Canada Industrial Relations Board Conseil canadien des relations industrielles

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Our Files: 032511-C; 032755-C; 032970-C; 033316-C

Document No.: 0600939-D

July 26, 2021

BY WEB PORTAL

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Dear Sirs:

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 Local Union No. 213 of the International Brotherhood of Electrical Workers, complainant, alleging violation of sections 50(a), 50(b), 94(1), 94(3) and 96 of the *Code* by LTS Solutions Ltd., and LTS OSP Services Limited, respondents. (032511-C)

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 Local Union No. 213 of the International Brotherhood of Electrical Workers, complainant, alleging violation of sections 50(b), 94(1), 94(3) and 96 of the *Code* by LTS Solutions Ltd., respondent. (032755-C)

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 Local Union No. 213 of the International Brotherhood of Electrical Workers, complainant, alleging violation of sections 50(b), 94(1), 94(3), and 96 of the *Code* by LTS Solutions Ltd., respondent. (032970-C)

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 Local Union No. 213 of the International Brotherhood of Electrical Workers, complainant, alleging violation of sections 94(1), 94(3) and 96 of the *Code* by LTS Solutions Ltd., respondent. (033316-C)

Further to the hearing held in the above-noted matters, the parties will find enclosed the Reasons for decision issued by a panel of the Canada Industrial Relations Board (the Board) composed of Mr. Paul Love, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code*.

To comply with section 20 of the *Official Languages Act*, the Reasons will be translated and published on the Board's website at www.cirb-ccri.gc.ca. A copy may be obtained upon written request to the undersigned.

Sincerely,

Justine Abel
Director, Case Management
Services (Registrar)

Encl.

c.c.: Ms. Lindsay Foley (CIRB–Vancouver)
ESDC–Labour Program (By Web Portal)

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Reasons for decision

Local Union No. 213 of the International Brotherhood of Electrical Workers,

complainant,

and

LTS Solutions Ltd.; LTS OSP Services Limited,

respondents.

Board File: 032511-C

Local Union No. 213 of the International Brotherhood of Electrical Workers,

complainant,

and

LTS Solutions Ltd.,

respondent.

Board Files: 032755-C; 032970-C; 033316-C
Neutral Citation: 2021 CIRB **982**
July 26, 2021

The panel of the Canada Industrial Relations Board (the Board) was composed of Mr. Paul Love, Vice-Chairperson, and Messrs. Gaétan Ménard and André Lecavalier, Members. A hearing was held in person on February 12, 13 and 14, 2020. Following the incapacity of Mr. Lecavalier, these matters were reassigned to the Vice-Chairperson, sitting alone, pursuant to section 14.1 of the *Canada Labour Code* (the *Code*).

Appearances

Mr. Brandon Quinn, for the Local Union No. 213 of the International Brotherhood of Electrical Workers;

Mr. Peter A. Gall, Q.C., and Ms. Melanie Vipond, for LTS Solutions Ltd. and LTS OSP Services Limited.

These reasons for decision were written by Mr. Paul Love, Vice-Chairperson.

[1] The Board notes that because of COVID-19, there was a rescheduling of additional hearing dates from April 2020 to October 2020. The hearing resumed by videoconference on October 13, 14, 15, 26, 27, 28 and 30, 2020, and subsequent dates were added on November 9, 10, 12, 13, 16, 17, 20, 24, 25 and 28 and December 14, 2020, and on January 13 and 14, 2021. During the hearing, the Board heard testimony from Mr. Daniel Geheran, Regional Vice-President–Operations Support and Business Improvement, on behalf of the employer; and from Mr. Dan Amos, former drops technician and team lead; Mr. Robin Nedila, Assistant Business Manager; and four former business field services (BFS) technicians, Mr. Chad Escott, Mr. Matthew Arsenault, Mr. Matthew Gill and Mr. Michael Gill, on behalf of the union.

[2] There were many pages of exhibits, and the parties also provided voluminous written arguments. On the dates scheduled for oral argument, the employer provided a voluminous written submission. The parties agreed to continue with oral submissions as scheduled, and the Board accorded the union the right to make additional written submissions given the voluminous nature of the employer's written submission. On January 22, 2021, the union advised the Board that it did not wish to make further submissions. The employer provided a final written reply to the union's arguments.

I. Nature of the Complaints

[3] On August 31, 2017, the Board issued order no. 11171-U, certifying the Local Union No. 213 of the International Brotherhood of Electrical Workers (IBEW or the union) as the bargaining agent for a unit comprising all technical field employees employed by LTS Solutions Ltd. (LTS or the employer) in British Columbia, excluding office, sales, warehouse and casual employees, and supervisors.

[4] On September 6, 2017, the union gave a notice to bargain to the employer. The parties held their first formal bargaining sessions on November 8 and 9, 2017. At those sessions, an issue emerged as to the scope of employees covered by the certification (the scope issue).

[5] The parties have not yet reached a collective agreement (CA). The union has been on strike since September 2019.

A. Nature of the Work

[6] It is important to understand the nature of the work performed by LTS and by each type of technician within the bargaining unit. This was set out in the Board's decision on the scope issue, rendered on January 25, 2019 (*LTS Solutions Ltd.*, 2019 CIRB 896 (the scope decision)).

[7] LTS is part of the Ledcor group of companies. It is a construction company that engages in the designing and building of fibre-optic networks. It does not own or operate the infrastructure. It also provides technicians to service networks owned by different telecommunications companies, such as TELUS, Rogers Communications (Rogers) and Bell Canada (Bell), which includes providing services to individual customers and businesses who are the downstream users of those networks.

[8] LTS is a labour supply company that is primarily connected to TELUS, although it clearly has other customers as well.

[9] Non-bargaining-unit construction-side employees are involved in building the network. That can include the work of linemen, fusion splicers (splicers) and other employees on the core infrastructure side of LTS or subcontractors.

[10] The drops technician connects a cable from a network access point (NAP) outside the home, for example on a pole or underground access point, to a home or business. In larger, multi-unit buildings such as apartments, condos or offices, the fibre-optic technician–inside wiring (referred to as an MXU technician) installs a fibre distribution hub inside in the communications room of the building, installs an intermediate distribution hub on each floor, runs the cable through duct work and uses Invisilight—a clear, gel-like substance—along the junction between the ceiling and walls to complete the fibre path to each suite. It is a complicated task, and a crew of four would typically spend a whole week completing this task in a building.

[11] The work of a drops technician differs from that of an MXU technician in that a drops technician only connects one strand of fibre from the NAP to the home and this connection takes about 45 minutes, unless the work is complicated by factors such as garden suites or multiple suites within the building or disruption of the underground service by collapsed or blocked conduits. The MXU work is more complex.

[12] The installation and repair (I&R) technicians and BFS technicians run the cable from a NAP on the outside edge of the home by putting a plug or socket on a single strand of fibre on the edge of the home and run a cable inside the home to the router or gateway. The I&R and BFS technicians commission the service, test the service and demonstrate that the installed products, such as internet, television, telephone or alarm systems, work. This work is performed on a live network and can involve minor repairs or replacement of components.

[13] BFS technicians also provide services such as fixing breaks in the fibre-optic trunk line by fusion welding (break fix), locating underground services prior to someone else disturbing the surface (locates) and performing installations and repairs inside above- or below-ground shelters. Some of this work for certain companies such as Bell or Rogers is provided in remote locations in British Columbia, Alberta and in other provinces.

[14] Sometimes the I&R or BFS technician will perform the drop if this is needed and sometimes the drops technician will perform it.

[15] In the spring of 2017, the IBEW began its organizing drive at LTS.

[16] On August 28, 2017, during the certification process, the union filed an unfair labour practice (ULP) complaint with the Board (Board file no. 032266-C). It is unnecessary to set out the details of that complaint as the union applied on September 1, 2017, to withdraw it once the Board granted a certification order. On September 14, 2017, the Board ordered that this file be closed. Although this complaint was referred to in this matter by both parties, the Board puts no weight on the unproven and unadjudicated allegations.

[17] At the time of the certification application, the LTS workforce was at a peak because LTS was heavily involved in Project Falcon, which involved designing and building a fibre-optic network for

TELUS, replacing TELUS's copper wire network. Project Falcon started in 2015, and the work was expected to last five to seven years.

[18] LTS was a Project Falcon contractor for TELUS in the lower mainland area of British Columbia. There was other Project Falcon work in other parts of British Columbia and Alberta. LTS's work for Project Falcon also involved connecting customers to the new fibre network, as well as sales of new products.

[19] Prior to Project Falcon, LTS also carried on other work in British Columbia and other parts of Canada. The peak work for Project Falcon in the lower mainland was in 2017, around the time of certification. LTS anticipated that the workload would decrease in 2018 as the project was nearing its end. Mr. Geheran further testified that fibre networks are more reliable than copper networks, so this would result in less work for I&R technicians, who had worked on copper networks in the past. Further, LTS anticipated that the work for the I&R group would decrease.

[20] Prior to Project Falcon, LTS was involved in mass-market work in British Columbia for TELUS. Mass-market work can simply be described as the sale, installation and repair of consumer-oriented telecommunications products, such as telephone-based internet, television and alarm systems. The Board understands from Mr. Geheran's evidence that the mass market is "saturated," with the largest telecommunications companies trying to out-market each other for the same consumer-oriented work. Mr. Geheran quaintly described this as telecommunications companies "eating each other's lunch."

[21] Much of the bargaining unit work is work that LTS provides under contract to TELUS. In 2005, there was a lengthy strike at TELUS, referred to by the parties as "The Event" (the event). The TELUS CA resulting from this work stoppage eliminated all the restrictions on TELUS's ability to contract out work, or its obligation to use solely union contractors when contracting out work. As a result, TELUS has contracted out work to other contractors, primarily non-unionized contractors, under highly competitive terms. TELUS sets the terms and conditions. LTS is one of a small number of contractors who work with TELUS—in the range of 6 to 12. LTS commenced its relationship of providing I&R services to TELUS following the event.

[22] As described by Mr. Geheran, the residential I&R work is low-barrier work in the sense that it does not require a technician to have a journeyman certification. The skills can be easily learned. LTS hires experienced people and has limited training—reviewing standard operating procedures, doing ride-alongs and receiving some product-specific training. The capital cost of entry into this business for contractors is relatively low. According to Mr. Geheran, TELUS uses contractors—such as LTS—rather than its own employees where it is efficient to do so.

[23] Mr. Geheran testified that consumers are largely looking for convenience; they do not want to wait around all day for a technician to appear at an uncertain time. Many of the consumers are looking for installations at a time convenient to them, which might be in the morning, in the evening or on a weekend, or some attendance certainty within a short time window.

[24] Mr. Geheran testified that although LTS has a contract with TELUS, TELUS constantly seeks reductions in costs and efficiencies from all its contractors. LTS's strategy to cope with its TELUS contract is one of flexibility.

[25] Mr. Geheran testified that there is no guaranteed volume of work with TELUS. The work is based on forecasts, and, while LTS is required to maintain the capacity to deliver the forecasted amount of work, TELUS has no obligation to assign the forecasted volume to LTS. According to Mr. Geheran, this is an underlying driver of the need to have a flexible workforce strategy and for LTS to maintain control over who it hires and the right-sizing of its employee complement.

[26] Initially, when LTS began its I&R work with TELUS in 2008, it was paid on an hourly rate; however, this quickly changed to a piece-rate system. The contract between TELUS and LTS provides for payment on a piece-rate basis for LTS's I&R work. In turn, LTS pays its I&R technicians on a piece-rate basis—30 percent of the amount it is paid by TELUS. The evidence from Mr. Geheran is that the income of the I&R technicians is uncapped; they have at least one technician who is earning over $200,000 per year. According to the unchallenged evidence of Mr. Geheran, the average salary of an I&R technician exceeds $72,500 per year.

[27] LTS pays its other technicians based on an hourly rate. For some of the work, there is a "bucket of hours," which is a forecasted amount of work.

B. A Clash of Ideologies

[28] In British Columbia, the IBEW has had a lengthy presence in the telecommunications industry, holding certifications for many CAs for which Shaw Cablesystems (Shaw) is the employer.

[29] An example of this is the Cable Contractors Standard and Project Labour Agreement (August 10, 2015, to August 9, 2020), signed by the IBEW with several cable contractors (cable contractors' agreement). This agreement provides for union recognition, for a bar on the use of non-union workers (Article 2.03), for a bar on contracting out unless it is to a contractor with an IBEW certification, that the union may discipline its members (Article 2.05), for a prohibition on contracting out bargaining unit work (Article 2.09(b)) and for labour to be supplied through a union hiring hall (Article 4.0).

[30] The cable contractors' agreement is a closed-shop agreement, which means that the employees must remain members of the union in good standing to remain employees of an employer. The union can call on the employer to terminate an employee who is not in good standing. Employees are generally paid based on an hourly rate with those terms set out in the CA. Many of these CAs in the lower mainland of British Columbia have existed since the 1960s with limited use of unionized subcontractors.

[31] Prior to the certification of this bargaining unit, LTS had minimal exposure to trade unions that advanced closed-shop provisions during collective bargaining. This is standard in many CAs. The closed shop is not mandated by the *Code*; it can be negotiated and agreed to by the parties. The very few Ledcor CAs based on an open-shop arrangement are with either the Christian Labour Association of Canada (CLAC), the Carpenters' Union or the Labourers International Union of North America.

[32] An example of such an open-shop agreement in the Ledcor group is a CA between LTS OSP Services Limited and the Construction and Allied Workers Union, CLAC Local 68 (expiry date September 9, 2022). This is the company whose labour relations are under provincial jurisdiction, to whom LTS transferred the linemen and splicers it employed at the time of certification. This is an open-shop agreement with no requirement for union membership (Article 7.02). There is no union hiring hall. The wage schedules applicable to job descriptions are set out as a schedule to

the CA and the wage rates are based on hourly rates, not piece rates. There is a provision that the parties will meet and agree on a wage scale applicable to a project prior to its commencement (Article 10.02). The CA also sets out a normal work week of 40 hours per week (Article 11.01).

[33] LTS's position in this regard was summarized at paragraph 74 of its closing argument:

> 74. The problem, in a nutshell, is that the open shop TELUS world requires a different business model than the closed shop Shaw world, and, therefore a different type of collective agreement—one that reflects not only the extremely competitive nature of the open shop world, but also how quickly the needs and demands of this marketplace can change. Hence, as LTS repeatedly stressed to the IBEW, a collective agreement in the TELUS open shop world has to control costs, promote productivity and provide for the ability to flexibly respond to ever changing customer needs and demands. **In other words, the collective agreement had to be based on LTS's existing business model, in which employees are highly paid for being productive, receive good benefits, and the company can chose [*sic*] the best candidates for its jobs and is able to freely utilize subcontractors to carry out the work.**
>
> (emphasis added)

C. Summary of the Complaints

[34] The union has filed a number of ULP complaints with the Board since giving its notice to bargain on September 6, 2017. These complaints are summarized in the table below.

File Number	**Complaint Date**	***Code* Sections Allegedly Violated by the Employer**
032511-C	March 9, 2018	36, 50(a), 50(b), 94(1), 94(3) and 96: • Allegation that the employer refused to recognize the IBEW's bargaining rights with respect to drops and MXU technicians; • Allegation that the terms and conditions of drops and MXU technicians in relation to shifts and parking were altered.

032755-C	September 11, 2018	50(b), 94(1), 94(3) and 96: • Allegations pertaining to contracting out and the layoff of four BFS employees.
032970-C	March 11, 2019	50(b), 94(1), 94(3) and 96: • Allegations relating to the continued reduction of the size of the bargaining unit from 238 to 161 members, the reduction of drops technicians from 25 to 6 and the elimination of the drops team days after the Board issued the scope decision.
033316-C	October 18, 2019	94(1), 94(3) and 96: • Allegation relating to the employer's layoff of 31 I&R employees while continuing to use subcontractors.

D. Summary of the Parties' Positions

1. The Union's Position

[35] The union's basic position is that the employer's conduct in bargaining over the course of the relationship shows anti-union animus supporting its ULP complaints. In particular, the union argues that anti-union animus arises from the following:

- the employer took the position at the outset of bargaining that drops and MXU technicians were not within the scope of the bargaining unit;
- various actions the employer took were suspicious in nature;
- the employer did not make a substantive response on monetary proposals for two years and then offered no wage rate;
- while initially productive, bargaining did not progress because of proposals that the employer knew or ought to have known would not be acceptable; and

- when the union showed a willingness to move, the employer would not bargain.

[36] The union seeks declarations that the employer violated the *Code* and various remedies, including a cease and desist order and publication of the decision in the workplace.

2. The Employer's Position

[37] The employer's view is that the Board needs the full picture of the dealings between it and the union in order to assess the union's claims of anti-union animus. The employer states that the union engaged in exaggerated, untrue and misleading conduct with its members and the employer during collective bargaining and the strike. The employer's position is that all of its actions were simply business as before. It submits that the Board should dismiss these complaints.

E. Summary of Decision

[38] The law is well known in this area, and the parties seem to have little dispute on the applicable law. There is, however, a substantial factual dispute.

[39] The Board notes that it reviewed the voluminous written submissions of the parties. It has briefly summarized the arguments but has not recited the more than 300 pages of written argument.

[40] The Board notes that regardless of the burden of proof, the employer has presented a strong case for its impugned conduct being business as before, without anti-union animus.

[41] On the whole of the evidence, the Board accepts that, for the most part, the employer has established that its actions were based on business as before and were untainted by anti-union animus.

[42] The Board, however, finds that the employer refused to recognize the union's representational rights with respect to drops and MXU technicians for the period of November 7, 2017, to January 25, 2019, the date on which the Board issued the scope decision resolving an issue about the scope of the bargaining unit. At all material times, drops and MXU technicians were part of the bargaining unit, and the employer's actions are therefore a violation of sections 50(a) and 94(1) of

the *Code*. The parties agreed to put negotiations on hold until this issue was resolved, and there was therefore some impact on collective bargaining.

[43] It is the Board's view, however, that it cannot find that anti-union animus was a factor in any of the decisions taken by the employer which form the basis of the ULP complaints. There has been limited bargaining activity since the summer of 2019.

II. Parallel Files and Procedural Rulings

A. The Scope Decision

[44] The bargaining proposals made by the union on November 7, 2017, included proposals for all field technicians, which it claimed included I&R technicians, BFS technicians, drops technicians, MXU technicians, linemen and splicers. The employer took the position that the certification included only employees on the customer premises side and did not include core infrastructure employees such as linemen and splicers. The employer also took the position that drops and MXU technicians were not included within the certification and that the union was attempting to expand the scope of the certification comprising employees on the customer premises side to include core infrastructure employees.

