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*Federal Public Sector
Labour Relations and
Employment Board Act and
Federal Public Sector
Labour Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

TREASURY BOARD

Applicant

and

**FEDERAL GOVERNMENT DOCKYARDS, TRADES AND LABOUR COUNCIL
(ESQUIMALT, B.C.)**

Respondent

Indexed as

*Treasury Board v. Federal Government Dockyards, Trades and Labour Council
(Esquimalt, B.C.)*

In the matter of an application for a declaration of unlawful conduct under section
198(1) of the *Federal Public Sector Labour Relations Act*

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour
Relations and Employment Board

For the Applicant: Jena Montgomery, Larissa Volinets Schieven, and
Alexandre Toso, counsel

For the Respondent: Ronald A. Pink, KC

Heard at Victoria, British Columbia,
January 9 to 11 and April 2 and 3, 2024,
and by videoconference,
May 10, 2024.

REASONS FOR DECISION

I. Application before the Board

[1] From April 19 to 30, 2023, the Public Service Alliance of Canada (PSAC), one of the major bargaining agents certified by the Federal Public Sector Labour Relations and Employment Board (“the Board”) to represent federal public sector employees, set up picket lines throughout Canada in the context of a legal strike. The strike ended with a tentative agreement between PSAC and the Treasury Board (the legal employer and, in this case, “the applicant”). When I refer to the employer in this decision, it means specifically the employer as represented by management at the worksite at issue.

[2] Ship repair employees at the Department of National Defence’s (DND) naval repair facilities in British Columbia (SR(W)s) are represented by another bargaining agent, the Federal Government Dockyards, Trades and Labour Council (Esquimalt, B.C.) (“the Council” or “the respondent”; in its documents it refers to itself as Federal Government Dockyards, Trades and Labour Council (West)). They were not in a legal strike position. They did not cross the PSAC picket line.

[3] On May 8, 2023, the Board received an application for a declaration that the respondent unlawfully counselled the members of the bargaining unit it represents to carry out strike action, contrary to s. 194(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”).

[4] This application was made under s. 198 of the *Act*, which states that the Board may declare that conduct unlawful.

[5] There was no unlawful conduct, and therefore there will be no declaration.

II. Summary of the evidence

A. Overview

[6] The relevant facts were mainly uncontested. I will briefly describe the worksites and the bargaining unit to situate the events that took place during the PSAC strike. I will then introduce the witnesses whom I heard and summarize the evidence chronologically.

[7] DND has two naval worksites that are at issue in this decision. One is the large Fleet Maintenance Facility Cape Breton (FMF CB) at the Canadian Forces Base in

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Esquimalt (CFB Esquimalt), B.C. Approximately 1000 civilian employees work at FMF CB. The largest group by far is composed of SR(W)s and counts between 650 and 700 people. Other employees include excluded managers and members of other bargaining units, represented by the Professional Institute of the Public Service of Canada, the Association of Canadian Financial Officers, and PSAC, through its component the Union of National Defence Employees (UNDE).

[8] The second worksite is the Canadian Forces Ammunition Depot at Rocky Point, in Metchosin, B.C., some 20 km from FMF CB. Approximately 10 SR(W)s work there. Their role is mainly to repair missiles and torpedoes. They work in close collaboration with ammunition technicians, who are UNDE bargaining unit members.

[9] SR(W)s are tradespeople and belong to several unions. The trades and local numbers were provided at the hearing in oral testimony; the complete names of the unions are found in the collective agreement between the applicant and the respondent for the SR(W) group (expiry date January 30, 2023). Trades in DND naval repair and their respective unions are as follows:

- machinists: Machinists, Fitters and Helpers Industrial Union, Local 3;
- shipwrights: Shipwrights, Joiners and Wood Caulkers' Industrial Union, Local 9;
- boilermakers: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 191;
- operating engineers: International Union of Operating Engineers, Local 115;
- sheet metal workers: Sheet Metal Workers' International Association, Local 276;
- pipefitters: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the US and Canada, Local 324;
- electricians: International Brotherhood of Electrical Workers, Local 230;
- riggers: International Association of Bridge, Structural and Ornamental Iron Workers, Shipyard Riggers, Bench Men and Helpers, Local 643;
- painters: International Union of Painters and Allied Trades, Local 138, District Council 38;
- carpenters: United Brotherhood of Carpenters and Joiners of America, Local 1598; and
- machinists: International Association of Machinists and Aerospace Workers, Local 456 (the fact that machinists belong to two different unions was not discussed at the hearing).

[10] For the purposes of collective bargaining with the federal government, the trade unions set up the Council to represent the tradespeople employed as federal public service employees in the west coast dockyards. It is a council of employee

organizations certified as the bargaining agent for SR(W)s. As stated earlier, it is the respondent in this case.

[11] The respondent represents only those members of the several union locals that hold employment in the federal public service. Each union local just listed (except the shipwrights) includes other members employed elsewhere, including in the private sector. In general, the federal public service employees represent only a small minority of the locals' membership.

[12] Considerable time was spent at the hearing poring over maps to understand how the facilities are accessed. For the FMF CB facility, there are four access points: Canteen Road, Lyall Street, Naden gate, and Y gate. For the Rocky Point facility, access is through a single entrance.

[13] Considerable time was also devoted to discussing how solid or porous the picket lines were. Having considered the whole of the evidence, I find that picket lines were at every access point. They were more or less forceful, but they were present. Military personnel and excluded managers were allowed through, although for the managers, it was important that their names appear on a list. I did not hear any direct evidence concerning members of other bargaining units crossing the picket line, although some witnesses alluded to that fact. The only certainty is that no SR(W) crossed a picket line.

[14] In its evidence, the applicant sought to establish that SR(W)s could have crossed the picket line had they wanted to. Some of the access points, such as Naden gate, were supposedly easier to enter, although the evidence on that point was somewhat contradictory.

