BRITISH COLUMBIA LABOUR RELATIONS BOARD

BEE-CLEAN BUILDING MAINTENANCE INCORPORATED

(the "Employer")

-and-

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 2, BREWERY, GENERAL & PROFESSIONAL WORKERS' UNION

(the "Union")

PANEL:	Jennifer Glougie, Associate Chair
APPEARANCES:	Keith Murray, for the Employer Alexander Currie, for the Union
CASE NOS.:	2020-000408, 2020-000409 and 2020-000410
DATE OF DECISION:	October 27, 2020

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 This case involves a collective bargaining dispute between the parties regarding the negotiation of a first collective agreement.

2 The parties disagree as to what process I should direct them to use to resolve their first collective agreement under Section 55(7), in the event a direction becomes necessary. Given the nature of the dispute, my reasons will be brief.

II. BACKGROUND

3 The Union holds three certifications covering employees working at six of the Employer's operations. The Union applied under Section 55 of the *Labour Relations Code* (the "Code") for first collective agreement mediation for all three certifications. The Board appointed a mediator (the "Mediator") who met with the parties almost a dozen times before he was asked to write his report under Section 55(6) (the "Report").

4 The Mediator notes that, while the parties were able to resolve numerous issues, several key issues remained unresolved at the time the Report was written, including: wages for both light and heavy duty classifications; overnight premiums; wages guaranteed over the minimums set out in the *Employment Standards Act*; introducing Boxing Day as a statutory holiday; health and welfare and pension contributions; sick and personal leave days; footwear allowances; provision of work clothing; language concerning workload issues; and a letter of understanding to address how the agreement would apply to new sites varied into the Union's certifications.

5 After reviewing the final positions of the parties, the Mediator concluded that they would be unable to voluntarily finalize a collective agreement. He reviewed the unresolved proposals and crafted a recommendation package which, in his view, was reasonably likely to be adopted by both parties (the "Recommendations").

6 The parties were given an opportunity to review the Report and advise whether they were prepared to accept the Recommendations, in which case, the Recommendations and the agreed-to provisions would become the first collective agreement between the parties. Absent agreement, they were asked to provide their position on what process I should direct under Section 55(7) to resolve the collective bargaining dispute.

7 The Employer has indicated it is prepared to accept the Recommendations. The Union says it is only prepared to accept the Recommendations if the employees in the bargaining unit vote in favour of them through a ratification process. It asked for an extension of time to October 30, 2020 to conduct the ratification votes at each of the

Employer's certified operations. I granted the extension to October 30 to conduct the ratification vote, but asked the Union to file in advance its submission on what process I should direct if the vote is unsuccessful. My intention in doing so was to have the direction in place, if necessary, so that the parties could act on it once the results of the ratification vote are known without causing further delay.

III. POSITIONS OF THE PARTIES

8 As indicated, the Employer is prepared to accept the Recommendations. However, it says that, if the Union does not also accept the Recommendations, after the ratification vote or otherwise, I should direct that the collective bargaining dispute be resolved through binding arbitration pursuant to Section 55(6)(b)(ii) of the Code. The Employer says where one party accepts a mediator's recommendations, as here, the Board's policy is to refer the dispute to binding arbitration. It says there is no reason to depart from that policy in the present case.

9 The Union says it is not prepared to accept the Recommendations unless the employees vote in favour. If the employees do not ratify the Recommendations, the Union says I should permit it to exercise its right to strike under Section 55(6)(b)(iii). It says the Board has generally ordered binding arbitration where there is some concern that a strike or lockout would be ineffective to break the logjam. There is nothing in the present case to suggest a strike or lockout would be ineffective; rather, the parties have reached a simple impasse in the terms and conditions of the agreement. In such cases, the Union says binding arbitration should not be the Board's preferred method for concluding the Section 55 process where one party accepts the mediator's recommendations and the other does not.

IV. ANALYSIS AND DECISION

10 Section 55(6) of the Code provides that, where a first collective agreement is not concluded within 20 days of the appointment of the mediator under Section 55(1), the mediator must report to the associate chair and recommend either or both of the following:

> (a) the terms of the first collective agreement for consideration by the parties;
>
> (b) a process for concluding the first collective agreement including one or more of the following:
>
> > (i) further mediation by a person empowered to arbitrate any issues not resolved by agreement and to conclude the terms of the first collective agreement;

(ii) arbitration by a single arbitrator or by the board, to conclude the terms of the first collective agreement;

(iii) allowing the parties to exercise their rights under this Code to strike or lock out.