[45] On March 9, 2018, the union filed a complaint (Board file no. 032512-C) with the Board, which alleged that the employer had violated the *Code* in December 2017 by transferring linemen and splicers to LTS OSP Services Limited, another related employer in the Ledcor group of companies, which is certified to the CLAC by the British Columbia Labour Relations Board. As a result of case management meetings with the parties, the Board identified a common issue in the ULP complaints about the scope of the bargaining unit and held a hearing from November 13 to 16, 2018, on this issue.

[46] The Board issued the scope decision on January 25, 2019. This decision clarified that the bargaining unit consisted of all technicians employed on the customer premises side of LTS, including the I&R, BFS, drops and MXU classifications, but not linemen or splicers. The linemen and splicers are employed on the construction side of LTS and are not within the bargaining unit.

[47] As a result of the scope decision, the Board dismissed the ULP complaint in Board file no. 032512-C as linemen and splicers were not within the scope of the bargaining unit.

[48] As a result of the scope decision, the Board has partially dealt with the issues in Board file no. 032511-C. The remaining issues are outlined in the chart above.

B. Referral by the Minister Under Section 80 and Revocation Application

[49] The Board notes that it also has separate proceedings before it which include a section 80 referral from the Minister of Labour (the Minister) for the Board to settle the terms of a first CA between the parties (Board file no. 033606-C), as well as an application by Mr. Jordan Howell, an LTS employee, to revoke the union's certification (Board file no. 033912-C). Both files are being held in abeyance pending this decision.

[50] On September 25, 2020, the Board made a direction prior to the continuation of the hearing in October 2020 that the revocation application would not be consolidated with these ULP complaints.

[51] The existence of the related proceedings, as well as the approach taken by both parties, caused some difficulties at this hearing concerning the scope of the evidence that the parties wished to adduce in support of their respective positions.

C. Procedural Rulings

[52] During the course of the hearing, the Board made two rulings that limited the parties in the calling of evidence. These rulings substantially shortened the hearing, which had become a marathon.

[53] On October 12, 2020, the Board ruled that the employer was precluded from calling witnesses or adducing documents about the revocation issue. The employer had sought to tender voluminous documents and call witnesses (Mr. Peter Morrison and Mr. Howell) about the revocation process.

[54] On October 28, 2020, the Board also made a ruling that prohibited the parties from introducing bargaining evidence respecting events that had occurred after April 30, 2020. The Board made its

ruling in the context of an employer request to exclude bargaining discussions because of a privilege arising from the mediation process, facilitated by an industrial relations officer, mandated by the Board in the section 80 application.

[55] The union had sought to tender ongoing communications between the parties, including information about mediation processes that were mandated by the Board in the section 80 application. In that application, the Board directed the parties to meet with its industrial relations officer and engage in mediation.

[56] The Board did not rule on mediation privilege but ruled that any documents or oral testimony relating to events after April 30, 2020, were not relevant to the ULP complaints before it.

[57] The Board indicated that evidence relating to events that had occurred after April 30, 2020, was more relevant to the Board's intervention under section 80 and was not relevant to the events that had resulted in the filing of the ULP complaints in 2018 and 2019. The Board was conscious of the fact that the section 80 application has been referred to a panel and that it is for that panel to decide issues related to it.

[58] The Board notes that this ruling confined the union to lead evidence relating to events that had occurred before or on April 30, 2020. This period was longer than the employer claimed was relevant and shorter than the union wanted to lead evidence for as it claimed that it had made substantial concessions in bargaining after April 30, 2020.

[59] Whether the union made substantial concessions in bargaining after the Board's section 80 process commenced is a matter more relevant and better canvassed in the section 80 process.

[60] As a result of these rulings, the Board is unable to come to a final determination on the issue pressed by the employer that the union will not accept anything less than what is set out in its cable contractors' agreement, primarily with Shaw. Again, this is an issue better left to the section 80 process.

[61] It is clear from a review of the bargaining history that little progress was made between the parties after the union took its strike vote in August 2019.

D. Application by the Union to Consolidate and Start Again

[62] On November 2, 2020, the union made application to consolidate the ULP complaints with the section 80 referral from the Minister and for the new panel to start hearings afresh. On November 6, 2020, the employer filed a submission opposing consolidation. On November 9, 2020, Ms. Ginette Brazeau, Chairperson, exercised her authority not to reassign the panels in the following terms:

> … the hearing into the ULP complaints has commenced, evidence has been tendered and the proceeding is scheduled to continue from November 9 to 27, 2020. It is important that these matters proceed and conclude in a timely manner. A reassignment of panel and consolidation of those matters at this particular time would inevitably lead to a rescheduling of dates and further procedural challenges. It is unclear how this would result in more efficient and timely proceedings before the Board.

III. Legal Principles

[63] In light of all the various allegations, it is important to review at the outset the general legal principles applicable to the various *Code* violations that are common to these ULP complaints, since they will apply to each of the different complaints.

A. Section 50(b)–the Statutory Freeze Provision

[64] With respect to the statutory freeze, the relevant provision of the *Code* is set out in section 50(b), which reads as follows:

> **50** Where notice to bargain collectively has been given under this Part,
>
> …
>
> **(b)** the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraph 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

1. The Employer's Argument on the Statutory Freeze

[65] The employer states that the purpose of the statutory freeze is to protect bargaining rights, which prevents an employer from making changes to the terms and conditions of employment that could undermine collective bargaining.

[66] The employer argues that the statutory freeze period does not paralyze a business and prevent it from making necessary alterations to its practices or work force. The employer must be able to adapt to the changing nature of the business environment in which it operates (see *United Food and Commercial Workers, Local 503* v*. Wal-Mart Canada Corp*., 2014 SCC 45; [2014] 2 S.C.R. 323, at paragraph 56). This approach has been adopted by the Board (see *Swissport Canada Handling Inc.*, 2017 CIRB 863, at paragraph 58) and upheld by the Federal Court of Appeal (see *FedEx Freight Canada Corp.* v*. Teamsters Local Union No. 31*, 2017 FCA 78, at paragraphs 29–30).

[67] The employer submits that it has the right to manage its business so long as it continues to do so in the same pattern as before the statutory freeze. This can include making bona fide business decisions regarding terms of employment or staffing levels if they are the type of decisions that would be made by a reasonable employer under those circumstances or they reflect business as before (see *Northern Air Solutions Inc.*, 2016 CIRB 811, at paragraphs 129–130; and *Conseil des Innus de Pessamit*, 2017 CIRB 861, at paragraph 26). It is relevant to consider whether the changes commenced before the onset of the freeze or were part of the way the employer operated or reasonably could be expected to operate (see *Canadian Federal Pilots Association* v*. Canada (Attorney General)*, 2020 FCA 52, at paragraph 12).

[68] Layoffs due to economic conditions are unfortunate but can be part of the normal operation of a business (see *FedEx Freight Canada Corp.* v. *Teamsters Local Union No. 13*, *supra*, at paragraphs 29–30).

2. The Union's Argument on the Statutory Freeze (Section 50(b) of the *Code*)

[69] The union argues that the statutory freeze in section 50(b) of the *Code* is triggered when the union serves the notice to bargain. The union agrees that the Board must apply the "'business as before' test" in assessing whether LTS has violated the statutory freeze provision of the *Code* (see *D.H.L. International Express Limited*, 2001 CIRB 129, at paragraphs 92–93). It submits that the purpose of the freeze is to protect the integrity of the right of association and preserve the status quo in a business that is the object of an application for certification until a CA is reached. It prevents the employer from loading the dice in its favour before bargaining.

[70] The union submits that the Board looks at whether the employer is conducting its operations as it did before the freeze came into effect and that the employer's right to manage its business is maintained as long as it continues to do so in the same pattern (see *Northern Air Solutions Inc.*, *supra*, at paragraphs 129–30).

[71] The union states that the proof of improper employer intentions can assist in establishing that an action is inconsistent with the employer's past practices but is not necessary in order to establish a breach of the statutory freeze provision (see *BHP Billiton Diamonds Inc.*, 2006 CIRB 353). The Board can look to determine whether there is any anti-union animus motivating the change (see *Purolator Courier Ltd.* (1987), 71 di 189; and 87 CLLC 16,053 (CLRB no. 653)), but the union is not required to establish anti-union animus. The burden rests with the employer to show that its actions were not tainted by anti-union animus (see *Québec Aviation Limitée* (1985), 62 di 41 (CLRB no. 522), at page 58).

3. Legal Principles on Section 50(b)

[72] Section 50(b) of the *Code*, colloquially known as the "freeze provision," states that an employer cannot alter the terms and conditions of employment or any right or privilege enjoyed by the employees in the bargaining unit, including their rates of pay, until the conditions of sections 89(1)(a) to (e) of the *Code* have been met and the parties have acquired the right to strike or lockout.

[73] The purpose of the freeze provision at section 50(b) of the *Code* is to maintain the balance of power between the parties during their attempts to bargain collectively to reach a CA. In order to achieve this balance, the *Code* prohibits the employer from modifying the terms and conditions of employment and thus lessening the bargaining authority of the union in the eyes of its membership, unless the union consents to the changes (see *Canada Post Corporation*, 2016 CIRB 827).

[74] However, the freeze provision does not prevent all changes to the terms and conditions of employment. Instead, it imposes a regime of "business as before" such that the employer's right to manage its business is maintained as long as it continues to do so in a similar pattern as it did before the events that gave rise to the freeze (see *Northern Air Solutions Inc.*, *supra*). It is also

well established that it is not necessary to conclude that there were anti-union motives in order to find a violation of the freeze provision (see *Crosbie Offshore Services Limited* (1982), 51 di 120 (CLRB no. 399)). The Board will therefore look at whether the employer is conducting its operations in the same way it did before the statutory freeze took effect.

B. Section 94(1)–Interference With the Administration of the Union

[75] Section 94(1) of the *Code* reads in part as follows:

> **94 (1)** No employer or person acting on behalf of an employer shall
>
> **(a)** participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; …

1. The Employer's Argument on Section 94(1)

[76] The employer submits that section 94(1) prohibits interference with the formation or administration of a trade union or its representation of employees. There is a twofold purpose of section 94(1) of the *Code*:

[77] The first is the domination or attempted domination of the formation and administration of a trade union and the domination or attempted domination of the representation of employees by a trade union. The second is interference with the formation or administration of a trade union or interference with the representation of employees by a trade union Royal Bank of Canada (1980), 32 di (CLRB no. 279), page 164). (see *D.H.L. International Express Limited*, *supra*, citing *Canada Post Corporation* (1985), 63 di 136 (CLRB no. 544); and *Société Radio-Canada*, 2005 CIRB 308, at paragraph 61).

[78] The employer argues that section 94(1) does not shield the union from employer actions taken for legitimate business reasons or from any action the union considers contrary to the interests of its members. In the absence of anti-union animus, not every employer action that causes difficulty for the union can be redressed under section 94(1) (see *Canadian Broadcasting Corporation* (1990), 83 di 102, and 91 CLLC 16,007 (CLRB no. 839)).

[79] The employer submits that the Board must balance competing interests. The Board looks for a "sufficient or legitimate managerial, entrepreneurial, or collective bargaining justification" for the

employer's action (see *Canadian Broadcasting Corporation*, *supra*, cited in *Transport Besner Inc.*, 2004 CIRB 285, at paragraph 241).

[80] The employer states that in the absence of anti-union animus, action taken by the employer for the purpose of cutting costs is not a violation of section 94(1) of the *Code* (see *Servall Transport Limited et al.* (1991), 86 di 185, and 16 CLRBR (2d) 303 (CLRB no. 908)).

[81] The employer argues that the present case is like *Servall Transport Limited et al.*, *supra*, in that LTS has repeatedly informed the union of the financial realities of its business and the IBEW is not willing to negotiate a CA consistent with its business realities. The hardline and inflexible positions taken by the IBEW have had serious consequences, but that is part of collective bargaining.

[82] The employer argues that rarely will a case of contracting out be a violation of section 94(1)(a), where there is no anti-union animus, as labour costs and job security are at the core of what parties bargain about (see *Société Radio-Canada*, *supra*, at paragraphs 57–59; and *Bernshine Mobile Maintenance Ltd.* v. *Canada Labour Relations Board*, 1985 CanLII 3089; [1986] 1 F.C. 422 (F.C.A.), upholding the Board's decision, at page 95).

[83] The employer submits that it is entitled to review its operations, reorganize or shut down unprofitable activities, in the absence of proof of anti-union animus (see *American Cartage Agencies Ltd., Dragon Lady Express Ltd. and American Cartage Ltd.*, 2013 CIRB 684; and *Bell Canada*, 2009 CIRB 458).

[84] While the employer's action can have a significant impact on a union, if there are business reasons and no anti-union animus, an employer is not prohibited from making those changes. The employer states that all of the changes it made were justified by legitimate business considerations in light of the competitive business environment in which it operates.

[85] The employer submits that all the actions it took were for business reasons only and that they were not driven by anti-union animus.

[86] The employer further argues that the union bears the burden of establishing that there was an interference with its administration or representation of members and that it has not done so.

2. The Union's Argument on Section 94(1)

[87] The union notes that section 94(1) of the *Code* prohibits general interference with a trade union. The protection often goes hand in hand with the protection provided by the statutory freeze and provides protection for free collective bargaining and the settlement of disputes (see *D.H.L. International Express Limited*, *supra*). The Board takes an objective view of the employer's actions to determine whether it has interfered with the union in a way that violates section 94(1) (see *Canadian Broadcasting Corporation*, *supra*, at page 127).

[88] The union argues that the employer's actions in making the changes were motivated, at least in part, by anti-union animus.

3. The Employer's Reply Argument

[89] In its reply argument, the employer submits that it has done nothing to interfere with the union. It argues that any delegitimization of the IBEW was its own fault in trying to force a Shaw-style agreement on LTS.

4. Legal Principles on Section 94(1)

[90] Section 94(1) prohibits the employer from interfering in the formation or administration of a trade union or the representation of employees by the trade union.

[91] In *FedEx Freight Canada, Corp*., 2015 CIRB 770, the Board set out the main principles relevant to the analysis of a complaint alleging a violation of section 94(1), as follows:

> [41] …
>
> a. The legal onus of proof rests with the complainant;
>
> b. Not all acts that interfere with the formation or administration of a trade union or the representation of employees by a trade union will constitute a violation of this provision. The Board engages in a balancing of interests to determine whether a good faith action by the employer has the effect of interfering with the union's rights and obligations;
>
> c. It is not necessary that anti-union animus be proven to find a violation of this provision; and
>
> d. When anti-union animus is present, employer interference in the union's formation or administration or its representation of employees that might otherwise be permissible will be rendered unlawful.

[92] The purpose of this provision is to prevent conduct that undermines or interferes with the union, whether intended or not (see *Canada Post Corporation (544)*). If an employer did not intend to interfere with the representation of the union but it can be demonstrated that the conduct had this effect, the Board may find a violation of section 94(1) (see *669779 Ontario Limited O/A CSA Transportation*, 2018 CIRB 882).

[93] The onus is on the complainant to show that the employer's actions interfered with the union's administration or representation.

C. Section 94(3)–Anti-Union Animus and the Reverse Onus

[94] Sections 94(3) and 98(4) of the *Code* read in part as follows:

> **94 (3)** No employer or person acting on behalf of an employer shall
>
> **(a)** refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
>
> > **(i)** is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,
> >
> > …
>
> …
>
> **(e)** seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union…
>
> **98 (4)** Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such a failure actually occurred and, if any party to the complaint proceedings alleges that such a failure did not occur, the burden of proof is on that party.

1. The Employer's Argument on Section 94(3)

[95] The employer argues that section 94(3) of the *Code* does not apply to many of the union's allegations as there were no allegations tied to particular individuals or groups of individuals. When all bargaining unit members are affected by the employer's actions, the applicable section of the *Code* is 94(1)(a) and not 94(3) (see *Servall Transport Limited et al.*, *supra*; *Société Radio-Canada*,

supra; and Ronald M. Snyder in the *2017 Annotated Canada Labour Code* (Toronto: Thomson Reuters, 2017), at page 775).

[96] The employer submits that the union has made broad "kitchen sink" allegations that every employer action that is contrary to the interests of at least some bargaining unit members constitutes intimidation because employees assume that the employer made a decision because they joined a union. The allegations made in this case are vague allegations of indirect intimidation or anti-union animus.

[97] The employer states that the filing of a complaint under section 94(3), when it should only be considered under section 94(1), improperly shifts the burden of proof to the employer. The entire structure of the *Code* requires the union to prove its case unless the exceptional circumstances of section 94(3) apply. The union cannot be permitted to benefit from this approach simply by characterizing the issue as one under section 94(3) when it is in fact an issue that should be raised under section 94(1).

[98] The employer argues that the only allegation that is properly within the scope of section 94(3) is the union's allegation that the employer chose the BFS employees for layoff because it suspects that they are strong union supporters.

[99] The employer submits that section 94(3) does not apply to the allegations relating to contracting out work or reducing employment levels by attrition or erosion of the bargaining unit.

[100] The employer argues that intention is critical and that there can be no violation of sections 94(3) or 94(6) without a finding of anti-union animus. The reasons must be legitimate and not simply a pretext to cloak the true motivation of punishment, intimidation or coercion to discourage the exercise of rights.

[101] The employer submits that it is not obliged to establish that it has good, compelling, fair or reasonable justifications for its actions; the only issue is whether its actions were taken for reasons unrelated to anti-union animus (see *Dionne et al.* (1998), 107 di 29; 42 CLRBR (2d) 239; and 98 CLLC 220-053 (CLRB no. 1228), at page 34). The employer refers to a number of cases showing the application of this principle (see *Corbeil*, 2011 CIRB 603, at paragraphs 31–32 and 38–40; *Radio Atlantic (CKCL) Ltd.* (1993), 90 di 206 (CLRB no. 986); *Bunge of Canada Ltd.* (1994), 94 di

39 (CLRB no. 1063), at page 6 (QL); and *The British Columbia Corps of Commissionaires*, 2011 CIRB 586).

[102] The employer argues that where there is a legitimate business reason, there must be some substance to the union's allegation (see *Canada Post Corporation* (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426)).