[15] I heard from the respondent's side that SR(W)s were unwilling to cross the picket line. There were some concerns for safety crossing the line; as I say, some lines appeared somewhat forceful (seen in the video evidence). There was evidence adduced that the picketers allowed only military personnel and excluded managers to go through. An additional and important concern when crossing the line was the resulting label of "scab" that SR(W)s simply could not live with. The respondent's witnesses all stated that crossing the picket line left an indelible mark on the person, who would be forever ostracized by their colleagues. The only way to cross the picket line, according to the respondent, was to obtain official permission from the striking union. As shall

be seen in the chronology, the respondent sought and obtained that permission when it became clear that the applicant considered being absent from work a disciplinary matter.

[16] At the Rocky Point access road, the Commanding Officer, Lieutenant-Commander (LCdr) Craig Newman, actively sought to accompany SR(W)s across the line; they politely declined. At FMF CB, managers did not intervene to have SR(W)s cross the picket line.

B. The witnesses

[17] The applicant called the following witnesses.

[18] Anthony Bone, who is a senior labour relations officer. Mr. Bone testified to his role during the strike, which was to provide support to the chain of command at CFB Esquimalt and FMF CB through labour relations employees onsite and through virtual meetings. Mr. Bone lives in Shawnigan Lake, B.C., and works remotely. He was not physically present at FMF CB or Rocky Point.

[19] His message throughout the strike to union officials and management was that employees not on strike should cross the picket line. If there were any safety issues, management would ensure that they were able to cross the picket line safely.

[20] Geoffrey Letwin, who is an SR(W). In April 2023, he was a wastewater electroplater operator. He came to the applicant's attention because he wrote a letter to the prime minister's office once the PSAC strike was over. He testified to his view of the events that occurred during the strike. I will return to his testimony in the chronology.

[21] Jason Evans, who is a group manager for Group 1 (metal work). He explained the organization of work at FMF CB.

[22] There are six groups (there were seven at the time of the strike) of SR(W)s for the different tasks. Each group is headed by a group manager, who reports to the production manager, who in turn reports to FMF CB's commanding officer.

[23] Under the group managers are the work centre managers, to whom the supervisors report. Managers are excluded; that is, they are not part of the bargaining unit. Supervisors are part of the bargaining unit.

[24] Captain (Navy) Sébastien Richard, who was FMF CB's commanding officer (referred to in emails as CO) during the PSAC strike. He testified to his actions during that time.

[25] Kelly Walsh, who was at the time director of labour relations operations at DND. Ms. Walsh was responsible for managing strike operations for DND and was based in Ottawa, Ontario. She provided advice based on reports received from labour relations employees onsite. She was never physically present at FMF CB or Rocky Point.

[26] Throughout her testimony, she reiterated the employer's position that non-striking employees were expected to cross the picket line and work.

[27] LCdr Newman who, at the time, was the commanding officer at Rocky Point. He testified to his actions during the strike.

[28] The respondent called the following witnesses.

[29] Desmond Rogers, who is the respondent's national president. He is also the shipwrights' local president. He described the respondent's structure as a council composed of representatives from the 11 affiliate unions. He stated that SR(W)s join a union, not the respondent. They are members of the bargaining unit represented by the respondent, but their loyalty is to their own unions, which alone can discipline them if they fail to live up to their union commitments. He testified to the events before and during the strike.

[30] Kevin Walsh, who is the respondent's first vice-president; he is also the president of the sheet metal workers' local. He testified to the events during the strike.

[31] Travis Lachmund, who is an SR(W) and an electrician by trade. He introduced at the hearing a series of text messages contemporaneous with the strike. I will return to their contents in the chronology.

[32] Simply to provide context, I will add that commanding officers such as Captain Richard and LCdr Newman change every two or three years. They are military personnel. Mr. Rogers has been working at the FMF CB dockyards for over 40 years, and for Mr. Walsh, it has been some 39 years.

C. The chronology of events

[33] Long before the PSAC strike began on April 19, 2023, both management and union officials were well aware that it was a real possibility. The respondent was concerned about how the situation would be handled for the bargaining unit members, and it reached out to management to discuss the matter.

[34] Mr. Rogers and Mr. Walsh met with Captain Richard in his office in early April 2023 and again by phone a week before the strike. Mr. Rogers testified that the purpose of the meetings was mainly to inform Captain Richard of past practice and to find out his position. Mr. Rogers was concerned by the fact that many SR(W)s had never experienced a strike and risked being confused about what they should or should not do. Captain Richard said that he was working on a release to inform employees how to deal with a picket line, should one occur.

[35] The past practice was summarized in an email that Mr. Rogers sent to Jennifer Bordeleau, Director General of Workplace Management (to whom Ms. Walsh reported), on March 31, 2023, to inquire about the impact of picket lines on the bargaining unit members. It reads in part as follows:

...

On our coast during the past picket lines, the non-striking employees would gather at the parking lots outside the base where management would account for their people. At some point shortly after that, myself (or past President) along with the CO would approach the picket captain and ask if they are going to be dropping the picket lines and allowing the non-striking members access to the workplace. The answer of course is no, and the CO would then have everyone stay in the area for a few hours until it was evident the line was not coming down for the day. Management would then send everyone home, and the members would receive pay for that day as they could not be assured of their safety and security when crossing the line or in the future (on-site retribution).

This was the past practise since the early 1990s in my memory. We have now been informed by the CO that this will not be the practise this time if there are lines up. Members who do not cross will be sent home without pay.

...

[Sic throughout]

[36] Ms. Bordeleau responded the same day, as follows:

...

Thanks for reaching out. I'm a little concerned with "Members who do not cross will be sent home without pay." Our position is and has been (for as long as I've been here) that an employee has to make every attempt to cross the line. If that means waiting while negotiations occur wrt 10 employees per 15 min, for example, then they should wait. Our comms next week will say that employees not in strike position who see a lengthy wait ahead will need to connect with their manager for further instructions.

What I can tell you is that a line going up for the day without anyone being allowed through will be challenged by the department. Similarly, an employee who shows up and then immediately leaves without permission will likely not be paid.

Bottomline - as long as the employee has satisfied mgmt. that they attempted to cross the line and mgmt. is unable to negotiate their access, the employee will be paid.