11 In the present case, the Mediator made recommendations under Section 55(6)(a). The Recommendations are acceptable to the Employer, but the Union will only accept them if the employees vote in favour during a ratification process which will conclude by 4:00 pm on October 30, 2020. If the Union does not accept the Recommendations by that time, then, under Section 55(7) of the Code, I must direct that the parties use one of the processes in Section 55(6)(b) to conclude their first collective agreement. The Employer says I should direct binding arbitration under Section 55(6)(b)(ii). The Union says I should permit it to exercise its right to strike under Section 55(6)(b)(iii).

12 The Board's policy with respect to Section 55 is set out in its seminal decision in *Yarrow Lodge Ltd.*, BCLRB No. B444/93 ("*Yarrow Lodge*"). In *Yarrow Lodge*, the Board unequivocally stated that "the policy of Section 55 is that the terms and conditions of a first contract are to be negotiated, not arbitrated" (p. 54). It acknowledged that goal of first contract mediation not to provide either party with a collective agreement, but to assist the parties to facilitate the achievement of their own collective agreement. Moreover, it recognized that the Board's intention under Section 55 is to impose as few terms and conditions as possible (p. 31).

13 The policy reasons for the Board's strongly-expressed preference that first collective agreements be negotiated, not imposed, are set out, in part, at pages 29 and 32-33 of *Yarrow Lodge.* There, the Board not only acknowledged the importance of the "catalyst" and "cathartic" effects of job action, but recognized that direct negotiations between parties - who must ultimately govern themselves in accordance with the contract - are more likely to result in an agreement that accurately reflects their own needs.

14 The Board nonetheless acknowledged that it may be appropriate to impose a first collective agreement in certain circumstances. Specifically, the Board indicated a willingness to impose a first collective agreement as a remedy to address the breakdown in negotiations resulting from the conduct off one of the parties (*Yarrow Lodge*, p. 35). In the Board's view, such a remedy would be appropriate where the capacity to voluntarily achieve a collective agreement has been negatively impacted, including by factors such as:

(a) bad faith or surface bargaining;

(b) conduct of the employer which demonstrates a refusal to recognize the union;

> (c) a party adopting an uncompromising bargaining position without reasonable justification;
>
> (d) a party failing to make reasonable or expeditious efforts to conclude a collective agreement;
>
> (e) unrealistic demands or expectations arising from either the intentional conduct of a party or from their inexperience;
>
> (f) a bitter and protracted dispute in which it is unlikely the parties will be able to reach a settlement themselves. (p. 36)

That is, the Board held the imposition of a first collective agreement will be appropriate where the breakdown in negotiations is the result of one of the impugned factors (*Yarrow Lodge*, p. 46. Also, see, for example, *Compass Group Canada*, BCLRB No. B117/2005).

15 Since *Yarrow Lodge,* the Board has also held that binding arbitration is an appropriate forum for resolving first collective agreement disputes in circumstances where a strike or lockout would not be effective. For example, the Board has directed parties to binding arbitration: where all of the employees in the bargaining unit are laid off (*Multicultural Society of Kelowna*, BCLRB No. B28/2003); where prolonged job action at another of the employer's operations certified to the same union has not resulted in a collective agreement (*British Columbia Automobile Association*, BCLRB No. B358/99 (Leave for Reconsideration of Letter Decision dated July 26, 1999), ("*BCAA*")); or where essential services are in issue (e.g., *Deltassist Family and Community Services*, BCLRB No. B326/2002; *Everett Rest Home Ltd.*, BCLRB No. B117/2003; *CWS Industries (Mfg) Corp.*, BCLRB No. B19/2009; *Pro Vita Care Management Inc.*, BCLRB No. B206/2009; *Osprey Care Inc.*, BCLRB No. B46/2010; *Stanford Place Holdings Ltd*., BCLRB No. B95/2011).

16 *Yarrow Lodge* also contemplates that the Board may direct parties to binding arbitration to resolve a first collective agreement dispute in the absence of any of the impugned factors or evidence a strike or lockout would be ineffective. In *BCAA*, and in a handful of cases that followed it, the Board held that its practice is to refer a dispute to binding arbitration where one of the two parties accepts the mediator's recommendations and its expectation is that the arbitrator contract will reflect those recommendations (para. 23). The rationale for this practice, it said, is that the mediator, having worked with the parties, is in the best position to understand the dispute and identify where a reasonable settlement lies (para. 20; see also, *Yarrow Lodge*, pp. 42-43).