2. The Union's Argument on Section 94(3)

[103] The union argues that section 94(3) is a prohibition on the various types of intimidation by an employer and that section 96 is a blanket prohibition on intimidation. When an employer acts out of anti-union animus, there is a violation of section 94(3), regardless of whether it also acts for other non-discriminatory reasons (see *Rousseau,* 2007 CIRB 393). In discharging a reverse onus, the employer must show that its actions were in no way motivated by anti-union animus (see *Conseil des Innus de Pessamit* v. *Michaud*, 2018 FCA 177).

[104] The union submits that employers are unlikely to admit to anti-union animus and that the Board must therefore consider the manner of the discharge, the credibility of witnesses, the employer's knowledge of the existence of union activity, previous anti-union conduct and other peculiarities (see *Plante*, 2011 CIRB 582, at paragraph 45, citing Justice George W. Adams, *Canadian Labour Law*, 2nd ed., Vol. 2 (Aurora: Canada Law Book, 2010), at paragraph 10:130).

[105] The union argues that in considering layoffs due to downsizing, there may be no direct evidence of anti-union animus but "tell-tale symptoms" that cry out for the Board to draw such an inference, such as union activity and knowledge by management, the timing of the layoff, the selection over other employees with less service and experience and the dredging up of excuses (see *Emery Worldwide* (1990), 79 di 150 (CLRB no. 775)).

[106] The union points out that there can be all-too-familiar patterns where the employer reacts spontaneously to the prospect of unionization of employees by discharging persons known or suspected to have joined the union (see *T.E. Quinn Truck Lines Ltd.* (1981), 45 di 254 (CLRB no. 339); *Road Runner Courier Service* (1979), 34 di 783; and [1979] 2 Can LRBR 20 (CLRB no. 181); and *A.G. Transport Ltd.*, 2008 CIRB 406, at paragraphs 37–39).

3. The Employer's Reply Argument

[107] The employer knows that the employees as a whole are members of the bargaining unit, but the employer may or may not know that an employee is an active union member or involved in organization.

[108] The union's authority in *Emery Worldwide*, *supra*, makes sense when dealing with whether the employer's decision about specific employees was driven by the employees' union activities.

[109] Timing is important. The employer states that if the mere fact of certification plus an impact on employees was sufficient to raise anti-union animus, it would never be able to disprove anti-union animus.

4. Legal Principles on Section 94(3)

[110] When a complaint alleges a violation of section 94(3), the employer bears the onus of demonstrating that its actions or decisions were not motivated in any way by anti-union animus and were solely based on legitimate business reasons (see *Larose-Paquette Autobus Inc.* (1990), 83 di 175 (CLRB no. 840)). The employer must prove, on a balance of probabilities, that its actions were not tainted by any anti-union animus.

[111] In *Echo Bay Mines Ltd.* (1995), 99 di 78 (CLRB no. 1140), the Canada Labour Relations Board, this Board's predecessor, summarized the main principles applicable to complaints filed under section 94(3)(a)(i) of the *Code* and explained that there is rarely direct evidence showing that an employer's conduct is motivated by anti-union animus. The employer can be found to be in breach of section 94(3) of the *Code* even if anti-union motives were not a proximate cause for employer action. In such cases, the Board will assess each complaint based on its own particular facts and circumstances and will be mindful of the fact that the objective in these types of ULP complaints is to ensure that the employees' right to collective representation and to access the collective bargaining framework is protected (see *669779 Ontario Limited O/A CSA Transportation*, *supra*). As such, any indication of anti-union animus in an employer's decisions or actions will taint the outcome and will be found to be a violation of section 94(3) of the *Code*. In complaints of this nature, the Board will take into consideration circumstantial evidence, including

any coincidence between the time of the union activities and the decision or actions giving rise to the complaint.

IV. Analysis and Decision

[112] For the reasons provided below, the Board finds that the employer's decisions to lay off bargaining unit members and to contract out bargaining unit work were not motivated by anti-union animus and were justified by legitimate business reasons. However, the Board finds that the employer violated sections 50(a) and 94(1) of the *Code* by refusing to recognize the union's bargaining rights for the drops and MXU employees.

[113] The union also argues that the employer violated section 96 of the *Code.* However, it does not provide any particulars with respect to this provision. Section 96 prohibits a person from seeking to compel, by intimidation or coercion, a person to become or refrain from becoming a member of a union. In the absence of particulars regarding allegations of intimidation or coercion, the Board dismisses this aspect of the complaints.

[114] There are several key issues that are common to almost all of the ULP complaints. In particular, the union alleges, among other things, that the contracting out of bargaining unit work and the layoff of bargaining unit members violated the statutory freeze provision at section 50(b) of the *Code* and constituted interference with its affairs, in violation of section 94(1) of the *Code*. In addition, each of the complaints raise violations of section 94(3) of the *Code*, which places the onus on the employer to demonstrate that its conduct was free from anti-union animus. The union has argued, among other things, that anti-union animus can be inferred from the employer's conduct during bargaining, when it refused to agree to a closed-shop CA in favour of preserving its ability to contract out.

[115] In the first ULP complaint, the union alleges, among other things, that the employer violated sections 50(a) and 94(1) of the *Code* by refusing to recognize the union's bargaining rights for the drops and MXU employees. It also argues that the employer altered the terms and conditions of these employees by changing their shift schedules and parking arrangements, in violation of the statutory freeze provision. In subsequent complaints, the union also argues that the employer

violated the *Code* and acted with anti-union animus when it laid off the drops and MXU employees, the BFS employees and the I&R employees.

[116] The Board will first address whether anti-union animus can be inferred from the employer's conduct during collective bargaining, specifically its insistence on preserving its ability to contract out. The Board will then address the more general allegations related to the employer's decision to contract out bargaining unit work. Lastly, the Board will deal with the specific complaints in relation to the three different groups of employees.

A. The Employer's Conduct During Collective Bargaining

[117] Both parties have asked the Board to draw inferences from the conduct of the other party at the bargaining table. The union asks that the Board draw an inference of anti-union animus. The employer asks that the Board find that the union was seeking to impose a closed-shop, cable contractors-style CA on it and was focused on organizing LTS to reduce the competitive advantage that TELUS had over Shaw to protect its cable contractor agreements.

[118] The Board notes, however, that it is not seized with a complaint against the union. Therefore, it would not be appropriate to make any findings regarding the union's conduct during collective bargaining in the context of this decision. In addition, save for a specific allegation regarding the drops and MXU employees, the union has not alleged that the employer's conduct during collective bargaining constitutes a breach of its obligation to bargain in good faith or to make a reasonable effort to reach a CA. The Board will address the specific allegation regarding the drops and MXU employees later in this decision.

[119] There are substantial issues at stake in this dispute. These are sophisticated parties. Like in many collective bargaining processes, each of the parties engaged in strategic negotiations.

[120] LTS calculates large costs arising from the union's collective bargaining proposals which are not offset by anything that permits it to compete more effectively with other TELUS contractors. That often is the reality; a CA imposes costs on the employer.

[121] The employer pursued a strategy of attempting to ensure that minimal changes were made to the way it operated prior to certification. This is dressed in the language of flexibility and cost neutrality.

1. Collective Bargaining Timelines

[122] It is important to set out some of the timelines and events around collective bargaining because it is the union's position that the Board can find anti-union animus supporting its ULP complaints from a review of the bargaining history. The employer says that no such anti-union animus can be inferred from the bargaining history.

[123] On September 6, 2017, the union's lawyer gave a notice to bargain to the employer by letter to the employer's lawyer. In correspondence with the union, Mr. Iain Morris, Chief Operating Officer, confirmed that the union should contact Mr. Jack Hoosen, VP Industrial Relations, and Mr. Dale Hildebrandt, Manager of Industrial Relations.

[124] On September 18, 2017, Mr. Nedila, Assistant Business Manager, phoned Mr. Hoosen to organize bargaining meetings. The parties agreed to a pre-bargaining meeting on October 16, 2017, and bargaining on November 7, 8 and 9, 2017. Mr. Hoosen asked if the IBEW had CAs with other employers. Mr. Hoosen wanted to consult one of the agreements to see what it meant for LTS.

[125] On October 16, 2017, Mr. Nedila and Mr. Adam Van Steinburg, Union Business Manager, met with Mr. Jimmy Bird, the President of LTS, and Mr. Morris at the union hall. Mr. Geheran was not present at the meeting.

[126] Mr. Nedila testified that at this meeting, there was some joking by IBEW representatives about TELUS being the bad guys and the union's long-term interest in organizing the entire sector of employers who provided contract services to TELUS. Mr. Geheran testified about a different version of the conversation, but he was not present for it; therefore, the Board prefers Mr. Nedila's testimony on this point.

[127] On November 7, 2017, during the first bargaining session, the employer was represented by Mr. Scott Boogemans, Senior Manager Industrial Relations, and Mr. Geheran. The union's

bargaining team was led by Mr. Nedila. The parties reached a bargaining protocol. The union provided a form of CA from which the parties conducted their bargaining.

[128] The opening remarks from both Mr. Boogemans and Mr. Geheran expressed the view that the market in which LTS operated was highly competitive and that there was a need for flexibility and reduced operating costs. Mr. Geheran expressed that LTS bought hours from its employees and sold them to clients. He expressed that there were at least 12 different contractors —providing the same services as LTS.

[129] Mr. Geheran testified that he had expected to hear what the employees wanted, but the union had instead delivered a full set of proposals with language that they had not seen before in a full draft CA. Based on Mr. Geheran's testimony, the employer's position was that this was an attempt by the union to force a Shaw-style CA on the employer.

[130] Mr. Nedila testified that he was asked by Mr. Hoosen to provide a copy of a CA that the union had used with another telecommunications employer so that LTS could determine whether this agreement suited its business needs. The union bargaining committee tweaked the cable contractors' agreement to ensure that there was input from the LTS employees; however, the form was largely based on this agreement.

[131] The Board prefers the evidence of Mr. Nedila over that of Mr. Geheran on the point of why the union provided a full offer in the form of a CA instead of simply articulating a list of what the employees wanted to change in the existing LTS terms and conditions of employment. Mr. Geheran has no first-hand knowledge on this point, as the initial communications leading to the union producing a full CA were the result of a request by Mr. Hoosen. Furthermore, there is no evidence that Mr. Geheran had any work experience bargaining with unions that advanced a traditional CA containing closed-shop and hiring hall provisions. The Board does not find it unusual for the union to provide a full set of proposals, particularly where it had a long history of organizing in the telecommunications industry and had CAs with TELUS competitors in the same geographic market area.

[132] The form of the CA provided by the union for use in negotiations contained a closed shop (Article 4.00–Union Security), labour provided through a union hiring hall (Article 4.01(c)), a

prohibition on contracting out work (Article 2.09(a)), hourly wage rates (Article 16–Wage Schedule), a classification through which employees could progress over time and a supervision structure for technicians (Article 7.0–Duties and Definitions of Employees). This was markedly different than the terms and conditions used by LTS with its employees prior to the certification.

[133] The parties worked off the form provided by the union as the employer was content with its existing terms and conditions and had no proposals to make. According to the testimony of both Mr. Nedila and Mr. Geheran, it was apparent that LTS was seeking to maintain the status quo.

[134] The bargaining notes reveal that on November 9, 2017, Mr. Boogemans provided an outline of the employer's position on the union's proposals. The overall theme was the employer's need for the status quo, on flexibility and costs, as it was in a highly competitive environment where TELUS drove the terms and conditions of the work and LTS was one of many suppliers of hours or services to TELUS.

[135] The parties made some progress in collective bargaining meetings on November 7, 8 and 9, 2017, and on January 23, 24 and 25, 2018.

[136] While LTS responded to the union's bargaining proposals and many clauses were agreed to, no agreement was reached on monetary items. Further, LTS did not tender a full written proposal until the late afternoon of September 17, 2018. There was a dispute between the parties as to whether they agreed to work on the easier items first or the non-monetary items first. In the Board's view, this is an irrelevant distinction, as most of the clauses agreed to had very little financial impact on LTS and were the easier items to negotiate. It strikes the Board that the parties spent a lengthy amount of time negotiating issues that were not particularly significant in comparison with the remaining outstanding issues.

[137] On March 9, 2018, the union filed its first ULP complaint (Board file no. 032511-C) and its second ULP complaint (Board file no. 032512-C). These complaints appear to have been precipitated primarily by the employer's transfer of linemen and splicers to another company in the Ledcor group which was certified to the CLAC under the British Columbia *Labour Code*. The Board notes that this specific complaint (Board file no. 032512-C) was dismissed in the scope decision.

[138] On March 12, 2018, Mr. Nedila and Mr. Boogemans agreed to put bargaining on hold until the Board issued its decision on the scope issue. The Board notes that while the Board offered early dates to the parties, the scheduling of the hearing had logistical issues as there were the schedules of the Board's panel, the schedules of the two main parties and the schedule of the CLAC and its counsel, who had been granted intervenor status on the limited matter of making submissions on the issue of federal or provincial jurisdiction related to Board file no. 032512-C (transferring the linemen and splicers to another Ledcor-affiliated company).

[139] On November 13 and 14, 2018, the Board held a hearing on the scope issue.

[140] On January 25, 2019, the Board issued its scope decision.

2. Bargaining Process After the Scope Decision

[141] On January 29, 2019, Mr. Nedila advised the union membership that the union had filed a notice of dispute and request for conciliation assistance with the Federal Mediation and Conciliation Service (FMCS).

[142] On February 7, 2019, the FMCS appointed Ms. Susan Fisher, an FMCS mediator, at the request of the union. Under the *Code*, if no extensions are made to the 60-day conciliation period, after a 21-day cooling-off period, the union may exercise its right to strike and the employer may exercise its right to lock out employees.

[143] On February 15, 2019, Mr. Morris wrote to Mr. Nedila, objecting to conciliation rather than direct bargaining. He also objected to the union not being available to meet with the conciliator for the first 52 days of a 60-day conciliation period. The Board notes that the tone of the letter was accusatory:

> You must have known you were too busy to meet with us and the Conciliation Officer when you filed for conciliation and therefore you must have known you would waste virtually all the available time. This concerns us. Why would you want to waste the opportunity for the conciliation officer to assist us?
>
> You have stated how committed you are to successfully negotiating a collective agreement, but your actions would suggest otherwise. How committed can you really be when you deliberately start the 60-day count down knowing you are not going to be available for the first 52 days. Are you purposely not giving the conciliation process a chance?

> Rather than being committed to negotiating you appear to be more focused on getting into a position to strike.

[144] The letter ended with the following comment:

> We have confirmed our availability for the 1st, 2nd, and 3rd day of April but doubt much progress will be made in the 3 days offered by you. As we have explained to you, multiple times, a collective agreement must be based on the essential facts of our business. Trying to force a boilerplate telecom company collective agreement on us is not going to protect and secure the employment of our employees. What you have proposed would make our business unviable.

[145] In his oral testimony, Mr. Nedila explained that scheduling conflicts made it difficult for the union to meet with the employer and the conciliator until towards the end of the conciliation period.

[146] The parties met with Ms. Fisher for further bargaining between April 1 and September 18, 2019. The parties worked through a union proposal that was based on its standard cable agreement. Some progress was made. The employer considered the union's proposal and tendered some counterproposals during bargaining.

[147] Although the union pressed it to do so, the employer did not make a monetary offer in writing on wages until September 17, 2019.

3. The Strike Vote

[148] On August 9, 2019, Mr. Geheran wrote a letter to Mr. Nedila, which reads in part as follows:

> … We can never accept your demands because it will put us out of business. …
>
> …
>
> We say all of this in the hope you will reconsider whether persuading our employees to go on strike is really in their best interests. We think our employees are much better served by you accepting that you will never be successful in representing employees in our industry without recognizing that their terms and conditions have to fit the actual nature of the industry—and not some other industry. Neither you nor we can change the nature of our industry. We have to accept it as it is—and work within those parameters. We hope you come to understand that before inflicting potentially irreparable harm on our business, and by extension, our employees.

[149] On August 13, 2019, Mr. Nedila gave a speech at the IBEW convention. The text of that speech reads in part as follows:

Hello Sisters and Brothers, I am Robin Nedila. I have been member of IBW and a shop steward since 2006 when I worked for Shaw Communications. Then in 2015 I was hired in the Local 213 where I am currently an Assistant Business Manager. I am responsible for members of 213 who are in the telecommunications industry.

Sisters and Brothers the reason I am here before you is to share a recent story of organizing in the telecommunications industry. I am sure you are aware of the major providers, you know them by name, Bell, Rogers, Shaw, TELUS—these are names you are very familiar with. The providers continue to make record profits and it's always quite visible in Canadian cities where sports stadiums and large shiny towers are named after them. There's more than enough money going around to treat employees fairly. However these companies use their vast resources to fight Unions and organizing drives.

Despite this and because of hard fought wins by Union supporters in the past, Shaw Communications in the Lower Mainland is a closed shop Union environment shared between IBEW and formally the TWU, more recently United Steelworkers. We have a strategic Partnership—it's in or best interests. It's been this way since the 1960's. This closed shop includes Union contractors. In this environment the wages are fair, benefits are good and members enjoy a democratic workplace with real job security and there's even a registered provincial trade.

However, since the TELUS Labor Dispute of 2005, more commonly known as "The Event," TELUS contractors have been almost exclusively non-union. As we have seen in the last decade, the wages, benefits, training, job security have tanked for non-union workers. This is TELUS's dirty little secret. Unfortunately mostly new Canadians are getting exploited. I talked to a contractor of TELUS last week who was just fired by his contracting company. He spoke of wages of $14.00 an hour. That's cents above minimum wage. He worked 10 hours a day, 6 days a week. This is Canada. No overtime, no benefits, no RRSP, no hope of any progress. The TELUS contractors deserve better.

Now I'm sure you're aware TELUS and Shaw are competitors. If Shaw's workforce is making a fair Union wages versus TELUS, TELUS is gaining an advantage on labor costs, which puts massive pressure on our existing members employed by Shaw. This is why we organize. We can't stand still and be happy with the status quo. Doing this would be a massive disservice to our current members.

One of the major organizing wins for our Local is the 240 employees of Ledcor Technical Solutions, more commonly known as LTS, or on every vehicle and white vehicle you see doing work for TELUS, a big Ledcor globe on the side door—very recognizable. They are a prime contractor for TELUS. They were one of the first contractors let in the door after The Event. All it took was one LTS employee, Dustin Brecht. He's in the room *applause*. He said he wasn't going to take it anymore and he had a bunch of followers, who stood up and he helped those employees discover a brighter future. Dustin is now a keen member of our Local 213 team. These employees were getting treated very poorly by Ledcor. Massive pay cuts, zero job security, assembly line terminations en masse, unpaid job functions, working on days off for no pay—you name it—it was happening at Ledcor. Ledcor relied on its bottom-feeding mentality to outbid the competition and take in millions of profits. Unfortunately this is a fairly common place in the non-union TELUS contractor world. We must make a commitment to change this. Through hope of a better tomorrow and successes within our Local those employees of LTS follow Dustin's lead and made the right choice to join a Union *applause*. Certification was granted, automatic certification—one of the first ones after the Trudeau Government got in by the Canada Board to Local 213 in August 2017.