...

[Sic throughout]

[37] On April 11, 2023, the respondent put out a bulletin addressed to all the bargaining unit members. It spoke of the imminent PSAC strike and told the members that they were not in a legal strike position. The essential message reads as follows:

...

If you encounter a picket line blocking entry to your place of work, the Council and our 11 Affiliate Unions do not support crossing a legal picket line. In the event of a picket line blocking access to the Dockyard, please follow your managers [sic] instructions regarding a muster point, attendance check-in, etc. We have reached out to local management requesting any information given to FMF CB members regarding picket line instructions be shared with us, however we have not heard back at this time.

In the event of a picket line barring access to the Dockyard, Council will be present to coordinate with local management.

...

[38] On April 14, 2023, Captain Richard emailed all FMF CB employees about the imminent PSAC strike action. The essential message reads as follows:

...

... Should PSAC members decide to take action, they are entitled to withhold their services and form picket lines, but may not prevent access to the workplace by employees with a right to work. Non-PSAC employees who are not in a strike position are expected to report to work as normal, but may not interfere with legitimate

picketing activities. Notwithstanding the expected interactions and delays, each side's rights and responsibilities are clear and should be respected. Note that there is no grey area that permits employees not in a legal strike position to withhold services, not report to work or join the picket line in solidarity. This would be considered illegal strike activity and, unless on leave in accordance with their collective agreement, would be considered unauthorised leave without pay.

Management is responsible for and will do everything in our power to support the required activities by all parties should strike activity come to pass, including facilitating the arrival of employees at work to carry on with their duties with as minimum [sic] disruptions as possible while legitimate picketing is conducted. Specific FMF plans to coordinate this will be promulgated to the management team shortly, focussed not on impeding or circumventing any party's actions or position but rather simply facilitating, coordinating and supporting such that the process is allowed to unfold smoothly by all parties.

Remember that, however regrettable or disruptive, this is a legitimate and beneficial part of the collective bargaining process that ultimately leads to a better and stronger integrated team at work. We all have to work together and I will not tolerate any animosity or disrespect to happen [sic] between individuals.

...

[39] On the eve of the strike, the respondent issued another bulletin to the bargaining unit members. It announced that the national strike would begin the next day, unless a tentative collective agreement was reached. It then stated the following:

...

The FGDTLC (W) asks all members to respect and support our PSAC sisters and brothers as they fight for a fair and reasonable collective agreement for their membership.

For all members of the Ship Repair Group represented by the FGDTLC (West), we are not in a strike mode nor are any of our members declared essential service.

Attached to this bulletin is the newly release [sic] FMF Temporary Memorandum entitled "Strike Mitigation Plan". It outlines the processes management will be following.

In the event of a picket line blocking access to the Dockyard, please follow your managers [sic] instructions regarding a muster point, attendance check-in, etc. Council will be present to coordinate with our Affiliate Unions as well as local management.

...

[40] In a larger font that was in bold and underlined, the bulletin concluded as follows: **“To be very clear, the FGDTLC (West) and our 11 Affiliate Unions do not endorse or support the crossing of any legal picket line.”**

[41] The “Strike Mitigation Plan” referred to in the bulletin outlined the different measures to be implemented by FMF CB management to counter strike activity. It provided direction for employees and managers.

[42] Managers were expected to cross the picket line and report to work. Some managers were assigned to muster points. Two muster locations were mentioned: a nearby church parking lot, and the Tillicum Centre mall, which is some 5 km from the main dockyard entrances. According to the mitigation plan, employees were expected to report to the muster points and follow management’s direction and if directed to attempt to cross the picket line. The plan also discussed the situation of employees who refused to cross the picket line in the following terms:

...
... Some personnel that are not in a legal strike position may feel compelled to act in solidarity, this may result in situations that will need to be managed in a consistent manner. Employees have the right to choose whether to cross the picket line; however, making the choice to not cross will result in the employee falling into an unauthorized leave without pay situation. The PLT [Picket Line Team, composed of managers] will monitor conditions of the line and will ensure employees are able to cross. Employees who have concerns about crossing a picket line are to discuss this with the PLT representatives at the picket line.
...

[43] Events during the PSAC strike unfolded somewhat differently at FMF CB and Rocky Point. I will recount the two chronologies separately.

1. At FMF CB

[44] On the first day of the strike, April 19, 2023, most SR(W)s mustered at the church parking lot not far from one of the main entrances to the dockyards on Canteen Road. By mid-morning, civilian employees were not being allowed through the Canteen Road gate.

[45] Mr. Rogers testified that he spoke to the crowd, as did John Dyson, who was one of the group managers. Mr. Dyson simply said to be patient and that further

instruction would come from Captain Richard. When asked if it was safe to cross the picket line, Mr. Dyson answered that it was not safe. This is from Mr. Rogers' testimony; Mr. Dyson was not called as a witness.

[46] Mr. Rogers also spoke at that time. He testified that he told the SR(W)s to follow management's directions. He told them that the respondent was not in a strike position. At the hearing, he also insisted that he told the SR(W)s that he could not tell them not to cross the line. Every person had to decide on their own.

[47] Mr. Rogers also told the SR(W)s that unions do not look favourably on union members crossing picket lines, wherever they are found. It could be a work situation, as was so in this case, or a shopping situation; no matter, a union member would not cross another union's legal picket line. He also spoke of the consequences of crossing a picket line; that is, being considered a scab and thus untrustworthy in the eyes of fellow union members. He then repeated that each person had to decide on their own and that the respondent could not advise them to not cross the picket line.

[48] At 2:30 p.m., Captain Richard gave the direction for all SR(W)s to go home. Group managers and work centre managers were to return to the worksite to discuss the day.

[49] On April 20, 2023, mustering was organized at Tillicum Centre mall for all employees who came by car. Employees arriving on foot or by bike were to report to the muster station near the firehall not far from the picket line. The church had signified that it did not want mustering taking place in its parking lot. Employees had been provided with a map of the Tillicum mall showing where their group should assemble. According to management reports, some 456 SR(W)s showed up and registered at Tillicum mall.

