the collective agreement, the Participating Employer status must end as well. Hence, the employer cannot be bound by the Trust Agreement via its Participation Agreement.

Counsel for the Employer Trustees also points to the definition of "Contributions" in the Trust Agreement as being such sums of money as the Trustees shall, from time to time, determine must be paid by a Participating Employer. On this argument, since Participating Employer status ends with the end of the collective agreement, "Contributions" cannot include premium payments during a strike or lockout.

Counsel for the Union Trustees points to section 8.1(a) (iii) of the Plan text to illustrate that Participating Employer status survives a strike or lockout. The section provides that:

“where for any reason other than a strike or lockout a Participating Employer ceases to be a party to a Collective Agreement, the Participating Employer shall cease to participate in the Plan as of the date of such cessation”

On a reading of the Trust Agreement definitions of Contributions, Participating Employer and Participation Agreement in isolation, the argument put forward by counsel for the Employer Trustees has some logic. However, section 8.1(a) (iii) of the Plan text suggests that Participating Employer status does not terminate due to a strike or lockout. On the face of the documentation the two positions are not reconcilable. Accordingly rules of interpretation must be referenced to reach a conclusion.

Counsel for the Union Trustees submitted case law outlining appropriate rules of interpretation. The cases indicate:

- Plain meaning of words should be given effect unless that leads to unrealistic or unreasonable results.
- Interpretation of contract language must consider the full purpose and context of the agreement giving rise to avoid unduly restrictive interpretation.
- The whole documentation should be considered to determine the true intent of the parties.
- Evidence of factual background and setting at the time the agreement was entered may be considered even in the absence of ambiguity.
- In cases of ambiguity the circumstances in which the agreement was made and the subsequent actions and representations of the parties may be examined.

Purpose and Context

IWA-Forest Industry Pension Plan (Trustees of) v. Aspen Planers Ltd. [2006] B.C.J. No. 1523 is a good example of the court looking beyond what it considered an unduly narrow interpretation of a defined term in a plan document. The case involved audit rights by plan trustees of employer records relating to “Eligible Employees” which was a defined term in the agreement. The court gave a broad interpretation to the wording based on the full purpose and context of the agreement and allowed the audit to cover documents to determine all questions of coverage and eligibility in keeping with the mandate of the trustees of the plan, not just those related to Eligible Employees.

The genesis of the Plan is found in the 1961-1962 Master Agreement (Tab 2) and provides context relevant to the issues raised by this third party referral.

In typical fashion the parties to that collective agreement agreed upon some very basic principles governing the new health and welfare plan including the establishment of a board of 4 trustees, 2 appointed by each side, to be responsible for “the placement and administration of the plan”.

Pursuant to the collective agreement the bargaining parties entered a trust agreement concerning such matters as the governance structure of the plan and the powers and duties of the trustees.

In this instance the voting structure of the Board is such that all decisions require the unanimous agreement of the Union Trustees and the Employer Trustees. Section 3.3 of the Trust Agreement vests in the Trustees power "to adopt and to operate the Plan in conformity with the Trust Agreement" with power to "change, modify or amend the terms and provisions of the Plan...provided that any such change, modification or amendment shall be consistent with the terms of the Trust Agreement and the appropriate Collective Agreement." Further, to provide the benefits contemplated by the Plan, the Trustees have the power "in their sole and absolute discretion to enter into such contracts or arrangements, to procure such policies, undertakings or agreements and to do such other things as the Trustees shall consider appropriate and reasonable in the circumstances". Section 3.3 concludes by stating nothing contained therein "shall enable the Trustees to amend or otherwise affect any Collective Agreement".

In short, the Trustees have broad discretion to set the terms of the Plan subject to the Trust Agreement and any applicable collective agreement.