Sisters and Brothers Local 213 has spent thousands and thousands of dollars since the certification in legal fees, battling Ledcor's anti-union animus at every level since the certification. We have had hearings at the Canada Board just to force Ledcor to recognize its employees as a Union. That took

> many months just to have them recognized. **We had a CLAC raid in the construction group.** Negotiations have grinded to a halt. It's been almost two years. The Company refuses to negotiate meanwhile employees continue to get terminated, laid off, their work is getting contacted out non-union and departments are shutting down. It's clear Ledcor does not have any intention of ever negotiating a Collective Agreement with the IBEW. But that's what Ledcor thinks. Ledcor doesn't know what the IBEW is capable of. Ledcor doesn't know its employees are ready for the fight. This has been many years in the making, we have a strike vote planned for tomorrow evening, we are in a legal strike position given 72 hours' notice should we secure that strike mandate, but Ledcor continues to threaten and intimidate its employees in the hopes they vote "no."
>
> In the meantime, Local 213 has attempted other organizing drives at other TELUS contractors but the employees have a common concern at those companies. They look at what is happening at Ledcor and the fact that we don't have a Collective Agreement in almost two years and they are fearful.
>
> [*sic*]
>
> (emphasis added)

[150] At the hearing, the employer took strong exception to statements made by Mr. Nedila which it characterized as untruthful. In cross-examination, Mr. Nedila did not agree with many of the employer's characterizations of his speech. The Board notes that Mr. Nedila's characterization of "a CLAC raid in the construction group" is incorrect. There was no raid; there was a transfer by LTS of non-bargaining unit members to a related company, which had previously been certified to the CLAC by the British Columbia Labour Relations Board. Further, Mr. Nedila conceded that the $14-per-hour TELUS contractor with the 60-hour work week and no overtime that he was referring to was not at LTS.

[151] On August 15, 2019, the employer received notice of the strike vote results.

[152] On August 19, 2019, Mr. Nedila emailed Mr. Geheran, alleging that the employer had been engaged in stalling and "surface bargaining." Mr. Nedila pointed out that a strike or lockout was a last resort when other options were exhausted. The Board notes that no ULP complaint has been filed about surface bargaining.

4. The September 17, 2019, Offer

[153] On September 17, 2019 at 3:54 p.m., the union received the employer's bargaining proposal that was in the form of a CA. It contained terms that Mr. Nedila felt would be unacceptable to the union and bargaining unit members. While there was recognition of the union (Article 5.01) and

union dues check-off and remission (Article 5.03), there was no union closed shop, no prohibition on contracting out, no recognition of seniority, no union hiring hall and limited recognition of seniority.

[154] Particularly galling for the union was the wage schedule proposed by the employer. The employer's proposal for hours of work and the "wage schedule" was as follows:

> **ARTICLE 15.00–HOURS OF WORK**
>
> 15.01 **Hours of Work**
>
> a) The Employer will determine the necessary work schedules required to fulfil its contractual obligations with its clients. The Employer will also determine the number of employees required on each workday and each work schedule in order to meet its contractual obligations.
>
> **ARTICLE 17.00–WAGE SCHEDULE**
>
> 17.01 **Wages**
>
> The Employer will determine the appropriate remuneration rates for each position within the bargaining unit. Employees may be paid hourly and / or a piece rate depending on the work they perform and the nature of the Employers contracts with its clients.
>
> Current hourly rates, deemed rates and piece rates of pay, at the time of execution of this agreement, will be maintained.
>
> As per Management Rights the Employer reserves the right to alter, increase or decrease, rates of pay from time to time.
>
> (a) Hourly Paid Employees
>
> Hourly paid employees will be paid their hourly rate for each hour they spend conducting the work of the Employer.
>
> (b) Piece Rate Employees

[155] Piece rate paid employees will be paid as per the published Piece "Rate Card" for each pice of work completed in accordance with the customers and Employers expectations. In contrast to the union's proposal that was based on a regular work week, the employer proposed no weekly hours of work, other than work at its discretion.

[156] In essence, the employer's proposal contained insufficient particulars for any employees to determine the basis of pay and hours to be worked in a week, other than work hours and pay at the employer's discretion.

[157] After receipt of what appeared to be the employer's final proposal, Mr. Nedila had some thought of referring the offer to the membership for its consideration and a vote. The union's recommendation was to decline the employer's offer.

[158] On September 19, 2019, the union sent out a notice for a membership meeting. From the material before the Board, it appears that certain unnamed employees kept the employer well informed of the union's dealings with its membership. The employer was aware of the date of that meeting.

[159] On September 25, 2019, the employer notified the union that it had terminated 31 residential I&R technicians. As a result, Mr. Nedila felt that there was no choice but to declare a strike.

[160] On October 1, 2019, the union commenced a lawful strike after serving a strike notice.

[161] The union remains on strike; however, the evidence before the Board is that most members are crossing the picket line.

5. The Union's October 25, 2019, Proposal Following the Start of the Strike

[162] On October 25, 2019, the union provided a further bargaining proposal. Mr. Nedila characterized this as making substantial movement.

[163] The union's proposal allowed for limited use of subcontractors not exceeding 20 percent of the number of employees in the bargaining unit (Article 2.08(b)), whereby the employer was required to terminate subcontractors before laying off bargaining unit members and was not permitted to utilize subcontractors where there were bargaining unit members on layoff. The proposal included the hiring hall and closed shop and had a layoff and recall clause and seniority protection. The proposal also provided for a 40-hour work week and included a wage schedule (Article 16.00–Wage Schedule). In particular, it included a minimum guaranteed wage of $2,500 per pay period with a top-up if the I&R technician fell below the average of $2,500 per pay period, with an hourly rate based on types of installation work.

[164] Mr. Geheran testified in effect that this was a meaningless proposal that did not address the realities of LTS's business. Mr. Geheran pointed out that historically, prior to the certification order, LTS had used subcontractors at levels substantially higher than in the union's proposal. LTS's view was that the wage proposals limited its flexibility and increased costs. Further, the employer was not prepared to delegate the hiring of employees to the union through the hiring hall as it argued that this impacted its ability to select the best and most productive employees for its work. Finally, Mr. Geheran testified that the union's proposal had the potential to reduce productivity because under the uncapped scheme at LTS, employees had an incentive to be more productive than employees paid based on an hourly rate.

[165] As outlined later in this decision, the Board finds that with regard to the contracting out proposals in the union's October 25, 2019, proposal, the employer historically used subcontractors at a much higher rate than in the union's proposal. From the IBEW's perspective, this was a concession on contracting out in comparison with the cable contractors' agreement. From an objective perspective, bearing in mind the employer's historical use of subcontractors, the proposal was in fact a significant limitation on the flexibility LTS wished to retain in any final CA. The union's wage proposal provided a minimum floor which was less than the average earnings of a technician under LTS's pre-certification compensation scheme. LTS viewed this proposal as reducing its efficiency by taking away the incentive for an employee to remain productive.

[166] On December 13, 2019, the union applied to the Minister to refer the matter to the Board under section 80 to fix the terms of the first CA. The union's application to the Minister referred to its inability to negotiate a first CA and ULPs committed by LTS. The union did not send the employer a copy of its application to the Minister.

[167] On December 20, 2019, Mr. Geheran wrote to Mr. Nedila, pointing out that LTS's residential I&R contract with TELUS would expire in April 2020 and would have to be re-negotiated. Mr. Geheran advised that TELUS was "expecting cost and efficiency savings in any new contract." He set out LTS's analysis of the union's contract demands, which he claimed added an estimated $15.4 million of costs to LTS with no increase in offsetting revenue. His letter went on to read as follows:

> We will shortly start discussions on our TELUS Business I&R contract as well and without doubt we will face the same cost and efficiency challenges.
>
> We have provided the IBEW with our proposals, based on our current terms and conditions and the realities of our business environment. We are competing against other companies that are not encumbered with these substantial additional costs and restrictive work practices.
>
> **We urge you to recognize the realities of our business and accept our proposals, as provided on 18th September, so we can be successful in securing a new contract for residential I&R work in B.C. Without the IBEW recognizing these realities our B.C. residential I&R work will come to an end.**
>
> (emphasis added)

[168] On December 27, 2019, Mr. Nedila emailed Mr. Hildebrandt, indicating that he was alarmed by the employer's statement that "[w]ithout the IBEW recognizing these realities our B.C. residential I&R work would come to an end." The union proposed referring the dispute to an independent arbitrator to settle and finalize a CA. The Board notes that this was also raised by the conciliator in earlier bargaining between the parties on April 16, 2019.

[169] On January 6, 2020, Mr. Hildebrandt responded that the employer favoured free collective bargaining over arbitration. He requested a meeting with the union with or without a mediator, as the employer wanted to submit a proposal to TELUS to renew its contract for residential I&R work.

[170] On January 7, 2020, the union agreed to meet, and the parties met on January 22, 2020, with Ms. Fisher, the mediator. The purpose of that meeting from the employer's perspective was to extract a commitment from the union about flexibility and cost neutrality. The employer withdrew from the discussions after learning that the union had filed a section 80 application.

[171] Except for mediation suggested by the Board pursuant to its section 80 process, up until the start of that process, the parties did not engage in any further collective bargaining since the January 22, 2020, session with Ms. Fisher. The Board notes that describing that meeting as collective bargaining is a stretch. The employer wanted a commitment to pursue its contract renewal process with TELUS.

[172] On February 13, 2020, during the hearing, the employer informed the Board that on February 12, 2020, it had learned from TELUS that LTS had lost its I&R contract in British

Columbia. An email from Mr. Phil Moore from TELUS to Mr. Fergus Denhamer, Vice President at Ledcor, stated in part the following:

> … It is disappointing to be informed that you need to raise your prices by 10% moving into a renewal. We have been transparent in our required rate reduction minimum target of 6% which we are applying across all partners, at time of renewal.
>
> … Given the latest information you have provided around price and supply with respect to the British Columbia region mass market I&R services, we will not be looking to renew the current Statement of Work expiring on April 26, 2020. …

[173] On February 12, 2020, during this hearing, Mr. Nedila emailed Mr. Hildebrandt about comments made by the employer's counsel and Mr. Geheran during his evidence. Mr. Nedila asked, "Are you guys saying that if the IBEW agrees to cost neutrality and drops the limit on subcontractors that you guys can agree to our language proposals?"

[174] Mr. Geheran testified that the employer lacked trust in the union and saw this communication as a way of manufacturing evidence to be used in its section 80 application.

[175] Mr. Hildebrandt responded to emails from the union. On February 18, 2020, he referred to a number of statements in the news articles which the employer considered to be false and damaging to its business. In his email, Mr. Hildebrandt stated the following:

> These statements are very damaging to our business and obviously are not conducive to establishing a successful collective bargaining relationship with us. Coupled with the position you have taken in bargaining, which has led to the loss of all of our BC residential I&R work, it is crystal clear to us that you are incapable of adjusting to the realities of our business. You are seemingly locked into an old and tired trade union model of waging war against employers, in an attempt to beat them into submission, without recognizing that in the modern economy this approach, as proven here, simply leads to the destruction of businesses and the loss of jobs for your members.
>
> You say you want to quickly return to bargaining, but until we see that you fully accept what is required for us to remain competitive as a contract labour supplier to TELUS, we don't see any possibility of concluding an agreement that fits our industry. You say that you are willing to move on subcontracting, but as you must know by now, for us to [be] competitive, there can be no restrictions on subcontracting, not just some movement on this matter. And for us to retain our remaining TELUS work, there can be no labour cost increases whatsoever. That also must be clear to you by now.
>
> And finally, and importantly, to move forward, it is necessary for you to publicly retract your false statements about LTS – which significantly damages our reputation and hence our competitiveness. We expect you to do this immediately if you have any genuine interest in establishing a productive and harmonious collective bargaining relationship with us.

[176] The Board notes that there were continuing emails between the parties up until March 9, 2020. However, the parties did not meet and bargain again until the Board's direction in the section 80 application.

[177] At least based on the email communications between the parties, the employer refused to bargain further with the union unless the union published a retraction of derogatory public statements about LTS.

6. The Employer's Allegations of Union Misconduct During the Strike

[178] The employer raised issues concerning the conduct of the union and union members while on strike.

[179] In the Board's view, the union's alleged conduct during the strike may have been a factor in the difficulty in resuming CA negotiations, but it does not assist the employer in answering the ULP complaints that arose during bargaining but before the commencement of the strike. The Board makes no findings about the union's conduct during the strike, as it is not seized with a ULP complaint against the union.

[180] In summary, the IBEW is seeking a CA which, in its view, best advances the interests of the LTS employees. Part of its long-term objectives was to organize the entire sector of telecommunications employers, including companies who provided services for TELUS. In its collective bargaining proposals, the union pursued a traditional strategy of the closed shop, as well as a hiring hall.

[181] The employer alleges that the union is perpetrating "some sort of fraud on the Board by accusing LTS of anti union behaviour when they simply can't agree on an agreement that allows LTS its desired flexibility." (union's argument paragraph 5)

[182] The union argues that the Board cannot consider this argument because the union was prohibited from leading all the bargaining evidence.

[183] The Board agrees with the union and is unable to evaluate the employer's argument as it does not have before it all the bargaining evidence, but rather a portion of the bargaining evidence up until April 30, 2020. That full evidence may be available in the section 80 process. The Board

notes that there may be issues about mediation privilege related to that evidence, but they can be sorted out in the section 80 process.

[184] The Board notes that both parties appear to have been intransigent in their positions on the closed or open shop or union hiring hall issues, at least for the period under consideration, which is up until April 30, 2020. Further, the Board notes that there has been no new employer proposal since its full CA proposal on September 17, 2019.

[185] Unless there is voluntary recognition, the union acquires its bargaining rights by certification from the Board. In this case, the Board granted a certification order. Once the Board certifies a trade union as the bargaining agent for a bargaining unit, that trade union "has exclusive authority to bargain collectively on behalf of employees in the bargaining unit" (section 36(1)(a) of the *Code*).

[186] The *Code* has very few mandatory requirements for the form of a CA. This is because one of the overriding purposes of the *Code* is to promote free collective bargaining. In essence, the parties receive what they negotiate. Negotiations may rest in part on the respective economic power that can be brought to bear on the opposing party.

[187] There are some minimal mandatory requirements of every CA. It must be in writing. It must apply to all employees in the bargaining unit (section 56 of the *Code*). It is required to have a final and binding method for resolving disputes, without a work stoppage, by arbitration or otherwise (section 57). It is required to be of a term of at least one year (section 67). There is a requirement about compulsory dues check-off if a union requests that this be included in the CA (section 70).

[188] The *Code* is permissive on the issue of a closed shop:

> **68** Nothing in this Part prohibits the parties to a collective agreement from including in the collective agreement a provision
>
> **(a)** requiring, as a condition of employment, membership in a specified trade union; or
>
> **(b)** granting a preference of employment to members of a specified trade union.

[189] The *Code* is also permissive on the issue of union hiring halls:

> **69 (1)** In this section, ***referral*** includes assignment, designation, dispatching, scheduling and selection.

> **(2)** Where, pursuant to a collective agreement, a trade union is engaged in the referral of persons to employment, it shall establish rules for the purpose of making such referrals and apply those rules fairly and without discrimination.
>
> **(3)** Rules applied by a trade union pursuant to subsection (2) shall be kept posted in a conspicuous place in every area of premises occupied by the trade union in which persons seeking referral normally gather.

[190] Generally, the parties address the terms and conditions of employment in a CA. The Board notes that the parties are fundamentally at odds regarding the remuneration of I&R employees. Those employees have been paid on a piece-rate system, and the union seeks to change that compensation system.

[191] The Board notes that in examining proposals, one cannot truly ascertain the subjective intent of a party, as a party might depart from the rigidity of a proposal if it suits its needs or interests at a particular time. Despite that ideological gap, the parties made some progress on issues that were relatively easy to deal with and were non-monetary.

[192] What most of the history shows is hard bargaining and some progress, but not on the main items. Hard bargaining in and of itself is not evidence of anti-union animus. Further, the failure of the employer to agree to a mandatory union membership article, or a closed shop, or a union hiring hall is not evidence of anti-union animus. These types of arrangements are permitted under the *Code* but are not mandatory requirements of the *Code*.

[193] What seems clear is that the parties are not negotiating in the same ballpark. For example, contracting out is one of the major issues in the negotiations. While the IBEW made a counteroffer in bargaining that it considered reasonable, it was an offer that did not reflect the historical use of subcontractors by LTS before and at the time of certification.

[194] The Board is going to be faced with the issue of whether to impose a CA on the parties in the separate section 80 process, which is being considered by a three-member panel.

[195] The Board, however, is unpersuaded that the differences between the parties about the terms of a CA or the bargaining history equate to anti-union animus by LTS for the ULPs alleged by the union. The Board notes that the union has not alleged that the employer's refusal to agree to a closed-shop CA breaches its duty to bargain in good faith. Instead, the union has raised other

very specific allegations of violations of different provisions of the *Code* that occurred over a period, which will be examined later.

[196] LTS appears to have the honestly held belief that it cannot compete with other TELUS contractors if it is "hampered" by a CA that contains a closed shop and hiring hall provision whereby it cannot maintain control over who it hires or flexibly respond to changes implemented by its main customer. While the employer's refusal to agree to a closed-shop agreement makes it difficult to reach a CA, the Board finds that this is not indicative of anti-union animus. However, the Board must still turn to the union's other more specific allegations to determine whether the employer committed any specific ULPs in relation to the particular circumstances of each case.

7. Laying off Bargaining Unit Members and Using Subcontractors

[197] The union has argued that LTS laid off many bargaining unit members or reduced the hiring of employees while maintaining or increasing the use of subcontractors. The Board notes that this is a central disputed fact in the complaints about the reduction in the size of the bargaining unit in Board file nos. 032755-C and 032970-C and the complaint about the layoff of 31 I&R technicians prior to the scheduled meeting with employees to review the employer's September offer (Board file no. 033316-C).

[198] The union alleges that throughout the period since it gave notice to bargain, the size of the bargaining unit shrank while the employer continued to use subcontractors and expanded its use of subcontractors. There are fewer employees in the bargaining unit than there were at the time of certification.