[50] At both mustering places, managers were present and took attendance.

[51] On that day, Captain Richard was present at the Tillicum mall and addressed each group in turn. A video recording was introduced at the hearing. It does not show anything except the pants of the person recording it. However, the voices can clearly be heard, and Captain Richard confirmed at the hearing that it was indeed his voice.

[52] To summarize, Captain Richard tells the workers that he understands their point of view and can understand that they have been placed in a difficult position,

which is why, he repeats several times, he wants to give them “max flex”. He lets them know that they can take leave, the nature of which will be determined later, with their managers. It is clear that he means that they should use whatever credits they can. He does answer a question about 699 leave (leave with pay for other reasons) with a clear “No”, stating that SR(W)s will not be granted 699 leave, but they can use their leave credits.

[53] At some point, someone asks him whether, if he were in their situation, he would cross the picket line. Captain Richard answers, “I probably wouldn’t.”

[54] On April 20, Captain Richard provided the following direction, according to an email from Acting Production Manager Ryan Klassen sent at around 11 a.m. to group managers (GMs in this quote) and work centre managers (WCMs in this quote):

UPDATE 2 - The CO has directed that FMF employees are to report onsite at this time. Once they are onsite, employees are to report to their Manager. Any employee not reporting onsite will be considered on leave as of the time you brief them at the muster location. The type of leave will be determined at a later time based on the employee's preference (paid/unpaid).

Once this message has been passed to employees, all GMs and substantive WCMs are to report onsite and leave the muster areas. A list of all unrepresented and excluded MGT-02/3s has been provided to MARPAC picket captains to allow access... For personnel reporting, Naden gate is best. Y gate will let them in Dockyard if they identify as FMF employees and they can park wherever.

...

[55] To be clear, “reporting onsite” for the applicant meant being in the workplace, across the picket line.

[56] On April 21, which was the third strike day, the same scenario occurred. The SR(W)s mustered and registered with their respective managers, and they were told that they could take leave if they did not report to work. According to Mr. Rogers, Mr. Walsh, Mr. Letwin, and Mr. Lachmund, no one from management expressly directed SR(W)s to cross the picket line. Rather, they were told that they had a choice and that they could take leave. Mr. Evans confirmed this indirectly. When asked at the hearing why he did not direct his employees to the Lyall Street entrance (which was quieter than the one on Canteen Road), he said that that would have seemed to be unfair play.

[57] April 22 and 23 are not part of the story, as they were a Saturday and Sunday respectively, which were the SR(W)s' days of rest.

[58] From April 24 to April 28, the scenario changed. Mustering was no longer expected. Some SR(W)s appeared at one of the main entrances but did not cross the picket line. Mr. Lachmund and Mr. Letwin both testified that they arrived every day during the strike and made sure to let their manager know that they were present but that they could not report to work due to safety concerns. Mr. Lachmund introduced his text message exchanges with his manager in which he stated that he was present. It was a group text; his teammates also registered their presence by text along with their willingness to work but unwillingness to cross the picket line due to safety concerns. The manager simply thanked them.

[59] On April 21, the following message was given to the managers to relay to their employees:

...

*Beginning Monday April 24th and until further notice, **FMF personnel will no longer report to muster locations in the event of a picket line.***

FMF employees are to report onsite daily. Once they are onsite, employees are to report to their Manager. Any employee not reporting onsite will be considered on leave. The type of leave will be determined at a later time based on the employee's preference (paid/unpaid) and further direction from Command....

...

[Emphasis in the original]

[60] From April 24 to 28, the same message was conveyed; it was addressed to managers and read as follows:

...

A picket line is now up. The CO has directed that FMF employees are to report onsite. Once they are onsite, employees are to report to their Manager. Any employee not reporting onsite will be considered on leave. The type of leave will be determined at a later time based on the employee's preference (paid/unpaid) and further direction from Command....

...

[61] On April 28, the tone changed drastically. In Mr. Lachmund's text chain, the following message appeared from his manager:

This is a message from the FMF Commanding Officer Please ensure EVERYONE acknowledges they got it by replying back to me. In consultation with Labour Relations of the Government of Canada, it is confirmed that SR(W) employees are not in a legal strike position. Direction from Management is to report to the workplace on Monday 1 May unless on pre approved [sic] leave. You are to report to the DND Picket Captain to facilitate access to CFB Esquimalt as required. Anyone failing to report to the workplace will be presented with a formal letter. Any questions in this matter can be referred to your Union Representatives.

[62] It appears that during the week, DND upper management in Ottawa made it clear to Captain Richard that his compromise solution (allowing the SR(W)s to take leave instead of crossing the picket line) would no longer apply. Work had to resume in the dockyard, or SR(W)s would face disciplinary consequences for withholding work.

[63] Ms. Walsh had reached out to Mr. Rogers during the week to ask why employees were not crossing the picket line. Mr. Rogers explained that SR(W)s were not crossing it for safety reasons. Part of it was a concern that crossing the picket line would lead to a confrontation with the picketers, and part of it was a concern that crossing the picket line would mean being branded as a scab for the rest of one's career.

[64] Ms. Walsh could not understand that reasoning. If the employees were not in a strike position, they were expected to report to work. That was not being a scab; the label would apply only to employees in a legal strike position crossing their own picket line. If employees were concerned by possible harassment, DND's anti-harassment policy would protect them.

[65] Mr. Rogers acknowledged that the April 28 message ordering SR(W)s back to work was a major change of direction. As he put it at the hearing, "the rules of engagement changed".

[66] Mr. Rogers was extremely concerned for the bargaining unit members. He did not want to expose them to disciplinary action; nor did he want them to risk their fellow workers seeing them as scabs.

[67] He testified that he negotiated throughout the weekend with PSAC to find a solution. PSAC was adamant that it would not take down its picket lines. Finally, the two bargaining agents came to a resolution: the picket line would be removed at the Lyall Street entrance to allow SR(W)s to enter the worksite. More importantly, they would enter with PSAC's permission, meaning that they would not suffer negative repercussions in the future. On April 30, Mr. Rogers sent the following message to the bargaining unit members:

...