17 Neither party says, nor is there anything in the Report to suggest, that any of the impugned factors are in issue in the present application or that there is any particular reason why a strike or lockout would be inappropriate to resolve the first collective agreement. The only issue is whether I should follow *BCAA* and direct the parties to

resolve their first collective agreement dispute through binding arbitration because one of the parties – here, the Employer – has agreed to accept the Recommendations.

18 As a starting point, I agree that the mediator is in the best position to determine where a reasonable settlement lies. I accept that premise both generally and on the specific facts of the case before me. That is, I accept that the Recommendations reflect a reasonable settlement of the first collective agreement dispute between the Employer and the Union. I am not persuaded, however, that the ability to exercise the right to strike or lockout should necessarily be precluded because the Mediator was able to identify where the reasonable settlement of this particular dispute lies. I find such a conclusion is not consistent with the broader policy objectives set out in *Yarrow Lodge*.

19 The Board in *Yarrow Lodge* is clear that, in the absence of any of the impugned factors set out above, the recommended option for resolving the first collective agreement should invariably be strike or lockout (*Yarrow Lodge*, p. 46). Where parties have made reasonable efforts to conclude a collective agreement, and it is clear that what is in issue is simply hard bargaining (a contest of strength over what the final terms and conditions of an agreement should be), they will most often be referred to the strike/lockout option (p. 45). The Board will generally not interfere in collective bargaining which is simply and clearly and contest over what the proposed terms and conditions will be (p. 46).

20 Moreover, while the Board recognized in *Yarrow Lodge* that, even in the absence of any of the impugned factors, a dispute may be referred to first contract arbitration where one party has accepted the mediator's recommendations for settlement and the other has not (pp. 39, 41), those comments must be read in context. Specifically, while acknowledging the associate chair's discretion to direct the parties to binding arbitration where one party accepts the mediator's recommendations, the Board expressly contemplated that such a direction will be the exception, not the rule:

> … Where *one* party has accepted the recommendations for settlement contained in a mediator's report pursuant to Section 55(60(a), the dispute may be referred to first contract arbitration. This exception shall be discussed under the heading of Mediators' Reports.
>
> However, it should be emphasized that referral to first collective agreement arbitration will generally be on the basis of a causal connection between one of the impugned factors set out above and the breakdown in negotiations.
>
> It must be emphasized that the purpose of Section 55 is for the parties to conclude their own collective agreement. In policy terms, the measure of success of the application of Section 55 will be how few collective agreements are actually imposed. (p. 39)

21 Neither party disputes that *Yarrow Lodge* is the Board's leading policy decision on Section 55 or that I must exercise my discretion to direct a process under Section 55(7) in a manner that is consistent with the Board's policy set out therein. Neither party disputes that a direction made under Section 55(7) is a discretionary one and that I continue to have discretion to direct a process other than binding arbitration, even where the mediator makes recommendations that are acceptable to one party and not the other.

22 As noted above, the Board was explicit in *Yarrow Lodge* that, absent compelling reasons otherwise, the recommended option for resolving the first collective agreement should invariably be strike or lockout. In the present case, neither party has alleged, nor would I find, any impugned conduct on the part of the other. Neither party has raised an issue as to whether a strike or lockout would be ineffective. In short, neither party has raised or established any basis on which I might find that a strike or lockout would be an inappropriate method of resolving the first collective agreement dispute. As a result, I am not persuaded there is a basis on which to deny the parties the right to strike or lockout in the circumstances.

V. CONCLUSION

23 As noted at the outset, the Union is in the process of putting the Recommendations and agreed-to provisions to the bargaining unit employees by way of a ratification vote. If the employees vote in favour, then the Recommendations and provisions agreed to in bargaining will form the collective agreement between the parties. If, however, the employees do not vote in favour of accepting the Recommendations and agreed-to provisions, then I direct, pursuant to Section 55(6)(b)(iii), that the parties are free to exercise their right to strike or lockout to resolve the first collective agreement dispute.

24 My direction will take effect on the earlier of (a) the Union notifying the Employer that the ratification vote was unsuccessful or (b) 4:00 pm on Friday, October 30, 2020, if the Union has not first confirmed with the Employer that the ratification vote was successful.

LABOUR RELATIONS BOARD

JENNIFER GLOUGIE
ASSOCIATE CHAIR