[199] The employer admits that there has been a reduction of bargaining unit members; however, it argues that there were legitimate business reasons for this reduction, consistent with its business as before practice. The employer's position is that such changes did not violate the statutory freeze provision under section 50(b) of the *Code* and are not indicative of interference with the union's affairs under section 94(1).

[200] At the time of the certification order, the bargaining unit consisted of 238 employees: 188 I&R technicians, 8 BFS technicians, 25 drops technicians and 17 MXU technicians. The Board

notes that linemen and splicers were not listed as part of the 238 employees, and the Board made findings about this in the scope decision.

[201] In March 2018, Mr. Nedila learned that LTS had transferred the linemen and splicers to another Ledcor company, and this led to the filing of the first ULP complaint. The Board notes that this was resolved by the finding in the scope decision that the linemen and splicers were not part of the bargaining unit. In the Board's view, since the linemen and splicers were never part of the bargaining unit, the employer's reorganization of those employees is not a factor to consider in assessing the present ULP complaints.

[202] The employer's argument centres around the historical and predominate use of subcontractors, the general decline in Project Falcon work over the relevant time frame, specific changes in the mix of the work from overhead drops to underground connections and TELUS's actions to reduce work assigned to LTS in response to anticipated strike action by the union.

a. Historical and Predominate Use of Subcontractors

[203] The Board notes that at present, there is no CA in place that requires LTS to use employees in preference to subcontractors. This is something that the union is seeking in collective bargaining. Prior to certification, LTS had the unfettered freedom to use whatever mix of employees or subcontractors it chose to perform work.

[204] The statutory freeze could impact the employer's ability to use subcontractors, if the use of subcontractors cannot be characterized as an action taken for legitimate business reasons or business as before.

i. Distinction From *D.H.L. International Express Limited*

[205] In its arguments, the union relies on the decision in *D.H.L. International Express Limited*, *supra*, to suggest that the employer breached the statutory freeze provision in this case. The Board notes that the present matter is factually dissimilar to the *D.H.L. International Express Limited*, *supra*, case. In *D.H.L. International Express Limited*, *supra*, after certification, the work of the bargaining unit at the Ottawa station was contracted out to outside contractors. The employer, D.H.L International Express Limited (DHL), claimed that it conducted business as usual at its

Ottawa station in accordance with its national practice. There was no evidence that at the time of the application for certification, DHL had implemented or had plans to implement the national strategy. In *D.H.L. International Express Limited*, *supra*, DHL had increased the use of contractors following certification. Further, it had also outsourced office and clerical personnel by using a placement agency, and there was no national approach to this. The Board found that the contracting out of office and clerical workers in Ottawa far exceeded DHL's practice elsewhere. As such, the contracting out could not be characterized as business as before. The Board had no trouble finding that DHL had acted differently following the notice to bargain than it would have prior to the commencement of the statutory freeze.

[206] The Board accepts Mr. Geheran's testimony that prior to and after certification, LTS performed most of its TELUS work using subcontractors. Mr. Geheran's unchallenged testimony was that subcontractors performed 80 percent of the MXU work, 99 percent of the drops work, 30 percent of the residential I&R work and about 50 percent of the BFS work. For example, prior to the hiring of Mr. Evan Wilds in Kamloops, LTS was using subcontractors in Kamloops to perform BFS work. Mr. Geheran reported that there are no statistics for the small medium business (SMB 0 technicians.

[207] The employer's position is supported by its data. For example, in terms of the MXU-installed suite volumes between August 2016 and December 2019, LTS used subcontractors more frequently than employees. LTS provided a chart showing that 81 percent of the MXU work completed since August 2016 was completed by subcontractors. There could be some monthly variation, however. As of August 1, 2016, 97 percent of the work was performed by subcontractors. As of September 2017 (the end of the first month following certification), subcontractors completed 85 percent of all units.

[208] LTS preferred to use subcontractors for certain types of work where it was efficient to do so. It used its employees when it was inefficient to use subcontractors. One example of this was in complex drops. Subcontractors were paid a piece rate for this work and did not want to do complex, more time-consuming drops work. In this situation, LTS would allocate the work to its own employees. Nevertheless, and overall, most drops were completed by subcontractors both before and after the certification.

ii. The Decline of Project Falcon Work

[209] The Board accepts Mr. Geheran's testimony that the union's certification drive and the Board's certification order occurred when LTS's workforce was at its peak as a result of Project Falcon. The Board accepts his testimony that by July 2017, before certification, LTS knew that the Project Falcon work was forecasted to decline. The Board accepts his evidence that Project Falcon was starting to wind down in 2018.

[210] The Board finds that Mr. Nedila generally knew that LTS had network building work and network servicing work. The Board is not satisfied that the union was aware of the nature of LTS's work on Project Falcon at the time of certification. Mr. Nedila acquired information about the employer's operations as time went on. The union was not aware, for example, that the Project Falcon work was at its peak at the time of certification.

[211] Any observations by the union's witnesses that the employees' work was declining must be interpreted while considering the expected reduction of Project Falcon work following certification and the historical use of subcontractors by LTS. These are facts that were not within the knowledge of the union's witnesses.

[212] LTS provided data showing the number of employees in the various technician categories on a quarterly basis from January 1, 2015, to December 31, 2019. This data showed a buildup of technicians from a low of 37 as of January 1, 2015, to 251 as of the quarter ending October 1, 2017 (the quarter in which certification occurred). From that point, the number of technicians fell to 115 as of the quarter ending December 23, 2019. From October 1, 2017, the only technician category that grew was that of the MXU technicians, which grew from 28 to 41 employees.

[213] LTS forecasted TELUS's need for its services, and the forecast was a falling forecast due to the reduction of the Project Falcon work. LTS provided data showing that the forecasted work for Project Falcon was 22,957 hours work in July 2017 and was projected to fall to 15,589 hours by December 2017 and to 3,749 hours (or by 18 technicians) by December 2018.

[214] The data shows that from April 2018, the number of technician hours needed fell from 21,719 hours in April 2018 to 3,749 hours in December 2018. This represents a decrease in the number of technicians needed from 110 in April 2018 to 18 in December 2018.

[215] Overall, the reduction in Project Falcon work would require a reduction in LTS's workforce, unless it secured replacement work. According to Mr. Geheran's unchallenged testimony, LTS used a policy of natural attrition—that is, not replacing employees who left with new employees—to achieve the reduced workforce.

b. Blips in the Reduction

[216] Mr. Geheran testified that while the overall work on Project Falcon was declining, there could be short-term increases or variability in the need for work or variability in the attrition rate of employees leading to a need for contract services. For example, the employer had no control over the number of employees who might choose to leave their position. This could lead to a blip in the need for services within the forecasted falling demand for services. The employer supplied data showing the turnover in technicians. This evidence was unchallenged by the union.

[217] Mr. Geheran testified that LTS used subcontractors to meet any short-term blip in demand for workers during the forecasted falling-down period rather than recruiting and training employees who likely would be laid off in a short period. Mr. Geheran estimated that the cost of training and equipping an employee was $25,000 to $35,000.

[218] LTS chose the cheaper and quicker way to deal with the blips by using subcontractors rather than employees.

[219] This was not a new strategy used by LTS following certification but the continuation of its business practices that existed prior to and at the time of certification. It must be recalled that Project Falcon was project work with a beginning, a middle and an end. TELUS had engaged LTS to perform this work prior to the certification.

[220] There was anecdotal evidence from Mr. Amos, former team lead of the drops group, about the use of subcontractors for drops work. Mr. Amos, however, does not have the overall picture of LTS's use of subcontractors and the nature of Project Falcon work. The Board prefers the testimony and documentary evidence supplied by LTS on this point.

[221] In summary, the Board accepts that prior to certification, the number of employees was forecasted to decline, for reasons that were business-related and entirely unconnected to

certification. The Board accepts that LTS has always used subcontractors and that in a period of falling demand for technicians, it chose to use attrition to reduce the number of technicians and used subcontractors where necessary to deal with the blips, as it was more cost-effective to do so. Therefore, the Board is satisfied that the employer's decision to use subcontractors was part of its business as before practice.

[222] The Board will now turn to the specific allegations related to the different groups of employees affected.

B. Specific Complaints

1. Drops and MXU Employees (Board File No. 032511-C, March 9, 2018, and Board File No. 032970-C, March 11, 2019)

a. The Complaints

[223] The union filed two complaints in relation to the drops and MXU employees. In the first ULP complaint (Board file no. 032511-C), the union alleged that the employer's refusal to recognize the drops and MXU employees in the scope of the bargaining unit constituted a violation of sections 36, 50(a) and 94(1)(a) of the *Code*. In the same complaint, the union also alleged that the employer had changed the scheduling and parking arrangements of the drops and MXU employees because of their participation in the union and had therefore violated sections 50(b), 94(1), 94(3) and 96 of the *Code*.

[224] The union seeks:

- a declaration that the employer violated sections 36(1), 50(a) and 94(1) of the *Code*;
- an order that the employer cease violating the *Code*;
- an order directing LTS to post a copy of the Board's decision in all work locations and to provide a copy of it to each of the employees in the bargaining unit;
- an order directing LTS to undo changes made to the terms and conditions of the MXU and drops employees and that they be made whole for any damages they have suffered; and
- further relief as counsel may request and the Board deems just.

[225] In another ULP complaint (Board file no. 032970-C), filed one year later, the union alleged that the employer had violated sections 50(b), 94(1), 94(3) and 96 of the *Code* by reducing the number of drops technicians (aerial self-performing drops team) from 25 to 6 employees and by eliminating a classification of technicians. The union's position is that the number of drops employees dwindled from 25 at the time of certification to 6 as of January 31, 2019, when the drops team was eliminated. This resulted in the layoff of four employees and the transfer of two employees to positions as I&R technicians. The union alleges that subcontractors have been used to perform the drops work.

[226] The Board will first deal with the allegation that the employer refused to recognize the IBEW as the bargaining agent for drops and MXU employees. Next, the Board will address whether the employer breached the statutory freeze provision or committed other ULPs when it allegedly changed the terms and conditions of these employees and subsequently reduced then eliminated the drops team. For the reasons set out below, the Board finds that the employer did violate sections 50(a) and 94(1)(a) of the *Code* by failing to recognize the drops and MXU employees in the scope of the bargaining unit. However, with respect to the alleged changes in terms and conditions of employment and the subsequent elimination of the drops team, the Board is satisfied that the employer provided a legitimate business rationale that was not in any way motivated by anti-union animus.

i. Refusal to Recognize the Drops and MXU Employees as Part of the Bargaining Unit

[227] While the scope decision determined some of the issues between the parties, one issue that remains is whether the employer violated the *Code* by refusing to recognize the drops and MXU employees as part of the bargaining unit. Section 36(1) of the *Code* reads in part as follows:

> **36 (1)** Where a trade union is certified as the bargaining agent for a bargaining unit,
>
> **(a)** the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit.

A) Arguments of the Parties

1) The Employer's Argument

[228] The employer states that there was a dispute between the parties about the scope of the bargaining unit and that it cannot be faulted for raising its issue that drops and MXU were construction-side employees when the union also clearly misunderstood the scope of the unit, as it included linemen and splicers in its CA proposals in November 2017.

2) The Union's Argument

[229] The union argues that the employer's refusal to recognize that drops and MXU employees were within the bargaining unit is a violation of section 36 of the *Code*. It submits that the exclusive authority to bargain arises from the Board's certification and that it has the authority to negotiate a CA on behalf of all of the employees of the bargaining unit (see *Air Canada*, 2001 CIRB 120, at paragraphs 15–16). It states that an employer cannot compel or seek to compel a bargaining agent to conclude a CA for a unit that is smaller than that in the certification granted by the Board and argues that this is a breach of the duty to bargain collectively in good faith (see *British Columbia Telephone Company* (1977), 22 di 507, [1977] 2 Can LRBR 404; and 77 CLLC 16,108 (CLRB no. 99)). In addition, the union submits that failing to recognize its bargaining rights is general interference with a trade union and a violation of section 94(1) of the *Code* (see *Verspeeten Cartage Ltd.*, 2004 CIRB 270). The union submits that LTS was not honestly mistaken about whether the drops and MXU technicians were within the scope of the bargaining unit. It states that Mr. Nedila honestly believed that linemen and splicers were classifications within the bargaining unit. The union submits that the employer's refusal to recognize that drops and MXU employees were included in the unit was not a genuine refusal but a "tit for tat" type of refusal, without a factual foundation.

3) The Employer's Reply

[230] The employer states that it did not take this issue to impasse. It submits that taking a position on the scope of the bargaining unit and seeking adjudication of its scope is not a ULP.

B) Facts

1) The Scope Issue

[231] At the time of certification, in its submission on the certification application, the employer took the position that drops and MXU employees were within the scope of the bargaining unit. Further, the employee numbers supplied by LTS to the Board included the drops and MXU technicians as being within the bargaining unit. The employer did not dispute this at the relevant time, which was the time of the certification application.

[232] It appears from the testimony of Mr. Geheran and Mr. Nedila that the employer raised the issue that MXU and drops technicians were not within the bargaining unit after it reviewed the initial union proposal that included splicers and linemen—who clearly were construction-side employees—as technicians within the bargaining unit. In its first proposal, Article 7.06 contained the following definition of installer: “A technical worker who is able to perform installs, service, network construction, splicing and placing.” In LTS, the build group, which includes linemen and splicers, performs the network construction, splicing and placing work.

[233] Further, it is also clear from the testimony of both Mr. Nedila and Mr. Geheran that the union’s bargaining committee did not have any splicers or linemen on it. The union’s bargaining committee did have representatives of the I&R, BFS and drops employees.

[234] When the employer raised its position that drops and MXU employees were not within the bargaining unit in the November bargaining session, it refused to discuss or elaborate on its position.

C) Analysis and Findings

[235] In the Board’s view, there is no basis in the evidence to conclude that LTS was confused about drops and MXU employees being within the bargaining unit. That was its clear understanding going into bargaining. Its main focus in the certification application was on trying to ensure that sales employees were included along with the SMB employees and that the scope of the certification was national rather than limited to employees residing in British Columbia. The

Board notes that in the certification application, the employer identified and provided information about drops and MXU employees as part of the list of 238 employees supplied to the Board.

[236] The Board is satisfied that the employer raised this issue on a “tit for tat” basis during the bargaining sessions on November 8 and 9, 2017, as argued by the union, although Mr. Geheran denied this.

[237] The employer now states that this case had to go to the Board anyway since the union was attempting to include splicers and linemen in the bargaining unit. It argues that there was no harm caused by this as the parties agreed to set aside the scope issue for a period and continue bargaining, and the union was required in any event to apply to the Board to seek a clarification on the splicer and lineman positions.

[238] It is correct that the Board needed to adjudicate the scope issue concerning linemen and splicers. Based on the parties’ conduct prior to the tendering of the union’s offer, there should have been no need to adjudicate the issue of MXU and drops technicians. This appears to have been something that the employer “tried on” for tactical reasons during bargaining.

[239] Further, the employer communicated directly with employees on this issue, which had the effect of undermining communication from the union on the scope of the bargaining unit.

[240] On November 11, 2017, Mr. Richard Hoy, Vice-President of Sales, sent an IBEW bargaining update to LTS field technicians, MXU build crews and drops crews. That memo stated in part the following :

> 1. The IBEW is attempting to enlarge the group of employees they are legally entitled to represent.
>
> We have made it clear that we recognize the IBEW as representing only TELUS I&R Technicians and Business Field Services Technicians, and that v/e [*sic*] are negotiating with them on that basis only.
>
> 2. The IBEW’s proposed agreement would negatively impact the flexibility, performance and costs of LTS in such a dramatic way that our business would not be viable, and we could not remain in business.

[241] On November 13, 2017, Mr. Nedila communicated to the members in Bargaining Update #4 that all technicians were covered by the certification. He specifically identified that LTS’s position

was that only the TELUS I&R and BFS employees were covered by the certification and the union was seeking to expand the certification.

[242] In the Board's view, there was an undermining effect on the union when the employer argued, contrary to the certification, that the MXU and drops employees were not part of the bargaining unit, when in fact this contradicted the union's communications with its members. This was a new certification, and the employer was very active in its communications with the employees. The Board notes that a difference in the communication by the employer about the exclusion of MXU and drops employees had the effect of driving a wedge between the union and its bargaining committee and the balance of the bargaining unit. The position taken by the employer had the impact of raising the issue of whether the union was being truthful in its communications with bargaining unit members on this matter.

[243] The employer argues that the union has violated the *Code* by seeking to expand the certification to employees who were not within the bargaining unit. Given that the employer has not filed a ULP complaint against the union, in the Board's view, there is no basis for it to consider that complaint or factor it in when defining the remedy.

[244] The union says that when it proposed Articles 2 and 7 of the CA, it thought it was enforcing the certification. Mr. Nedila testified that he honestly believed that splicers and linemen were part of the bargaining unit. This has to be weighed in light of the fact that the bargaining committee had no linemen and splicers on it and that the union had most of its support from the SMB technicians and no support from linemen or splicers.

[245] In the Board's view, the union erred in taking the position that linemen and splicers were part of the bargaining unit. However, it did not falsely or fraudulently advance this position. While Mr. Geheran sees this as a game by the union to expand its bargaining rights, that was not the case in the Board's view.

[246] The employer has argued that there was mutual confusion between the parties about the scope of the bargaining unit. The Board finds that this was not the case.

[247] Section 36 of the *Code* recognizes the certified bargaining agent as having exclusive authority to bargain collectively on behalf of employees in the bargaining unit. This provision

codifies the effect of the union's certification but does not impose an obligation on the employer that can give rise to a complaint filed pursuant to section 97 of the *Code*.

[248] However, in the past case law, the Board has found that a concerted strategy aimed at reducing the size of the bargaining unit, including the refusal to recognize the union as bargaining agent, is a violation of section 94(1) of the *Code* (see *Verspeeten Cartage Ltd*., 2000 CIRB 58; and *Verspeeten Cartage Ltd.*, *supra*). In addition, the Board has stated that the employer cannot evade its obligations under the *Code* by refusing to recognize the certified union as the bargaining agent for all or part of the employees in the unit and that such attempt may result in a breach of section 50(a) of the *Code* (see *British Columbia Telephone Company*, *supra*). A union cannot be required to conclude a CA for a smaller subset of employees than is set out in a certification.