I have been in contact with PSAC Vice President for BC Jamey Mills to discuss our members [sic] dilemma. PSAC is very cognizant of the issues for our members because of their job action, and has given Dockyard Trades and Labour Council (West) members access and egress without issue and consent to the worksite through their picket lines. They will also be suspending the picket activity at CFAD Rocky Point effective tomorrow.

Council has discussed this with the Affiliate Unions, and they have been clear that if a legally striking Union gives their consent to other members to cross the picket lines to attend to work, there is NO violation of that picket line. PSAC has given that consent to our members.

...

[68] Meanwhile, at the national level, active mediation and bargaining ended the strike. PSAC and the applicant reached a tentative agreement in the evening of April 30. All PSAC picket lines had disappeared by the morning of May 1.

[69] On May 9, 2023, the deputy commander, Cdr Iain Meredith, emailed the managers the following: "After much consultation with several advisors and authorities, ***the CO has authorised non-striking employees to use leave at their discretion in accordance with their respective collective agreements***" [emphasis in the original].

[70] Employees were to submit leave to their managers by May 19, 2023, failing which the managers would enter that time for them as unauthorized leave without pay.

[71] On June 2, 2023, Captain Richard emailed the FMF SR(W) team, reversing the decision. The email reads in part as follows:

...

While the situation has garnered national attention in the Department, the Admiral and I have argued vigorously that we know our workforce and workplace and are best placed to negotiate this delicate path – likely not to the satisfaction and agreement of all, but still the best way we could. I explained the situation and my planned compromise approach when I spoke to you all in the Tillicum Mall parking lot, and we have been proceeding thus far with leave administration as I described. However, I also necessarily told you that this was how it would be unless we were directed otherwise, which I considered unlikely.

Unfortunately, even as most of you have already complied with my decision, regardless of whether you then also exercised your complete right to grieve it (to which I take no offence and respect), the Admiral and I have now been directed to cancel all approved voluntary leave requests submitted in arrears for the strike period and that all workplace absences that were not pre-approved must be considered as ‘did not report too [sic] work’ and actioned as such as LWOP code 985 (Unauthorized). These will therefore be actioned in the coming days, though it will take some time for them to be processed through the system.

...

[72] It is clear from the email and it was again made clear in Captain Richard’s testimony at the hearing that the decision to not authorize leave ran counter to his conviction that harmonious labour relations were better served with his proposed compromise solution.

[73] On October 20, 2023, Mr. Letwin wrote to the prime minister’s office. He describes the SR(W)s’ situation as an impossible dilemma: they cannot cross the picket line due to its aggressive nature, management is pressuring them to cross it or be placed on “Unauthorized Leave Without Pay”, and they are being threatened by their unions not to cross it, as doing so would result in them being labelled with “Member in Poor Standing”, which would impact the rest of their tradesperson careers. And to add insult to injury, the Treasury Board was fining the FMF CB production staff 50 hours of pay.

[74] Mr. Letwin testified that he attended the main access point every day but that he did not cross the picket line, for two reasons. It would have been unpleasant to cross it, as the picketers were quite vociferous, and it would have been against his union oath not to cross legal picket lines. Doing so would have meant devastating consequences for the rest of his career.

2. At Rocky Point

[75] The pressure that DND upper management exercised for work activities to resume was felt earlier at Rocky Point. Its commander, LCdr Newman, testified that from the start, he could not accept that SR(W)s were refusing to cross the picket line.

[76] The respondent and PSAC (through its UNDE component) are the only bargaining agents at Rocky Point. There are 10 SR(W) positions (9 were filled at the time of the strike) and some 43 employees belonging to the UNDE bargaining unit, 8 of whom were declared essential during the strike.

[77] No direction to muster was given. Rather, non-striking employees were expected to report onsite. None of the SR(W)s attempted to cross the picket line (as stated, there is only one access point to the Rocky Point depot). On April 25, 2023, LCdr Newman and a manager offered to escort SR(W)s through the picket line; the offer was declined.

[78] On April 24, 2023, SR(W)s working at Rocky Point received a letter requesting their presence onsite for a fact-finding interview. The allegation was that on April 20, 21, and 24, they had been absent without authorization and had participated in illegal strike activities. They were to report to work on April 27. One of them expressed a concern it might be dangerous to cross the picket line. This objection was brushed aside — it was stated that should any difficulty be encountered at the picket line, he would be escorted.

[79] Concerns were also expressed to the respondent. Mr. Rogers testified that he spoke with UNDE representatives. The picket line came down on April 26 at around midday, so SR(W)s were able to report to work without crossing a picket line. Work resumed at Rocky Point after that.

[80] LCdr Newman did carry out the planned interviews, despite the return to work.

[81] In the end, no discipline was imposed, as LCdr Newman concluded that the respondent rather than the employees was responsible for the employees' absences from work. According to him, the respondent's "messaging" had caused the employees not to cross the picket line. The only consequence was administrative — for the days not worked, the employees were on unauthorized leave without pay.

[82] In the interviews, the employees stated the respondent had recommended not to cross the picket line. They reported to work once the picket line was taken down at 11 a.m. on April 26. They also stated that the main reason for not crossing the picket line was the fear of future repercussions. That would include being labelled a scab, which would never be erased, and possible retribution, most likely outside the workplace.

III. Summary of the arguments

A. For the applicant

[83] Despite the fact that the application was made once the PSAC strike had ended, the case is not moot. Employees must receive clear direction that if they are not in a legal strike position, they are expected to be at work. That is their duty, even if it means crossing a legal picket line.

[84] Whether or not the Board finds that a strike occurred, that is not necessary to make a finding that the respondent counselled strike action, which is where the violation of s. 194 of the *Act* lies.

[85] Both in the April 18, 2023, bulletin that was issued to the respondent's members before the PSAC strike and in Mr. Rogers' and Mr. Walsh's declarations to them at the mustering stations, the respondent counselled the bargaining unit members not to cross the picket line. The case law is well established that not crossing a picket line amounts to a work refusal or strike.