In terms of factual background and setting, the Plan No. 1 '93 and Plan No. 2 '93 Resolutions were passed on the heels of section 62 of the Labour Code being introduced. In the forest industry, as reflected in the 1986 Agreement, there was a clear accord between management and the union that the termination of health and welfare benefits during a strike or lockout would not occur. This had been the case during earlier strikes as well. Seemingly, both sides agreed that the economic pressure put on the employees during a strike or lockout should not include the termination of coverage for health and welfare benefits and that the employers would front the expense of continuing coverage for the duration of the labour dispute. The latter aspect of this accord departs from Section 62 of the Labour Code which leaves it to the union to front the cost of benefit coverage during a labour dispute. The forest industry could have, but did not, simply rely on section 62 to protect health and welfare benefits but augmented the concept of benefit continuation with employer financing.

In my view this benefit continuation arrangement is consistent with the overall purpose of the Plan as per section 3.2 of the Trust Agreement which is to provide "various kinds of health and welfare benefits...as the Trustees may, from time to time, determine for Plan Members". I also do not think this benefit continuation arrangement runs contrary to any collective agreement since it only has application upon the expiration of a collective agreement.

The intent to maintain the Plan continuously through successive strikes and lockouts seems clear. Section 10 of the Trust Agreement prescribes when the trusts **and the Plan** shall be terminated by the Trustees. Of course, being a product of collective bargaining, the Union and FIR may direct that a termination occur. Also, a transfer of all assets and liabilities to another trust can result in termination. The only other event terminating the trusts and Plan is set out in section 10.1 (b) of the Trust Agreement which reads as follows:

at any time when the Trustees reasonably conclude that all Contributions have been discontinued and are not likely to be resumed within the foreseeable future.

In the normal course a strike or lockout would not seem to me to be a basis upon which the Trustees could reasonably conclude Contributions are not likely to be resumed. The period between collective agreements has been described as a vacuum (see *Western Forest Products v USW* supra pg. 13) but it does not end the employment relationship. The underlying thread holding the Plan together through a strike or lockout is the continued employment relationship and the expectation that a new collective agreement will be reached.

In this regard I note section 3.5 of the Plan text which provides that an individual Member's coverage terminates with the termination of the employment relationship:

"a Member's coverage under the Plan for Accidental Death and Dismemberment, Life Insurance and Weekly Indemnity Benefits shall terminate as of 11:59 PM on the day on which the Member's employment relationship with his Participating Employer is terminated, or otherwise ceases to be an Eligible Employee."

The definition of "Eligible Employee" in the Plan text suggests that the status of Eligible Employee is based on the employment relationship. That section reads as follows:

"...a person who is employed by a Participating Employer as a regular full-time or part-time employee within a bargaining unit that is a party to a Collective Agreement..."

I would also refer back to the definition of "Contributions" in section 1.3 of the Trust Agreement (Tab 1). The definition extends to "any and all sums of money as the Trustees shall, from time to time, determine must be paid by a Participating Employer on account of his employees who are qualified as Plan Members". The term "Plan Member" is also defined by the Trust Agreement (section 1.9) and is "any member of the Union employed by a Participating Employer".

Conduct of the Parties

Taking the Employer Trustees' argument to its natural conclusion, the Trustees were never in a position to bind employers during a strike or lockout. Yet, up until 2007 all concerned acted as though the Plan No.1 '93 and Plan No. 2 '93 Resolutions were in effect, thus evidencing the intent to preserve Participating Employer status during a strike or lockout.

Unrealistic or Unreasonable Outcome

The Employer Trustees' argument would also suggest that upon a strike or lockout, Eligible Employee status would end because the employees are no longer employed by a Participating Employer since there is no Collective Agreement. This result is not something I believe is within the contemplation of the parties. Surely every member need not reenroll in the Plan at the end of a strike or lockout.

Similarly, given that the employment relationship persists during a strike or lockout, no one could reasonably expect that new participation agreements would be required at the end of every strike or lockout. This would be an unrealistic and unreasonable outcome.

During submissions it was suggested that participation agreements are suspended during a strike or lockout. I find this runs contrary to the main argument that the participation agreements end following the termination of the collective agreement. These agreements either are in effect or they are terminated. In my view they remain in effect during a strike or lockout.