[249] In the circumstances of this case, the Board finds that the employer violated both section 50(a) and section 94(1) of the *Code*. The employer knew that the drops and MXU employees were part of the scope of the bargaining unit from the moment of the certification application at the Board. These employees were included in the list of employees as part of the certification application. The employer only started taking a stance on the drops and MXU employees when the union sought to include splicers and linemen in the scope of the bargaining unit, thus knowingly attempting to exclude a group of employees who were included in the scope. In addition, the employer communicated directly with the employees about this issue in an attempt to undermine the exclusive authority of the union, which therefore constitutes interference with the representation of employees by the union.

[250] As indicated earlier, even in the absence of anti-union animus, an employer can be found to have violated section 94(1) of the *Code* if its conduct had the effect of interfering in the representation of employees by the union. In addition, the employer's failure to recognize the drops and MXU employees as part of the bargaining unit is a violation of 50(a) of the *Code*.

[251] Generally, in fashioning a remedy, the Board prefers a proportionate response that addresses the harm caused by the ULP.

[252] It is difficult to assess the degree of harm to the union caused by the employer's position. The Board notes that the parties were able to make some progress on some of the issues during

collective bargaining following the scope decision. There were no terms peculiar to the drops and MXU employees that were held up as a result of the position taken by the employer. The major issues related to the piece-rate system for I&R employees, to contracting out, to the union hiring hall and to the closed shop were not affected by the position taken.

[253] The major impact of this position was the hiatus in bargaining, but the parties agreed to put issues on hold until the scope issue was resolved by the Board. The parties were far from concluding a CA during the period in which the employer took the position, improperly, that the drops and MXU employees were not within the bargaining unit.

[254] Therefore, the Board finds that an appropriate remedy in this case is to issue a declaration that the employer violated the *Code* by failing to recognize, for the period of November 7, 2017, to January 25, 2019 (the date of the scope decision), that drops and MXU technicians were part of the bargaining unit. The employer is also required to publish this fact in an information circular to the employees to clarify the incorrect information it provided to employees on November 11, 2017.

ii. Changing the Terms and Conditions of Drops and MXU Employees and the Subsequent Elimination of the Drops Team

[255] In February and March 2018, the employer changed the location of its office in Port Coquitlam, expanded the use of bucket trucks, changed from two-person to one-person drops crews and went to a seven-day-per-week operation. There was also a change to the parking arrangements, the use of LTS vehicles for commuting and the scheduling for the drops technicians.

[256] The union argues that the employer altered the terms and conditions of employment of the drops and MXU employees because they were members of the bargaining unit. In particular, the union argues that the employer changed the schedules and parking arrangements of these employees. While it alleges that this amounts to a violation of sections 50(b), 94(1), 94(3) and 96 of the *Code*, the union's arguments regarding the alteration of schedules and parking arrangements focused solely on the statutory freeze provision (see section 50(b) of the *Code*).

A) Arguments of the Parties

1) The Employer's Argument

[257] The employer admits that changes were made to the terms and conditions of drops employees and argues that this was business as before and that the decision was made without anti-union animus.

2) The Union's Argument

[258] The union argues that there has been a violation of section 50(b) of the *Code*, or the statutory freeze provision. The union refers to *D.H.L. International Express Limited*, *supra*, at paragraphs 92–93, for the principle that the section sets out a legislative intent to maintain the prior pattern of the employment relationship. The purpose of the statutory freeze is to consolidate and protect the integrity of the right of freedom of association to prevent the employer from acting to intimidate, interfere with or in any way attempt to manipulate the bargaining unit and to preserve the status quo and maintain the equilibrium between the parties (see *D.H.L. International Express Limited*, *supra*, at paragraph 85, citing *Bessette Transport Inc.* (1981), 43 di 64 (CLRB no. 299)).

[259] The Board will look at the evidence to determine whether the changes made are part of the employer's normal practices. The employer has the right to manage its business if it continues to do so in the same pattern as before the freeze (see *Northern Air Solutions Inc.*, *supra*, at paragraphs 129–130).

[260] Anti-union animus is not a required element of section 50(b). The Board looks to determine whether there is a "sufficient or legitimate managerial, entrepreneurial or collective bargaining justification" (see *Canadian Broadcasting Corporation*, *supra*, at pages 128; and 14,106).

B) Facts

[261] LTS, or an affiliated company, had a lease on premises at 8240 Fraser Street, in Vancouver which had parking restrictions. The lease was made on October 1, 2015, for a period of 18 months. It provided for the exclusive use of 110 parking spaces for the benefit of the landlord.

[262] On July 7, 2017, Mr. Ken Daly, the Warehouse Manager, notified other LTS managers that LTS vehicles that were left in the parking lot on evenings and on weekends would be towed by the landlord, at LTS's expense, as the parking lot had to be cleared in the evening. Mr. Daly advised that they had to give the landlord 160 parking spots every evening and weekend.

[263] On October 19, 2017, Mr. Gary Peacock, Superintendent, notified Mr. Gurjeet Chima, Senior HR Business Partner with Ledcor, and Mr. Robin Neal, Superintendent, that LTS would be moving to one technician per truck as equipment became available and a compound dispatch model. On October 27, 2017, at a safety meeting, Mr. Matt Sundset and Mr. Neal notified the drops employees that it was moving to one person per truck.

[264] On February 8, 2018, Mr. Boogemans gave notice to the union that the employer needed to make changes that were being contemplated prior to the certification application for drops and MXU employees. Mr. Boogemans referenced that the employer did not consider these employees part of the bargaining unit, as it indicated in the November 2017 bargaining session. Mr. Boogemans noted that the union had not applied to the Board for a determination on the scope issue.

[265] On February 22, 2018, Mr. Peacock gave notice to 18 affected drops and MXU technicians of a change in scheduling, effective March 24, 2018, from a work schedule of Monday to Friday (7:30 a.m. to 3:30 p.m.) to rotational work scheduled on a continuous operation with a shift schedule 4 days per week, 10 hours per day, worked over a 7-day period and 5 days per week, 8 hours per day worked over a 7-day period.

C) Analysis and Findings

[266] The statutory freeze provision of the *Code* is triggered when a notice to bargain is served, which in this case occurred on September 16, 2017.

[267] In the Board's view, business as before must include a consideration of any changes forecast by the employer in its business operations and changes in the method of operation which were expected to materialize, as well as the employer's ability to respond to changes from external sources such as customers or suppliers.

[268] Some business operations are more static than others, so any change may not be business as before. Other industries may be more dynamic and change-oriented. It strikes the Board that a contractor such as LTS may be required to respond, on short notice, to changes in the work required of it by its principal client, TELUS, including the volume of this work. LTS may have events planned, or that materialize, that are unconnected to collective bargaining activities.

[269] The Board is also conscious that an employer may use a "drip-drip-drip" approach to make seemingly minor changes that undermine or erode the union's representational rights over time. An example of such a case was *669779 Ontario Limited O/A CSA Transportation*, *supra*, in which the Board stated the following:

> [174] … However, regardless of the characterization of the employer's actions, one must keep in mind that these actions occurred during a period where a group of drivers were attempting to obtain representation rights for the first time by organizing and filing a certification/variance application with the Board. During this very tense period, continuous and gradual changes are being made by the employer that affect the employees' pay, their schedule and the model under which they have been working for the past decade. Those changes are eroding the proposed unit by displacing drivers that support the union and replacing them with new owner-operators who the employer suggests might be independent contractors and not part of the bargaining unit at all. There is no doubt that during this sensitive period, those actions will have a chilling effect on the members of the bargaining unit.

[270] The statutory freeze is intended to protect the union during a vulnerable period, one that was even more vulnerable in this case given that the union had yet to negotiate its first CA.

[271] Here, there are two significant points: the change in parking arrangements and its consequential impact on employees and the increase in the drops backlog.

1) Changes to the Office Location, Parking and Use of Vehicles

[272] In his testimony, Mr. Geheran explained that the employer had been pursuing an alternative location for its warehouse for some time. One of the reasons for moving was that the parking arrangements at the old location were unsatisfactory. The employer was required to ensure that its vehicles were removed from the lot after working hours to accommodate another business user, a restaurant. The benefit of this for employees was that some employees, but not all, could take the employer's vehicle home and use it to commute to work.

[273] When LTS made the change from the Fraser Street location to the Port Coquitlam location, Mr. Amos testified that the technicians were no longer able to take the company vehicles home and that he saw this as a loss of a benefit. He also saw the changes in the parking arrangements as less convenient and safe. He described issues around flooding, freezing and street people at the new location.

[274] Mr. Amos confirmed in cross-examination that two drops employees generally worked together so only one of the employees would be able to take the vehicle home.

[275] In the Board's view, these are rather insignificant changes. The Board notes that the underlying issue was the unsuitable parking arrangements at the Fraser Street location, which was on the employer's radar prior to certification. In the Board's view, on balance, these changes are properly characterized as business as before. The decision to move locations had a business rationale. Further, this was a plan that was in the works for some time prior to certification because of the unsatisfactory parking arrangements which required LTS have all its vehicles removed in the evening. Therefore, the Board finds that the employer has not breached the statutory freeze provision. In addition, the Board is satisfied that the change had nothing to do with the union's bargaining rights and that anti-union animus played no role in the employer's decision to seek new office arrangements.

[276] For all the above reasons, this part of the complaint is dismissed.

2) Scheduling Changes

[277] The employer altered the shifts of the drops employees. It linked this to an increasing need for bucket trucks and to a need to reduce the drops backlog.

[278] It is apparent that at a particular juncture in Project Falcon, there was a buildup or a backlog in the completion of drops. Getting customers connected to the fibre cable is a priority for LTS, as TELUS generates its revenue from services that are delivered to the customer and this requires a connection to the network, including a drop. The idea was to get customers connected to the system as quickly as possible. This was in the business interest of TELUS and therefore also in the business interest of LTS.

[279] The Board accepts Mr. Geheran's testimony that there is little distinction for consumers between internet services that are cable-based (Shaw, for example) and telephone-based (TELUS). He also testified to the highly competitive nature of the business. The Board accepts that given the nature of the service, customers who experienced delayed access to the TELUS connection could choose a competitor such as Shaw, resulting in a loss of revenue for both TELUS and LTS.

[280] Further, the Board accepts Mr. Geheran's evidence that customers might prefer appointments for evenings or weekends and particular short windows in which to expect the attendance of a technician.

[281] There was a difference between Mr. Amos's testimony and Mr. Geheran's testimony about complex drops.

[282] On the scheduling change, Mr. Amos testified that it went to a seven-day rotation as the drops team had more bucket trucks. The drops crews were required to work with the I&R technicians, who worked seven days per week. He stated that there was a mixed reaction to this change from drops technicians. He confirmed Mr. Geheran's testimony that the employer had implemented the changes mainly by using volunteers. He was not able to confirm that going to the seven-day-per-week schedule made the operation more viable.

[283] The statutory freeze in section 50 of the *Code* is not an absolute freeze. There are two themes here. Firstly, there was a business need to change locations for the dispatch of the drops team because of a parking issue. This problem predated certification. Secondly, there was an escalating problem with the drops backlog. This was an underlying factor requiring changes in scheduling. The Board is persuaded by Mr. Geheran's unchallenged testimony that these were real business problems that LTS needed to deal with in meeting its Project Falcon commitments. Implementing solutions to these problems would impact the bargaining unit members.

[284] Vehicle-use patterns changed because of the change in location of the dispatch of workers and the need to eliminate the drops backlog. This meant that some employees could no longer drive a company vehicle to work, had to drive their own vehicle and had to park in a location considered to be less desirable. A reasonable business solution was to move the operation to a

location that had better parking. These changes were business as before. The Board dismisses this part of the complaint.

[285] The Board finds that the changes made to the scheduling of the drops team were the result of the employer's attempt to deal with the drops backlog issue. LTS is involved in delivering services under Project Falcon, and the work, including the drops work, can be expected to fluctuate. As a contractor for this project, LTS is expected to supply labour and equipment to get the job done, which is building the network and connecting customers to it. LTS has always had a strategy of flexibility in the use of its resources. A drops backlog was a service delivery problem that needed to be resolved. LTS had a history of trying to solve problems as they arose by flexible use of its resources.

[286] In the Board's view, is the above changes fell within the concept of business as before. Therefore, the Board finds that the employer has not breached the statutory freeze provision. For these reasons, this part of the complaint is dismissed.

3) Elimination of the Drops Team

[287] On or about January 10, 2019, Mr. Denhamer decided to eliminate the self-performing drops team. The total number of tickets (work performed for customers) had reduced. At that time, the team consisted of six employees.

[288] Data provided by LTS showed that the Project Falcon drops were at a high of 12,661 on October 26, 2017. This fell to a backlog of 2,109 drops on December 8, 2017.

[289] In cross-examination, Mr. Amos admitted that he was hired to do drops as part of Project Falcon. He stated that later, when the Project Falcon work declined, the drops group also started to work on copper drops, which had been the work of I&R technicians before.

[290] Mr. Amos testified that while he had been hired on a piece-rate basis, he was paid hourly while he trained and while he worked as a drops technician.

[291] Mr. Amos confirmed that by the time he left LTS in September 2018, there were a lot fewer drops employees. From his perspective, the work that he was doing was like work performed by

subcontractors; however, this would only be anecdotal evidence, as he was not involved in assigning work to subcontractors or monitoring their work.

[292] The employer recalled Mr. Geheran to address some of Mr. Amos's testimony.

[293] Mr. Geheran explained that the drops backlog resulted from the complexity of the work, primarily in the Kitsilano and Point Grey neighbourhoods, with multi-family dwellings and garden suites. Generally, when 85 percent of the homes in an area were connected, the LTS subcontractors would move to a new community. This left cleanup work to be done by LTS employees, as it was less economical to use subcontractors for this residual work. At one point, the backlog was at 12,000 drops, and LTS needed to address this quickly. As the backlog was reduced and the Project Falcon work declined, LTS tried to keep its drops crews busy with copper drops, some of the mass-market work and the replacement of old rotting poles (red dot work).

[294] The data supplied by LTS shows that the drops team grew from July 2016, peaked around June and July 2017 at 25 members and declined by December 2018.

[295] Mr. Geheran further testified that LTS had been using subcontractors to do drops work for the first 18 months of Project Falcon before it hired employees to do this work. He stated about 93 percent of all drops were performed by its subcontractors and only 7 percent were performed by employees.

[296] The data supplied by LTS indicated that there were seven subcontractors for LTS performing drops prior to the certification. The data showed that most drops performed prior to and after certification were performed by subcontractors. The union points out that there has been a 32.35 percent reduction in the size of the bargaining unit since certification.

[297] The union points out that it noticed a recruitment posting for a telecommunications labourer and brought this posting to the employer's attention on January 29, 2019, by email. It was the union's view that this was a drops technician, and it questioned the employer's intention. On January 31, 2019, Mr. Boogemans emailed Mr. Nedila and indicated that there was no change in the internal job title but that the term "drops technician" was one that required clarification based on "feedback from the market." The union alleges that the employer had been downsizing the

bargaining unit and that it eliminated its complement of 25 drops technicians a few days after the Board issued the scope decision.

[298] Mr. Geheran testified that the employer often has postings online to see what the market has to offer in terms of employees.

[299] The union alleges that there is no valid business reason for allowing the drops team to dwindle and then eliminating it.

[300] The union argues that this is a breach of the statutory freeze provision of the *Code*. The union submits that it need not show anti-union animus but can rely on evidence of anti-union animus. The union maintains that the employer cannot credibly claim that this was motivated solely by business reasons.

[301] The union says that this allegation is tied to the employer's failure to recognize the drops group. The decision was partially motivated by anti-union animus. The employer undermined the union's authority in communicating that these employees were not within the bargaining unit when the union was telling them otherwise.

b. Analysis and Decision

[302] The Board notes that the scope decision was rendered on January 25, 2019. It found that the drops technicians were within the bargaining unit. The Board notes the union's suspicion regarding the elimination of the drops team very close to the Board's decision and its suspicion that this would have an undermining effect on its support.

[303] The drops team was created primarily to deal with a large backlog of drops arising from Project Falcon. This was primarily due to the complexity of the drops work in the Kitsilano and Point Grey areas. This work was not cost-effective for subcontractors to complete, so LTS created a dedicated drops team to complete this work.

[304] Much of this drops backlog was dealt with by January 2019. Mr. Geheran's testimony was that, as a result, the employer tried to keep the drops team busy with other work and eventually reduced the drops team's size. The decision to eliminate the drops team was made before the Board released its scope decision and not in response to the Board's decision.

[305] On February 5, 2019, Mr. Boogemans gave the union notice by email that the employer was closing the dedicated self-performing drops team. The Board notes that on the same day, Mr. Denhamer issued a memorandum to LTS staff announcing a reduction in the work orders for aerial drops and that the employer had decided to eliminate the dedicated Project Falcon aerial self-performing drops team. The memorandum referenced that this was a response to TELUS moving to an "Order Based Drop" placement process which TELUS fulfilled "through other channels" and a movement in Project Falcon work from aerial to buried communities.

[306] LTS supplied data showing the total number of drops performed by quarter for the period of 2015 to 2019, broken down between the self-performing drops team and subcontractors. In every quarter, LTS subcontractors performed a far greater magnitude of drops than the self-performing drops team. Prior to the implementation of the self-performing drops team, subcontractors performed 100 percent of the drops. In 2016, the subcontractors performed 48,826 out of 51,779 or 94.3 percent of the drops. In the first and second quarter of 2017, which captures all of the period prior to certification, subcontractors performed 29,829 out of 35,876 or 83.1 percent of the drops. In 2018, subcontractors performed 68,674 out of 70,290 or 97.7 percent of the drops. The Board notes that the total drops fell from a peak of 70,290 drops in 2018 to 5,049 drops in the first quarter of 2019. In that quarter, subcontractors performed 5,019 out of 5,049 or 99.4 percent of the drops.

[307] The drops team was reduced in size. Mr. Geheran testified that the affected employees were offered other positions within LTS and that some took severance.

[308] The Board is satisfied that the employer's decision to eliminate the drops team was not taken in response to the Board's decision or motivated by anti-union animus. This clearly was a business-related decision taken by LTS in response to the completion of the backlog in Project Falcon drops.

[309] As noted earlier, the unchallenged evidence of Mr. Geheran was that LTS regularly used subcontractors in all its areas of work and used them predominately for drops and MXU work and to a lesser extent for BFS and I&R work. The data provided by LTS as outlined above shows that most of the drops work had been and was always performed by subcontractors.