[86] Mr. Rogers knew that management's direction was that the SR(W)s had to attempt to cross the picket line, yet at no time did he act to ensure that they would cross it. On the contrary, he stated that crossing a picket line was against union principles and that he would never cross one, wherever he found it, regardless of his work obligations.

[87] Mr. Walsh gave the same message when he spoke at the mustering stations and reinforced the message that crossing a picket line meant being ostracized for the rest of one's working life.

[88] When asked about management's apparent condonation, as shown in the emails stating that employees could choose to take leave, the applicant replied that in fact, its message was always that employees were to attempt to report to work, as seen in

*Federal Public Sector Labour Relations and Employment Board Act and
Federal Public Sector Labour Relations Act*

management's emails and the Strike Mitigation Plan. The harm done by the respondent's counselling to strike was that no SR(W) even attempted to cross the picket line because of the respondent's messaging that retribution would ensue. But for the respondent's action, there was no reason for employees to have any fear.

B. For the respondent

[89] Mootness is not the issue; rather, the case is absurd. The employer, as represented by the commanding officer, allowed SR(W)s not to cross the picket line while the PSAC strike was ongoing. The respondent worked with local management to maintain harmonious labour relations. The parties were not at odds.

[90] Both employees and management acted as planned. SR(W)s showed up to work, could not cross the picket line because it was unsafe, registered with their managers, and went home as directed.

[91] The respondent did not direct them not to cross the line. Mr. Rogers simply reminded SR(W)s that the different unions that they belonged to might have rules on crossing picket lines. The respondent has no power over SR(W)s and cannot discipline them.

[92] At no point did FMF CB management order SR(W)s to cross the picket line or escort them across. SR(W)s felt unsafe crossing and facing irate picketers. They felt unsafe in the face of possible future reprisals or retribution. The applicant never called the police and never sought an injunction. No member of local management affirmed that it was safe to cross the picket line.

[93] SR(W)s simply followed management's directions — check in, and if the line was uncrossable, choose to take leave.

[94] Captain Richard's management of the situation had but one goal: get through the legal strike and ensure harmonious relations between the different groups of workers, both striking and non-striking. His concern was safety, and rightly so. He spoke directly with SR(W)s, kept in touch with the respondent, and never raised the spectre of legislation.

[95] This situation continued until he received a different direction from management above him and told Mr. Rogers that the SR(W)s had to return to work

immediately. The respondent's reaction was to invest a great deal of effort to negotiate an agreement with the striking bargaining agent.

[96] Once the PSAC strike was over, local management's message was the same as during the strike — leave had been allowed, and it was now up to managers and employees to decide what leave would be taken.

[97] And then another sudden change of direction occurred, this time with respect to leave, and after that came this application for a declaration of unlawful conduct by the respondent.

[98] Throughout the PSAC strike, FMF CB management never intimated that the respondent's conduct was illegal. Rather, both sides managed a situation with the ultimate goal of keeping everyone safe and preserving the long-term relationship between the different groups of employees, both striking and non-striking.

[99] The respondent never told the SR(W)s not to cross the picket line. Rather, the SR(W)s determined that doing so would be unsafe in both the short and long terms.

[100] The applicant very much emphasized the April 18, 2023, bulletin, yet the witnesses and the Rocky Point employees interviewed by LCdr Newman never mentioned it as a reason not to cross the picket line.

[101] It is difficult to see how the respondent's actions could have amounted to counselling a strike. It told the bargaining unit members to follow management's direction, which was to attempt to report to work or choose to take leave. A strike does not occur when management gives its consent. Instructing its members to follow management's direction is not counselling a strike.

[102] The respondent submitted that this application was made simply to punish it. The process is unfair to it, as the evidence clearly set out that the actions taken during the PSAC strike were taken in agreement between it and local management. As soon as local management changed its attitude, the respondent complied with the new direction.

[103] Damages should be awarded to the respondent because the application was both frivolous and vexatious.

IV. Analysis

[104] This is an application under s. 198 of the Act, the relevant part of which reads as follows:

198 (1) *If the employer considers that an employee organization or any officer or representative of one has contravened subsection 194(1) or (2) or 197(3), or that a person has contravened section 195, or that an employee has contravened section 196 or subsection 197(4), the employer may apply to the Board for a declaration that the conduct giving rise to the contravention is unlawful.*

(2) *After affording the employee organization, officer, representative, person or employee referred to in subsection (1) an opportunity to make representations on the application, the Board may declare that the conduct is unlawful*

...

198 (1) *S'il estime qu'une organisation syndicale ou un dirigeant ou représentant de celle-ci a contrevenu aux paragraphes 194(1) ou (2) ou 197(3), qu'une personne a contrevenu à l'article 195 ou qu'un fonctionnaire a contrevenu à l'article 196 ou au paragraphe 197(4), l'employeur peut demander à la Commission de déclarer que l'activité ayant donné lieu à la contravention est illégale.*

(2) *Saisie de la demande visée au paragraphe (1), la Commission peut, après avoir donné à l'organisation syndicale, au dirigeant, au représentant, à la personne ou au fonctionnaire en cause la possibilité de présenter des observations, déclarer l'activité illégale [...]*

[...]

[105] An unlawful-conduct declaration is discretionary. The Board decides whether to make one after considering the representations of the employee organization or any officer or representative that the employer alleges has contravened s. 194(1). In other words, in view of the evidence and submissions, the Board may decide that such a declaration is not warranted.

[106] I will now deal with the parties' two accessory arguments.

[107] The applicant argued that despite the alleged unlawful strike ending before the application was made, the case is not moot. According to it, many issues remain unresolved because there is uncertainty as to the legality or illegality of the respondent's actions during the strike.

[108] I agree that the issue is not moot. The situation may arise again, and hopefully, this decision can provide some guidance on how the parties should conduct themselves.

[109] The second argument that I will address is the one that the respondent raised, which was that the case is absurd and that it should never have been called upon to defend its actions. It termed the proceedings frivolous and vexatious and asked for damages in this respect.