I am of the opinion that participation agreements remain in effect through a strike or lockout, albeit in anticipation of a new collective agreement being negotiated.

In my opinion the interpretation of the Trust Agreement and Participation Agreements put forward by counsel for the Employer Trustees to the effect that Participating Employer status terminates and Participation Agreements come to an end upon a strike or lockout is not in keeping with the Plan documents and the intent of the parties as evidenced by:

- The definitions of Eligible Employee and sections 3.5 and 8.1(a)(iii) of the Plan text,
- section 10 (1) (b) of the Trust Agreement regarding the trust and Plan termination,
- the purpose of and context within which the Plan operates,
- the unreasonable and unrealistic consequence which would follow should Participating Employer and Eligible Employee status end with a strike or lockout, and
- the actions of FIR, the Union and the Trustees following the adoption of the Plan No. 1 and Plan No. 2 Resolutions.

Accordingly, my answers to the four questions posed to me are as follows:

1. Are plan members who are engaged in a lawful strike covered under the Plan during the duration of that lawful strike on the basis set out in the April 1, 1993 Trustees' Resolution?

The answer must be given in two parts.

Yes, but in respect of members who are employed by an employer who is a FIR member company as per the Plan No. 1 '93 Resolution only as long as section 62 of the Labour Code is in force.

Yes, but in respect of members who are employed by an independent employer only if there is an agreement between the employer and local union that benefits will continue as per the Plan No. 2 '93 Resolution.

2. If the answer to the first question is yes, can the Trustees compel the employers of plan members who are engaged in a lawful strike to pay for those members' coverage under the Plan on the basis that, as set out in April 1, 1993 Trustees' Resolution, the affected plan members will repay the employers after the strike?

Yes, as and when the employees of the employer are covered as set out in answer 1 above.

3. If the answer to each of the first two questions is yes, are the Trustees compelled to initiate collection proceedings against any employer who fails to maintain its striking employees' coverage under the Plan in accordance with the April 1, 1993 Trustees' Resolution?

The Board has a general obligation to collect delinquent contributions. How and when the Trustees exercise the available collection options under the Trust Agreement and participation agreement is a matter of discretion. Ideally the Board actions will be guided by a delinquency policy approved by the Board.

Counsel for the Union Trustees submitted authority for the proposition that Trustees must act exclusively in the best interests of the beneficiaries of the trust. There can be no disputing that proposition. I would note however that the effect of trustee decisions on the employer is an appropriate consideration as per the English Court of Appeal in *Edge v Pension Ombudsman*, 2000, 3 WLR 79. Here a joint board of trustees of a multi-employer plan was criticised for applying a portion of pension surplus to reducing employer contributions. In the circumstances the court found it was within the discretion of the trustees to do so stating at page 100:

They must, for example, always have in mind the main purpose of the scheme-to provide retirement and other benefits for employees of the participating employers. They must consider the effect that any course which they are minded to take will have on the financial ability of the employers to make the contributions which that course will entail...The main purpose of the scheme is not served by setting contributions and benefits at levels which deter employees from joining; or which cause resentment.

4. If an employer pays benefit premiums for an employee who is on strike, can the employer recover those premiums from the employee after the strike?

Yes. The collective agreement provides that participation in the Plan is a condition of employment. The terms of the Plan are binding on employers and employees. For instance, employees are bound to reimburse the Plan under Appendix A of the Plan text from a third party recovery.

Similarly, employees are bound to reimburse their employer for the cost of benefit coverage paid during the strike or lockout once the strike or lockout ends. This is recoverable in debt.

Whether repaid by payroll deduction or not, the obligation remains. In a sense, payroll deduction to reimburse employer paid premiums is authorized by the collective agreement in that participation in the plan is a condition of employment. I note section 22 of the Employment Standards Act which requires an employer to honour an assignment of wages authorized by a collective agreement.


Shawn Hatch