[310] LTS supplied data breaking down the reasons for a reduction in the number of employees categorized as quits, shortage of work and dismissal. The data shows that there was significant attrition in the bargaining unit due to employees deciding not to continue their work with LTS. For example, there were 68 employees who quit in 2015, 43 in 2016, 68 in 2017, 45 in 2018 and 13 in 2019. LTS also forecasted a declining need for I&R services and a time when it had no control over technicians quitting their employment. In the years prior to the termination of the I&R technicians in September 2019, most of the reduction in employees at LTS was due to quits. In 2019, 38 employees were terminated for shortage of work, and the bulk of these would have been the 31 employees laid off in September 2019.

[311] The business rationale for retaining subcontractors was that during a period of forecasted and expected falling demand for work, it made more business sense to use subcontractors rather than to recruit, hire, train and equip an employee who may not be there for very long given the falling demand.

[312] On the face of it, the argument is sound. It is a complete explanation for the perception of bargaining unit members that subcontractors were being used during a period when the drops team was reduced in size. The Board notes that the employer's evidence was unchallenged around the reasons for the reduction in work and the rationale for using subcontractors.

[313] In the Board's view, the employer has met its burden of showing that its decisions regarding the drops and MXU employees, including its decision to eliminate the drops team, were unrelated to the union's certification or collective bargaining and were not tainted by any anti-union animus. Therefore, the Board finds that the employer's conduct regarding the changes to the terms and conditions of the drops and MXU employees and the elimination of the drops team did not violate sections 94(1) and 94(3) of the *Code*.

[314] The union also alleges that the same conduct constituted a breach of the statutory freeze provision. As noted earlier in this decision, LTS historically used subcontractors to perform the drops work. The Board accepts the business as before defence advanced by the employer regarding the alleged breach of the statutory freeze provision. Unlike the situation in *D.H.L. International Express Limited*, *supra*, the evidence does not support a finding that LTS increased

or even changed its use of subcontractors in the period following the giving of the notice to bargain. LTS had predominately used subcontractors prior to certification.

[315] As a result, the Board dismisses the complaints in Board file nos. 032511-C and 032970-C pertaining to the changes in the terms and conditions of employment of the drops and MXU employees and the subsequent elimination of the drops team.

2. The BFS Employees (Board File No. 032755-C, September 11, 2018)

a. The Complaint and Arguments of the Parties

[316] On June 28, 2018, Mr. Hoy announced the layoff of four BFS technicians in a letter. The letter indicated that the volume of BFS work in British Columbia and the utilization rate of employees had declined to a level that was unsustainable. The letter also mentioned the loss of Bell work and announced the merger of the SMB group and the BFS group to create a single business field services group. The letter indicated that this was a process that had started 18 months earlier. This would have been prior to the union's application for certification.

[317] The union alleges that the layoff of four BFS employees was without reason. It also alleges that the employer laid off and refused to hire employees into the unit while using subcontractors.

[318] The union alleges a violation of sections 50(b), 94(1), 94(3) and 96 of the *Code*.

[319] As a remedy, the union seeks a declaration that LTS violated the *Code* by contracting out bargaining unit work and by laying off four technicians, specifically, Mr. Matthew Gill, Mr. Michael Gill, Mr. Ryan Crane and Mr. Escott. The union seeks that the Board order the employer to undo the changes made and make the employees whole. Further, the union seeks an order that the employer post the decision and provide a copy to each employee in the bargaining unit.

[320] The employer admits that it laid off four BFS employees but argues that this was business as before and was done without any anti-union animus.

b. Facts

[321] Mr. Geheran related some historical information showing that there was a reduction in BFS work for LTS, both on the national level and in British Columbia.

[322] On January 13, 2015, SaskTel gave written notice that it no longer required LTS's services and terminated the contract effective March 28, 2015.

[323] On October 18, 2016, Bell advised LTS that it had decided not to renew their FLM Long Haul support contract based on performance considerations about LTS's BFS. Other customers such as Radian Communications, Rogers, TELUS, Hibernia and Zayo had also expressed disappointment in LTS's performance. As a result, LTS initiated some changes in BFS.

[324] LTS provided data showing that prior to the IBEW's certification, there was a significant reduction in the BFS work for Zayo and a reduction in the work for Radiant Communications. There was a slight increase in work for A&W. There was a slight increase in Zayo work from February 2019 to November 2019 while Zayo was recruited an employee.

[325] The data provided by LTS showed that work for which a security clearance was required was generally less than one percent of all the BFS orders.

[326] The data provided by LTS showed that the BFS orders, which peaked at 1,747 orders in August 2017, fell for a period in 2018 prior to the layoff of the four BFS technicians in June 2018. In February 2018, the orders dropped to 743; there was a slight improvement to 1,041 in June 2018. From February 2017 to May 2018, the utilization rate varied from month to month but was between 32 and 45 percent. After the layoff of the four BFS employees, the utilization rate increased and approached the 80-percent rate LTS was seeking to achieve. The utilization rate is a comparison between the hours worked by a technician and the hours the technician is available to work. It largely reflects the work that LTS has available for the employee.

[327] LTS supplied data showing the productive hours that BFS technicians worked in its 2016 and 2017 financial years. The productive hours in 2016 were 85,345, and this fell to 9,555 hours in 2017. Much of the loss can be attributed to the loss of the Bell contract when the hours fell from 23,437 hours in 2016 to 2,681 hours in 2017. The next-largest loss was with its Zayo contract when the hours fell from 29,841 in 2016 to 3,008 hours in 2017.

[328] Data provided by LTS showed that the completed work order for the period of September 2017 to September 2018 fell from 1,614 orders to 676 orders. This represents a declining level of work for BFS technicians.

[329] LTS supplied information showing a reduction in the I&R work. In 2014, it exited from Rogers I&R and Smart Home operations in Ontario and Atlantic Canada. As of April 8, 2016, LTS exited from Vancouver Island TELUS I&R work because of an unstable workload that made the costs of service unsustainable.

[330] TELUS changed its system of work to a district model whereby it worked with its own employees and assigned the work to one other contractor in the district. LTS was assigned mass-market work in the Central District, which included Burnaby to the west. This excluded work in Abbottsford, Chilliwack and Mission, where LTS had previously been assigned work.

[331] LTS supplied data in chart form which showed that prior to certification, roughly 20 percent of orders were completed by subcontractors. This rose to a high of about 40 percent by October 2018.

[332] At the start of the summer of 2018, LTS had nine BFS technicians. The majority of these technicians were in the lower mainland; however, Mr. Shane Berry was based in Victoria, Mr. Michael Gill was based in Kelowna and Mr. Wilds was based in Kamloops. Mr. Wilds was one of the least senior BFS employees, with less experience than other technicians who had worked for the employer for a longer period.

[333] On June 28, 2010, Mr. Hoy notified the BFS technicians by memorandum that work volumes in British Columbia had declined and that the utilization rate (the work available and performed) of technicians had dropped to an unsustainable level. Mr. Hoy announced the merger of the BFS and SMB groups to create a single business field workforce. This email also announced the layoff of four BFS technicians due to low volumes and that it was the continuation of a process that had started 18 months earlier when the BFS and SMB groups were put under the same operations director. Mr. Hoy stated that four BFS technicians would be retained due to geographic requirements or unique required skills.

[334] Some of the I&R technicians were also trained to do BFS work, and they performed both I&R and BFS work.

[335] On June 28, 2018, LTS laid off Mr. Escott, Mr. Matthew Gill, Mr. Crane and Mr. Michael Gill. Each of the lower mainland BFS technicians, Mr. Escott, Mr. Matthew Gill and Mr. Crane, were

told to report to the shop for inventory and bring their tools and equipment with them. Mr. Escott, Mr. Crane and Mr. Matthew Gill met for coffee before going into the office. When they arrived at the office, they were split into separate rooms and LTS terminated their employment. Mr. Michael Gill also learned he was to be laid off.

[336] The employer retained Mr. Dennis Woycheshen, Mr. Shane Berry, Mr. Ray McMillan, Mr. Wilds and Mr. Amar Dhaliwal. Mr. Geheran explained that the original decision was to layoff all the BFS technicians, but the employer had reconsidered this as it found operational reasons to keep a technician on Vancouver Island (Mr. Berry) and in Kamloops (Mr. Wilds) and to retain two technicians with fusion splicing experience (Mr. Woycheshen and Mr. McMillan), who were located on the lower mainland.

[337] The employer advanced several reasons for retaining certain of the employees and laying off others.

[338] The employer's basic argument was that it is important for it to be able to right-size its operation, which means retaining sufficient employees to meet its contractual obligations. The employer produced evidence that showed that many of the BFS technicians were underutilized due to no fault of their own; there was not sufficient work to keep them busy full time. This meant that the employer topped up their pay to ensure that they had full-time hours, even though they did not perform full-time work.

[339] LTS supplied "score cards" information for the BFS employees, which showed hours worked (productive hours), hours available to work and the utilization rate (the percentage of productive hours worked by the technician). For example, the scorecard for Mr. Escott showed a range in productive hours that never exceeded 79 percent. LTS strives for 85 percent. For the period of September 2017 to June 2018, the productive utilization by LTS of Mr. Escott was an average of 65 percent, when means that 35 percent of the time, Mr. Escott was not engaged in income-generating activities for LTS. LTS was required to top up his pay in every month during that period. His productive utilization rate never exceeded 74 percent. For Mr. Michael Gill, the productive utilization by LTS was an average of 58 percent. LTS was required to top up his pay both in every month during that period.

[340] During the same period, the productive utilization rate was 77 percent for Mr. Woycheshen, 78 percent for Mr. Crane, 60 percent for Mr. McMillan and 39 percent for Mr. Berry.

[341] For some of LTS's work, there was a contractual requirement to provide services within a mean time to respond (MTTR) and a requirement to maintain a "[p]oint of presence." For example, under its Rogers contract, LTS was obliged to have a technician on site within two hours of a break fix callout. The Rogers network went north of Kamloops. That meant that for Rogers work, it made more sense for LTS to have the required technician—Mr. Wilds—in Kamloops rather than retain Mr. Michael Gill for work in the interior of British Columbia. Mr. Geheran testified that under LTS's contract with Rogers, it was required to maintain a point of presence in Kamloops, but not in Kelowna. Mr. Geheran testified that it was not able to maintain its contractual commitments to Rogers using a technician working from Kelowna. While Mr. Wilds was a recent hire and had less seniority than Mr. Michael Gill, LTS had been providing services on the Rogers contract using subcontractors prior to the hiring of Mr. Wilds and at an earlier time had a BFS technician in Kamloops until he left the company.

[342] As a result of declining work volumes, LTS decided to merge the SMB and BFS working groups to reduce costs. It decided to cross-train SMB technicians to do BFS work. With the merger of the groups, LTS was able to obtain a higher utilization rate of the remaining employees. Mr. Geheran's testimony on this issue was not challenged by the union.

[343] Mr. Geheran noted that one of the thoughts the employer had was that it was easier to train SMB workers to perform BFS work than to train BFS workers to perform SMB work. He said that that related in part to the way employees were paid, and he thought it unlikely that a BFS employee, who was paid by the hour, would not want to undertake SMB work, which was paid on a piece-rate system. There is no evidence that the employer tested this theory by asking BFS employees whether they were prepared to do the SMB work as well as BFS work.

[344] The employer considered a skills matrix in making its decision to layoff. This matrix was not prepared by Mr. Geheran. LTS retained Mr. Woycheshen and Mr. McMillan primarily because they had a certain set of skills—fusion splicing—which is required for the repair of breakages of fibre-optic cable. According to Mr. Geheran, the employer prefers to hire employees with this skill rather than train them. It is a skill that is in high demand. The laid-off BFS employees did not have this

fusion splicing skill. Fusion splicing training was requested by the BFS technicians and arranged and cancelled by LTS at an earlier time.

[345] The union challenged the skills matrix and called evidence about the layoff of the BFS employees. The evidence was anecdotal in nature. All the technicians stated that they were busy and that they generally knew of the work performed by others because they would stay in touch during the working day.

[346] However, the cross-examination of Mr. Geheran and the additional evidence did not displace the employer's evidence that none of the discharged employees had fusion splicing skills, which was one of the criteria used for retaining Mr. Woycheshen and Mr. McMillan. Further, as between the two interior technicians, Mr. Wilds (in Kamloops) and Mr. Michael Gill (in Kelowna), a technician in Kamloops was preferred by LTS because it was able to meet its standards around mean time to respond on the Rogers contract, which was difficult from the Kelowna location. Clearly, Mr. Wilds was a more junior employee than Mr. Michael Gill and had less overall training and experience.

[347] The Board notes that the union did not challenge the need for LTS to retain Mr. Berry on the basis that he resided on Vancouver Island and was needed by LTS to serve Vancouver Island customers. The employer has therefore met its burden with respect to the retention of Mr. Berry over other BFS technicians.

[348] The union is suspicious of the layoffs because the employer had continuing work for customers including Allstream and Zayo, Radiant Communications, Rogers, Canay or Sienna, Stack 8, Infinera and XO. Some of the work required a Government of Canada security clearance (security clearance). Some of the laid-off employees—like Mr. Matthew Gill—had a security clearance. Mr. Matthew Gill testified that it could take a long time, after the date of application, for the Government of Canada to issue a security clearance. In his cross-examination, Mr. Matthew Gill admitted that he did not have fusion splicing skills at the time of his layoff. In his direction examination, he indicated that he had quickly acquired these skills after his layoff from LTS.

i. Connections of Some of the Terminated BFS Employees to the Union

[349] Mr. Escott is known by the employer to be a friend of Mr. Brecht, a former LTS employee and now an employee of the union. Mr. Brecht was instrumental in the organizing campaign that resulted in the union's certification at the employer.

[350] Mr. Matthew Gill was a representative on the bargaining committee. Mr. Michael Gill is Mr. Matthew Gill's brother.

[351] The Board notes that LTS filed data showing that the retained BFS employees had clearances from the Royal Canadian Mounted Police (Mr. Arsenault, Mr. Wilds and Mr. Woycheshen) and Public Services and Procurement Canada (Mr. Berry, Mr. Wilds, Mr. Dhaliwal and Mr. Conor Dean).

ii. Investigation Meeting

[352] The union argues that LTS laid off the four BFS employees for a non-existent reason or justification. As part of its opening, the union had submitted that at least two of the laid-off BFS technicians were known by the employer to be union members as a result of an investigation meeting. This was repeated at paragraph 134 of the union's closing argument. This was part of the union's case for anti-union animus in the layoff of two of the four BFS technicians.

[353] In September 2017, Mr. Matthew Gill and Mr. Crane were called into an investigation meeting by the employer. Present at the meeting on behalf of the employer were Ms. Alisha Scichilone, HR Director for Ledcor, and Mr. Chima. The Board heard testimony on this issue from Mr. Matthew Gill and Mr. Geheran.

[354] The questioning related to attendance at the IBEW office, allegedly during working hours. At the time, Mr. Matthew Gill was on the union's bargaining committee. In his direct testimony, he stated that he had asked for a union representative and the employer had arranged for one. The union argues that both individuals were known by LTS to be union supporters.

[355] Following the investigation meeting, the employer did not impose any discipline. Mr. Geheran testified that the individuals had asked for and had been given the right to the attendance of a union representative. Mr. Nedila had attended as the representative.

b. Credibility of Mr. Matthew Gill and Analysis and Decision

[356] Mr. Geheran testified that the employer had relied on the skills matrix in deciding to retain or lay off certain of the BFS employees.

[357] Mr. Matthew Gill testified that Mr. Woycheshen, an employee who was retained by LTS, did not have fusion splicing skills. In cross-examination, Mr. Matthew Gill said that he had a text message from Mr. Woycheshen confirming this fact. The employer took the opportunity over the evening to investigate further about Mr. Woycheshen's training in fusion splicing. The details of its investigation were put to Mr. Woycheshen in cross-examination.

[358] The next day, during Mr. Matthew Gill's continued cross-examination, the text message was produced and marked as an exhibit.

[359] The text message sent to Mr. Woycheshen by Mr. Matthew Gill included the skills matrix.

[360] The message from Mr. Matthew Gill dated November 17, 2020, reads as follows: "Ledcor said this is why I we were let go. Did you get fibre splicing training or is that just more BS??? This list looks bogus to me" [*sic*]. Mr. Woycheshen's response was as follows: "The only thing I have ever been officially trained on is Telus up to ttv. Everything else I learned in the field. I've done all that though. But trained… Meh. I've never been involved in a break fix for long haul."

[361] Mr. Geheran had no personal knowledge, but the information obtained from Mr. Woycheshen and verified by SaskTel was that Mr. Woycheshen had training and experience as a splicer. Mr. Geheran also testified—and this was verified by all the BFS witnesses called by the union—that LTS never provided its employees with fusion splicing training. Mr. Geheran testified that it prefers to hire employees with these skills rather than train them on the skills.

[362] In cross-examination, Mr. Matthew Gill tried to explain the difference between his evidence the previous day and the content of the text message. One of his unsatisfactory explanations was a lie about his evidence the previous day, claiming that he had stated that his evidence related to whether Mr. Woycheshen had received fusion splicing training at LTS.

[363] In assessing credibility, the Board considered and relied upon *Faryna* v. *Chorny*, 1951 CanLII 252, [1952] 2 D.L.R. 354 (BC CA), at page 357. On the whole of the evidence, the Board

accepts Mr. Geheran's testimony that the BFS technicians retained by LTS were retained because of their skill set and location. Mr. Woycheshen and Mr. McMillan were retained because of their fusion splicing skills. Mr. Berry was retained because he had fusion splicing skills and was located in Victoria. Mr. Wilds was retained because he was located in Kamloops. The Board is not satisfied that anti-union animus played a role in the employer's decision to lay off four of the BFS employees. This is not a case where the employer advanced convoluted and untenable reasons for the layoff of four BFS employees. There was an overriding business rationale—the reduction of BFS employees improved the utilization rates of the remaining technicians, and the employer offered a cogent rationale for distinguishing between the employees retained and those laid off.

[364] It is clear that the employer cross-trained some of its SMB technicians to perform BFS work. However, overall, the employer achieved a reduction of both SMB and BFS technicians, with resulting efficiencies in the utilization rate of the remaining BFS technicians. The Board also notes that the plan to combine the BFS and SMB groups was one that predated the certification and was a result of developments in LTS's nationwide services.

[365] Mr. Geheran gave compelling evidence on this issue. He explained that there was a reduction of work available to BFS technicians in British Columbia. This resulted mainly from the loss of a contract with Bell. Further, at the time of the layoff, LTS did not foresee an increase in the BFS work.