[110] The respondent cited *Steiner v. Canada*, 1996 CanLII 3869 (Federal Court - Trial Division, file no. T-1990-96) for these definitions of the terms “frivolous” and “vexatious”:

...
... A claim is a frivolous one where it is of little weight or importance or for which there is no rational argument based upon the evidence or law in support of the claim. A vexatious proceeding is one that is begun maliciously or without a probable cause, or one which will not lead to any practical result.
...

[111] It is unfortunate that legal costs were incurred, but unless there is abuse or obstruction of process, the Board will not award damages to cover legal expenses (see *Tipple v. Canada (Attorney General)*, 2012 FCA 158 at paras. 26 to 29). I do not consider this case to be a case of “abusive or obstructive conduct”. The applicant was entitled to question the legality of SR(W)s not crossing the picket line.

[112] I do not think that the case is frivolous, since the issue of the legality of not crossing the picket line arises from time to time (as set out in the case law); the facts in this case differ from the facts in the case law that was presented to me, and to that extent, some pronouncement is necessary.

[113] I also do not think that the case is vexatious or that the applicant acted maliciously or without probable cause. Again, it was legitimate for the applicant to question the respondent’s actions when it dealt with the PSAC strike situation.

[114] Both parties introduced case law to support their arguments. I considered it, but I find that the facts in this case do not easily fit into established patterns. Two features are prominent, and they will recur in the following analysis: the respondent is not a typical bargaining agent, as it is a composite of several trade unions (employee organizations according to the *Act*’s terminology), and FMF CB management tacitly supported SR(W)s not crossing the picket line.

[115] Both parties agreed that s. 194(1)(e) of the Act applied to the dispute; it reads as follows:

194 (1) No employee organization shall declare or authorize a strike in respect of a bargaining unit, and no officer or representative of an employee organization shall counsel or procure the declaration or authorization of a strike in respect of a bargaining unit or the participation of employees in such a strike, if ...

(e) the process for resolution of a dispute applicable to the bargaining unit is arbitration;

194 (1) Il est interdit à toute organisation syndicale de déclarer ou d'autoriser une grève à l'égard d'une unité de négociation donnée, et à tout dirigeant ou représentant de l'organisation de conseiller ou susciter la déclaration ou l'autorisation d'une telle grève, ou encore la participation de fonctionnaires à une telle grève : [...]

e) si le mode de règlement des différends applicable à l'égard de l'unité de négociation est l'arbitrage; [...]

[116] I note that the Act at s. 2(6) states that "... a reference to an employee organization includes a reference to a council of employee organizations ..." as is the case here.

[117] The respondent did not dispute that the bargaining unit it represents was not in a legal strike position. It disputed that it counselled the bargaining unit members to strike.

[118] Several times at the hearing, the applicant objected to any evidence on the leave situation and DND upper management's ultimate reversal of it. According to the applicant, it had nothing to do with the issue to be decided, which is whether the respondent had counselled a strike action.

[119] I believe on the contrary that this part of the evidence is important. It demonstrates a workplace marked by mutual respect and a deep understanding of the dilemma faced by every SR(W).

[120] Mr. Rogers vigorously denied that the respondent had counselled the bargaining unit members to strike. He insisted that the first direction that they were given was to follow management's directions.

[121] That was part of the message that was conveyed to the SR(W)s. And management's directions were complied with. Employees mustered, registered, and

waited for management's direction, which was to report onsite or to take leave, paid or unpaid.

[122] It was within that space that SR(W)s chose not to cross the picket line. When management hardened its position, the picket line was removed. This happened at Rocky Point on April 26, 2023, because the SR(W)s were being threatened with disciplinary action. It happened again on April 30 at FMF CB, again because of the threat of discipline; the respondent negotiated an agreement with the striking bargaining agent that eventually was overtaken by the tentative agreement that ended the PSAC strike.

[123] It is important to note that the respondent took active measures to negotiate with PSAC to allow the SR(W)s to cross the picket line once it became clear the employer would no longer tolerate the SR(W)s not crossing the picket line. Until then, the understanding was, certainly at FMF CB where the vast majority of SR(W)s work, that taking leave rather than reporting to work was an acceptable option.

[124] During the arguments, the applicant very much disputed that last statement. According to it, SR(W)s were expected to make every attempt to report to work. They did not because the respondent counselled or directed them not to.

[125] From the evidence, especially the emails sent every day by management during the PSAC strike, I find that the employer, as represented by the delegated authority held by the commanding officer, Captain Richard, allowed SR(W)s to choose between reporting to work or taking leave. In other words, until April 28, 2023, they were never directed to report to work.

[126] The term "strike" is defined in the Act as follows at s. 2:

strike *includes a cessation of work or a refusal to work or to continue to work by persons employed in the public service, in combination, in concert or in accordance with a common understanding, and a slow-down of work or any other concerted activity on the part of such persons that is designed to restrict or limit output....*

grève *Tout arrêt du travail ou refus de travailler, par des personnes employées dans la fonction publique agissant conjointement, de concert ou de connivence; y sont assimilés le ralentissement du travail ou toute autre activité concertée, de la part de telles personnes, ayant pour objet la diminution ou la limitation du rendement. [...]*

[127] In *British Columbia Terminal Elevator Operators' Association v. Grain Workers Union, Local No. 333, C.L.C.*, 2007 CIRB 384 (“*BC TEOA*”), a Canada Industrial Relations Board decision, the issue was whether refusing to cross a picket line was an illegal strike. In fact, the right not to cross a picket line was included in the collective agreement but was judged contrary to the statutory prohibition against mid-contract work stoppages.

[128] One could argue that in that case, the refusal to cross the picket line was not designed to restrict or limit output; that argument was rejected in *BC TEOA*. In the continuation case, freedom of expression was argued.

[129] There are two main differences between that case and the present case; first, in *BC TEOA*, the employers (the case involves several employers and several unions) took action against the non-striking union members during the job action. Thus, they were not allowed to choose between reporting to work or taking leave. Second, the arguments in that case had to do with the union members’ freedom of expression, including the right to act in solidarity with the striking workers, which was somewhat secondary in this case; rather, the emphasis was placed on SR(W)s’ safety, especially with respect to the long-term consequences.

[130] As mentioned in George W. Adams, *Canadian Labour Law*, 2nd Edition, § 11:3, there is a line of cases according to which individual refusals to cross a picket line in fear of reprisals do not represent a concerted effort and therefore cannot be termed a strike (see *MacMillan Bloedel (Alberni) Ltd. v. Swanson*, 1972 CanLII 1070 (BC SC) at para. 20, and *Rothsay Paper Limited v. Canadian Paperworkers Union, Local 907*, 1990 CanLII 5456 (NB KB)).

[131] As in the *BC TEOA* decision, a refusal to cross a picket line may constitute a strike (also see *Domtar Inc. v. Local 2995 I.W.A. Canada*, 2000 CanLII 2585 (ON LRB), and *Progistix-Solutions Inc. v. Communication, Energy and Paperworkers Union of Canada*, 1999 CanLII 19999 (ON LRB)). However, to conclude there is a strike action, one must first find a concerted effort, acting in combination, a common understanding. The circumstances of this case do not lead to the conclusion that there was a concerted effort, but rather that the employees’ actions were based on individual choices. More importantly, the option offered to take leave instead of reporting to

work undermines the idea of a strike. Once the employer agrees that its employees may take leave instead of attending work, I cannot see that a strike is occurring.

[132] The respondent was very cognizant of s. 194 of the *Act* and was very careful not to counsel or direct a strike. It said to follow management's directions, which was exactly what was done.

[133] The applicant insisted in its argument on the fact that the respondent had counselled strike action by recommending or encouraging such action by stating in its April 18, 2023, bulletin that "... the FGDTLC (West) and our 11 Affiliate Unions do not endorse or support the crossing of any legal picket line."

[134] The respondent was fully aware of its duty to not counsel strike action. Mr. Rogers repeatedly said that no one from the respondent told the SR(W)s not to cross the picket line.

[135] Stating the Council's and constituent employee organizations' position on picket lines is not the same as directing the members not to cross the picket line. Again, the choice was left to the individuals. In Mr. Lachmund's and Mr. Letwin's testimonies and in all the interviews that LCdr Newman carried out, I did not receive evidence that the refusal to cross the picket line was due to the respondent's counselling or direction. Rather, employees stated that they did not want to cross it because they feared the long-term consequences.

[136] In *Hickeson-Langs Supply Company v. Teamsters Local No. 419*, 1991 CanLII 6064 (ON LRB), the Ontario Labour Relations Board (OLRB) rejected the union's argument that not crossing a picket line was an individual choice. Rather, the OLRB found that the union members refused to cross another union's legal picket line out of union principle or solidarity. It specifically rejected the safety argument for not crossing the picket line, as it found that argument not credible.

[137] In that case, the strike was ongoing. The OLRB found it necessary to intervene in a work situation in which the employer was deprived of its workforce sporadically.

[138] I believe that the SR(W)s' refusal to cross the picket line was born of a genuine fear of negative consequences.

[139] Mr. Rogers and Mr. Walsh spoke of union principles of not crossing the line, but Mr. Letwin and Mr. Lachmund spoke of consequences, as did the Rocky Point SR(W)s. It was an action born of the fear of crossing the line and the risk both of a confrontation at the picket line and of being termed a scab for the rest of their careers.

[140] I think it is important to situate this labour relations matter in its particular context.

[141] SR(W)s are part of a bargaining unit that is represented by the respondent. The respondent is the Council, not the individual employee organizations that compose it. SR(W)s did not join the respondent as union members. They belong to the union related to their particular trade. Each of these unions has its own rules concerning picket lines.

[142] The consequences of crossing a picket line for a trade union member are far-reaching and cannot be overcome. It is not a matter of the employer prohibiting harassment in the workplace. Ostracization at work and in the union local cannot be countered by employer measures. If their employment as federal employee comes to an end, they remain in their trade union. Being unable to ever secure another position as a tradesperson has nothing to do with their employment in the public service or with the employer.

[143] In its closing arguments, the employer cast doubt on the reality of the negative consequences for union members crossing a picket line, intimating that had been more or less invented by the respondent to counsel or direct a strike.

[144] Frankly, I prefer the evidence of the respondent's witnesses in this regard, and I take notice too of the Rocky Point SR(W)s' answers provided to LCdr Newman. I accept the fact that for a trade union member, in this specific context, crossing a legal picket line can carry lifelong work-life consequences. I use the term "trade union" deliberately — I am not referring to the federal public sector bargaining agents.

[145] In this decision, I am not pronouncing on whether members of a non-striking bargaining unit should cross another bargaining agent's legal picket line. I am considering a very particular situation, in which the non-striking bargaining agent is made up of a heteroclite assembly of union locals that include many union members

not employed in the federal public service. Being viewed as a scab may entail far-reaching consequences.

[146] In all the case law that was presented to me, which generally confirmed the obligation for workers bound by a collective agreement in force to cross a picket line, I found no example of management tacitly approving not crossing the picket line, in consideration for employees' safety concerns. Generally, peaceful solutions do not cause litigation and therefore generate no case law.

[147] In the end, I find that the applicant has not made out that unlawful conduct occurred. Employees did not cross the picket line out of concern for their own safety. I find that the respondent did not direct or counsel strike action. It advised the SR(W)s to follow management direction. For the vast majority of SR(W)s, who work at FMF CB, that meant the possibility of using authorized leave. Such was not the case at Rocky Point, but as soon as it became clear that not crossing the picket line would not be tolerated, the SR(W)s resumed work. There too, I find the action to not cross the picket line was not directed by the respondent, but an individual choice.

[148] Captain Richard acted during the PSAC strike to ensure peace among the different groups of employees at FMF CB. The Board's role is to foster harmonious labour relations between employees and employers. It is not to force people to act against their best interests or to impose a remedy that goes against local management's better instincts.

[149] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[150] The application is dismissed.

June 24, 2024.

**Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board**