[366] Mr. Wilds and Mr. Berry were retained by the employer based on geographic considerations. LTS retained Mr. Berry, located in Victoria, as it needed someone on Vancouver Island for SMB and BFS work and TELUS work. LTS retained Mr. Wilds in Kamloops. The employer needed someone in Kamloops rather than Kelowna for its point of presence to respond to work for Rogers. The response times for a technician from Kelowna were such that LTS would not have been able to meet its contractual commitments to Rogers.

[367] The Board heard evidence from several witnesses who were laid-off BFS employees: Mr. Escott, Mr. Arsenault, Mr. Matthew Gill and Mr. Michael Gill (the laid-off BFS employees). While the laid-off BFS employees had previously requested fusion splicing training, they did not have that training.

[368] Mr. Escott admitted in cross-examination that there were numerous times when fusion splicing was required for a repair on the Bell or Rogers system. Mr. Escott did not have fusion splicing training. He testified that Mr. Raj Bains, Manager, had indicated that fusion splicing skills were going to be needed for the Rogers contract and that the BFS technicians would receive training. The training never materialized.

[369] The Board also heard and accepted evidence from the laid-off BFS employees that they were well liked by the BFS customers to whom they provided services.

[370] The Board also heard anecdotal evidence from each of the laid-off BFS employees that they were busy and that they knew from communications between themselves that other BFS technicians were busy.

[371] The Board prefers the employer's data about utilization rates over the anecdotal evidence of the bargaining unit members. The Board notes that the employer has an overall view of how its operation was working and the changes in the demand for the services of the BFS group over time.

[372] The employer expressed its geographic rationale, and in the Board's view, cross-examination on that point did not materially impact the cogency of Mr. Geheran's explanation.

[373] The Board is satisfied that union membership or an attempt to undermine the union had nothing to do with the employer's reasons for laying off the four BFS employees. There was insufficient work to retain all the employees. The only issue that supports any connection to the union is that nine months prior to the layoff, two of the employees, Mr. Matthew Gill and Mr. Crane, were called into a meeting with the employer because it was investigating why the employees had attended at the union hall for two hours during the day when the employer thought they should have been at work. The employer accepted the employees' explanation that they had attended during their lunch breaks. No discipline resulted at the time.

[374] In two of the decisions referred to by the union, there was a clear and proximate connection between union membership or union activity and termination by the employer. For example, in *T.E. Quinn Truck Lines Ltd.*, *supra*, employees were terminated within days after the certification and after the employer had sought a list of union supporters. In *Road Runner Courier Service*,

supra, the employer withdrew an assignment given to an employee because of union support. This is not one of those cases in which there is a clear and proximate connection between union membership or union activity and termination by the employer.

[375] None of the terminated employees appear to have been active organizers. In the case of Mr. Matthew Gill and Mr. Crane, there was a lengthy period between the employer's investigation into their absence from work, which did not result in any disciplinary consequence, and its decision to lay off these employees. This was not an immediate knee-jerk response to their attendance at the union's office to sign union cards. The Board is persuaded by the employer's evidence that there was no connection between these employees' participation in the union and their layoff.

[376] In addition, the Board finds that the layoffs of the four BFS employees do not constitute a violation of the statutory freeze provision. Nor did they have the effect of interfering with the union's representation of its members. As explained earlier, the decision to lay off was due to declining work volumes which preceded the application for certification and notice to bargain. In the Board's view, this falls under the business as before justification. In light of all of the above, the Board finds that there was no violation of sections 50(b), 94(1) or 94(3) of the *Code* regarding the layoffs of the four BFS employees and dismisses this complaint.

3. The I&R Employees (Board File No. 033316-C, October 18, 2019)

[377] In September 2019, LTS laid off 31 I&R employees, just before a scheduled vote on the employer's September offer.

[378] On February 12, 2020, during the course of the hearing in this matter, the employer announced the loss of the I&R contract with TELUS. Mr. Geheran testified that that would leave approximately 70 to 71 employees in the bargaining unit.

[379] The employer provided an email from Mr. Moore of TELUS to Mr. Denhamer dated February 12, 2020, which reads in part as follows:

> … It is disappointing to be informed that you need to raise your prices by 10% moving into a renewal. We have been transparent in our required rate reduction minimum target of 6% which we are applying across all partners, at time of renewal.

> We will be providing the next round of supply guidance this week as we are overdue in providing that to you. That guidance will reflect up to the expiry of the Statement of Work on April 26th. Given the latest information you have provided around price and supply with respect to the British Columbia region mass market I&R services, we will not be looking to renew the current Statement of Work expiring on April 26, 2020. In the event that you are able to meet our supply and pricing requirements for mass market I&R services in the Alberta region and with respect to services related to our other existing statements of work, we remain open to discussing all other parts of our business with you not affected by this price increase and labour uncertainty.

[380] In its complaint, the union alleges that the layoff of 31 I&R employees, like other layoffs, was not motivated by a work shortage. The union argues that the timing and circumstances of this layoff are suspicious and that it was motivated at least in part by anti-union animus.

[381] The union alleges that LTS simply replaced bargaining unit members with subcontractors and that this was done with the motivation to defeat the union's lawful rights to engage in collective bargaining.

[382] The union alleges that the amount of work assigned to bargaining unit members had plummeted, while subcontractor use had increased.

[383] This was a continued erosion of the bargaining unit. The union alleges a violation of sections 94(1), 94(3) and 96 of the *Code* by laying off employees while subcontractors continued to work.

[384] The timing of this layoff was before the union was going to hold a strike vote. The Board notes the union's concern that all the laid-off employees were I&R technicians and that this classification comprised the main union supporters in the bargaining unit.

[385] The union alleges that this layoff would have a substantial chilling effect on its members.

[386] The employer has argued that the pre-strike layoff is not suspicious. It occurred right after TELUS had reduced the work assigned to LTS and the union was apprised by LTS all along that this was the probable consequence of taking strike action. The union has not challenged Mr. Geheran's evidence that TELUS had reduced the available work by 60 percent.

a. Facts

[387] On May 22, 2019, Mr. Morris wrote to the union, asking that it commit to no labour disruptions for the period of June 2019 to October 2019. He indicated that TELUS was likely to take steps to

protect its business from potential disruption unless the IBEW gave a firm commitment that it would not pursue any form of a labour dispute. He indicated that the failure to give a commitment could "result in other partner workforces being prioritized work at the expense of LTS. This will result in a loss of work, a loss in revenue for LTS, and a loss in earning ability for our technicians. None of which is good for the long-term stability of our I&R business."

[388] In an email dated May 24, 2019, Mr. Nedila declined to make the commitment sought by the employer. On May 29, 2019, Mr. Morris indicated that he would be informing TELUS that LTS would not be able to confirm its "capability to provide the service we had previously committed to" and requested that the union reconsider its decision not to guarantee that there would be no strike between June and October 2019. On May 31, 2019, Mr. Nedila confirmed by letter that he refused to give the commitment sought. However, he also stated that the union was willing to continue bargaining.

[389] On July 26, 2019, the union announced that it would be taking a strike vote on August 14, 2019. At the bargaining session on July 26, 2019, the union stated that it would not agree to extend conciliation.

[390] On July 30, 2019, Mr. Morris wrote to the union, stating that the threat of a strike would not cause LTS to agree to terms proposed by the union in bargaining. Mr. Morris stated that the threat of a strike could have a detrimental impact as "TELUS may take proactive steps to protect its business in a way that would affect the viability of LTS's I&R business in BC as well as its MXU business."

[391] On August 9, 2019, Mr. Geheran also wrote to Mr. Nedila, asking that the union reconsider whether persuading employees to go on strike was really in their best interests. Mr. Nedila responded the same day, affirming that a strike vote would take place.

[392] On August 13, 2019, Mr. Nedila gave a speech at a union convention. The details have been set out earlier in its decision.

[393] On August 14, 2019, the union took its strike vote.

[394] In an undated letter from Mr. Stephen Duncan, Director, Partner Management, Customer Service Excellence, TELUS indicated that it had learned of the vote authorizing possible job action. It asked that LTS "formally waive all 'exclusivity' rights to any I&R work that you may have through your contracts for the period of any labour disruption and a recovery period of our choosing." TELUS gave notice to LTS that it was:

> … reserving the right to proactively pursue additional capacity from other labour suppliers. In order to reach appropriate arrangements with such suppliers, TELUS may have to reduce its future supply asks to LTS, which could delay the resumption of LTS service provision following any labour disruption that may occur.

[395] TELUS indicated that it would be giving further instructions at a later date.

[396] On September 13, 2019, Mr. Duncan sent an email to Mr. Denhamer with instructions concerning the deployment of subcontract labour and non-subcontract labour (i.e., employees). In the lower mainland area, TELUS instructed LTS to schedule non-subcontractors into Richmond, Burnaby and New Westminster.

[397] On September 16, 2019, Mr. Denhamer confirmed that LTS would work with TELUS on how best to deploy its resources and was confident that it had sufficient resources to meet the outlined priorities.

[398] On September 17, 2019, the employer tendered for the first time a full copy of its collective bargaining proposal.

[399] On September 19, 2019, the union gave notice of a membership meeting to deal with a bargaining update, ratification vote and possible strike vote. The bargaining update set out the bargaining committee's position that the membership should reject the employer's proposal of September 17, 2019.

[400] On September 20, 2019, Mr. Eric Koch, Manager Tactical Planning and Strategy at LTS, emailed Mr. Geheran, indicating that TELUS's ask for work had declined from 27,256 sweat (SWT) hours to 17,294 SWT hours. A SWT hour is the equivalent of a person hour of labour. Taking into account the historical fulfilment—the work TELUS assigned which LTS was able to perform—there was a surplus of 25 to 32 technicians in the lower mainland area.

[401] On September 25, 2019, Mr. Hildebrandt emailed Mr. Nedila, notifying him that LTS was laying off 31 I&R employees because TELUS had decreased the volume of work assigned to LTS. Mr. Geheran testified that the employer had decided to lay off 31 rather than 32 I&R technicians, as one of the I&R technicians was a member of the union's bargaining team.

[402] The Board accepts Mr. Geheran's testimony, which is also supported by contemporaneous documents, that LTS was contractually required to notify TELUS of risks involved in its service delivery. One of those risks was the possibility that LTS could not perform services for TELUS because of the strike by the union.

[403] The Board notes that Mr. Geheran's testimony about the reasons for the layoff of the 31 technicians was not challenged by the union on cross-examination. There truly was a shortage of work because TELUS chose not to assign work to LTS because of the prospect of labour instability.

b. Analysis and Decision

[404] The union alleges a violation of sections 94(1), 94(3) and 96 of the *Code*. Under sections 94(1) and 96 of the *Code*, the union bears the onus of proof. Section 94(1) prohibit a large range of employer behaviour that interferes with the formation or administration of a union or the representation of employees by a union. Section 96 deals with intimation or coercion. As indicated earlier, the employer bears the onus of proof in the context of a complaint under section 94(3) of the *Code*.

[405] The Board is not satisfied that this is a case where LTS laid off bargaining unit members and replaced them with subcontractors. For reasons given earlier, LTS made significant use of subcontractors.

[406] The union has argued that it is reasonable to conclude that the layoffs were motivated in part by anti-union animus, given the lack of smooth or fruitful bargaining, the continued use of subcontractors to perform the same work and the timing and circumstances of the layoffs.

[407] The Board is cognizant that employers will rarely admit to anti-union animus for their conduct, and rarely is there direct evidence. The Board has scrutinized the defences advanced by LTS.

The Board notes that this is primarily a fact-dependent issue. The union's complaint focuses on employer actions which could have impacted the union.

[408] The Board appreciates that a layoff of employees shortly before a strike vote could have a chilling effect on employee voting. It was, however, still open to the union to hold and conduct its vote. Given the recency of this layoff, there is no reason why the 31 laid-off employees could not have voted if a vote had been held. The union chose not to have a vote, as it felt that the employer was forcing its hand.

[409] The Board notes that the employer is permitted to manage its business. The real question is whether the employer's action in laying off the 31 employees was tainted by any anti-union animus. The onus is on the employer to show that its action was not tainted by anti-union animus. The Board is satisfied that the layoff of the 31 employees was not tainted by anti-union animus.

[410] In a full examination of the facts, the Board is not persuaded that the employer has violated any provision of the *Code* in its decision to lay off the 31 employees. The decision was driven by a business reason. It was taken in the context of LTS's business reality that it is a contractor for TELUS, with no right to a particular volume of work assigned by TELUS.

[411] The Board accepts the unchallenged testimony of Mr. Geheran that LTS is not entitled to the assignment of any particular volume of work from TELUS under its contract. As one of several labour suppliers to TELUS, with no guaranteed volume of work, LTS is vulnerable to potential changes that TELUS can undertake in response to TELUS's perceived impacts of a strike by LTS's unionized workforce.

[412] TELUS appears to have favoured other contractors over LTS in work assignments. In the evidence, it was unclear whether these other contractors were unionized contractors, but it is clear from the testimony before the Board that as a result of "the event," TELUS was not obliged to use unionized contractors in the performance of its work. It is probable that most of the TELUS contractors in British Columbia are not unionized.

[413] The Board notes that no one from TELUS testified at this hearing and that there is therefore no direct oral testimony from TELUS about its intent or motivation in reducing work assigned to LTS. TELUS is not a party to bargaining between LTS and the union. There is, however,

documentary evidence that tends to show that TELUS took steps to protect itself from the impact on LTS of a strike by the IBEW.

[414] Further, the union received ample warning from the employer about the possible loss of work because of actions TELUS might take in relation to strike action proposed by the union.

[415] On the whole of the evidence, the Board is satisfied that the layoff of these employees directly relates to actions taken by TELUS which reduced the work available to LTS during the strike.

[416] The union was not willing to give LTS a commitment to a period of labour stability. It was not obliged to do so. In fact, agreeing to do so might, in many disputes, undermine a union's ability to negotiate a CA.

[417] The union could have made the concession asked for by the employer. It chose not to. The Board does not fault the union for the choice it made. The IBEW took a risk that what the employer was telling it about TELUS protecting its business would not come to fruition.

[418] More important, however, is that there is no evidence of any agreement or collusion between LTS and TELUS which might form the basis for an inference of anti-union animus on the part of LTS. Further, Mr. Geheran testified that the employees were not laid off to avoid dealing with the IBEW or to undermine collective bargaining.

[419] Mr. Geheran's evidence was that TELUS had reduced LTS's volume of I&R work by about 65 percent. This translated into a loss of 31 I&R positions at LTS.

[420] Mr. Geheran's testimony was that the layoff decision was unconnected to the union's scheduled vote on the September 17, 2019, offer but was in response to TELUS reducing LTS's available work.

[421] In the Board's view, TELUS's decision to reduce work assigned to LTS was TELUS's decision. While LTS decided to lay off technicians, it was a decision made in response to a reduced demand by TELUS for its services. TELUS appears to have reduced the demand for LTS's services solely because of the possibility of a labour disruption. There is no evidence that the reduction in the need for LTS's services was arranged or orchestrated by LTS.

[422] For LTS, TELUS's actions, apparently taken to protect itself from the anticipated consequences of the union's strike vote, did result in a shortage of work for it and its I&R employees. There is no evidence that this shortage of work was contrived by LTS to avoid the consequences of certification or collective bargaining.

[423] It appears that the IBEW did not take seriously the communications by LTS about the impact a strike would have on the available work allocated by TELUS to it during the strike. Mr. Nedila appears to believe that this was simply posturing by LTS. The Board accepts Mr. Nedila's testimony that he and the IBEW believed that LTS's need for certainty was best met by a CA.

[424] The Board also accepts Mr. Geheran's testimony that LTS was not prepared to agree to a CA on the union's terms simply because it was under pressure due to a strike. Mr. Geheran's view was that LTS could not agree to a CA that it considered not in its best interests. The union was alerted to the employer's view that a labour disruption would result in TELUS taking steps to protect its business. That took place, but the resulting layoffs did not occur because of anti-union animus on the part of LTS. Therefore, the Board finds that the employer did not violate section 94(3) of the *Code* when it laid off the 31 I&R technicians.

[425] As noted above, the Board accepts that LTS was obliged to notify TELUS of issues related to the performance of its contractual obligations. TELUS appears to have responded by reducing the work available to LTS. The real situation is that TELUS holds the cards because it can choose to allocate work to LTS or to allocate it to other contractors.

[426] In addition, the Board is not satisfied that the decision to lay off the I&R technicians undermined the union or interfered with its rights. In fact, the union continued on with its strike action, and LTS has experienced the consequences of TELUS taking action to protect its interests. LTS passed on those consequences to the I&R technicians in layoffs as it did not have the work available to keep those employees working, with TELUS's reallocation of its work to other contractors. Therefore, the employer's conduct regarding the I&R technicians did not violate section 94(1) of the *Code*.

[427] As indicated earlier, the union has not provided sufficient particulars or evidence to support its allegation that the employer intimidated or coerced employees to refrain from becoming union

members. As a result, the Board dismissed the allegation that the employer had violated section 96 of the *Code*.

[428] This complaint regarding the layoff of the 31 I&R technicians is therefore dismissed.

V. Conclusion

[429] The union has demonstrated that there were organizational changes that occurred after the notice to bargain was given. There was a reduction in the number of employees, four BFS technicians were laid off, and 31 I&R employees were laid off before a vote on the terms of an employer offer of a CA. The employer has discharged its onus of showing that its actions were not tainted by anti-union animus. Further, the Board is satisfied that the changes were not made for the purpose of undermining the union's representational rights. There were valid business reasons for the changes implemented by the employer. This certification occurred for an employer that had historically used subcontractors, rather than employees, to provide many technical services. It operates in a dynamic environment and had some changes in the work. The nature of the business requires some flexibility for the employer to right-size its business. The certification took place at the height of a project, and it was anticipated that the demand for employees would decrease as the project wound down.

[430] However, for reasons explained above, the Board finds that LTS violated sections 50(a) and 94(1) of the *Code* by failing to recognize that drops and MXU technicians were part of the bargaining unit in the November 2017 collective bargaining negotiations for the period from November 7, 2017, up to the Board's scope decision on January 25, 2019. Therefore, the complaint in Board file no. 032511-C is allowed in part.

[431] The employer is obliged to publish to the employees an information bulletin outlining that it was incorrect when it communicated to them on November 11, 2017, that the drops and MXU employees were not part of the bargaining unit.

[432] All the other complaints are dismissed, and Board file nos. 032511-C, 032755-C, 032970-C and 033316-C are closed.

Paul Love
Vice-Chairperson