FOREST INDUSTRIAL RELATIONS
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ADVISORY LETTER

BY E-MAIL

AL 14 - 08

November 28, 2008

TO: ALL FIR MEMBER COMPANIES

Gentlemen and Mesdames:

Re: Western Forest Products – USW Arbitration
Benefits Premium Payments During a Strike Period

Enclosed please find the recent arbitration award of Stan Lanyon, Q.C. dealing with a group grievance against Western Forest Products concerning the recovery of benefit plan premiums from employees at the conclusion of the 2007 strike.

Arbitrator Lanyon found that the employer had an unrestricted right to recover benefit premiums from "active" employees (after the strike ended) including the right to prorate for partial months. He also found that employees who were on WI, WCB, or on layoff prior to the start of the strike had a "vested" benefit rights which continue (and are to be paid for by the employer) during the course of the strike.

FIR members who need clarification or wish to discuss the details of this award should contact the undersigned.

Yours very truly,

Thomas J. Getzie
Vice President, Education
& Benefits Administration

TJG:jc
Enc.

IN THE MATTER OF AN ARBITRATION UNDER THE
B.C. *LABOUR RELATIONS CODE,* R.S.B.C. 1996 c.244

BETWEEN:

Western Forest Products

(the "Employer")

AND:

United Steelworkers of America Coastal Locals

(the "Union")

(Re: Benefits Premium Grievance)

AWARD

UMPIRE:	Stan Lanyon, Q.C.
COUNSEL:	Chris Leenheer for the Employer
	Sandra I. Banister for the Union
DATES AND PLACE OF HEARING:	October 30, 2008 Vancouver, BC
DATE OF AWARD:	November 19, 2008

AWARD

I. Introduction

[1] The Union argues that during a strike the Employer is not entitled to recover benefit premium costs for those employees who were on Weekly Indemnity, WCB or layoff; nor is it entitled to recover pro-rated benefit premium costs for partial months during which the strike occurred.

[2] The Employer replies that it has no obligation to pay any benefit premiums during the period in which employees engage in a strike; however, when it agrees to do so, it is entitled to fully recover all such premium costs. Moreover, any past practices concerning the recovery or non-recovery of such premium benefits costs, do not create any positive legal rights.

II. Facts

[3] The following is the parties' Agreed Statement of Facts:

1. In 2007 the Union was on strike against FIR members from July 21, 2007, to approximately October 21, 2007 (3 months).

2. The Collective Agreement in force prior to the strike is at Tab 1.

3. Attached at Tab 2 is the subsequent Collective Agreement.

4. During a meeting between Bob Matters, USW Wood Council Chief negotiator and Terry Lineker, President of FIR, which took place as the strike commenced, the payment of benefit premiums during the strike was discussed. Lineker agreed the employers would continue to pay benefit premiums during the strike as there was a Trustees agreement to do so. FIR members had always done so. Mr. Lineker stated, "We will do what we have done in the past."

5. Mr. Lineker started with FIR in May, 1997. As President of FIR he was not aware, in 2007, of the individual FIR members' practice respecting the recovery or non-recovery of benefit premiums from employees in previous strikes. He was aware of the practice that was affirmed in the Trustees Agreement of 1993. At no time in his discussions with Mr. Matters was the issue of prorating of benefit premiums or the issue of recovery of benefit premiums for employees on WI, EI or WCB before the strike brought up or discussed.

6. Industry strikes occurred:

   I. November 21 – December 16, 2003, inclusive (26 days).
   II. June 27 – July 6, 2000, (9 days)
   III. July – December 5, 1986 (137 days)

7. During those strikes FIR members paid all benefit premiums; attached as Exhibit 2 is the 1986 agreement to that effect.

8. Attached at Tab 3 is the April 1, 1993 IWA-Forest Industry Health and Welfare Trustees' Resolution regarding "Continuation of Benefits-Labour Dispute", which states:

   "Continuation of Benefits – Labour Dispute"

   The Trustees discussed the new Labour Code, which lays down conditions for continuation of benefits during strike or lock-out, but which allows other arrangements to be made by agreement between Management and Unions. Moved, Seconded and Carried to formally adopt the past industry practice (as in the 1981 and 1986 strikes), for the period that Section 62 of the Labour Code remains in effect.

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

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

9. At the conclusion of the strikes in 1986, 2000, and 2003, FIR member companies:

   i. In most cases recovered benefit premiums with respect to those employees who were working prior to the commencement of the strike for months the employees were on strike the entire month.

   ii. In many cases FIR members did not recover benefit premiums from employees who were working prior to the commencement of the strike for partial months during which the employees were on strike. However, in some cases the Employer did recover the premiums on a pro-rated basis for partial months.

   iii. In many cases, did not recover any premiums for employees who were already in receipt of benefits prior to the commencement of the strike (WI, WCB, or EI). Some members may have required repayment, but sufficient evidence is not available at this time. FIR believes it has evidence of at least one instance when one member recovered benefit premiums for an employee on WCB. In one case an employer seems to have been advised by FIR not do so: Tab 4.

10. The Union would testify it was not aware any employers recovered premiums from employees who were on benefits prior to the strike or that any employers recovered pro-rated premiums.

11. FIR issued Advisories to its members in 2000, 2003, and 2007, advising that benefit premiums should be recovered on a pro-rata basis for periods the employees were on strike and explaining the Trustees Agreement on payment and recovery of benefit premiums during a strike: Tabs 5, 6 and 7, respectively. The Union was not copied with those Advisories and was not aware of them. FIR would testify it was not aware some of its members did not follow the advice contained in the Advisories.

12. The 2007 Advisory also advised FIR members that employees "who were on a disability claim at the commencement of the strike are not exempt from the provision requiring reimbursement of benefits and the calculation of their reimbursement should be on the same basis as the above". In preparing this Advisory FIR relied on the attached e-mail from Terry Duggan, who is the consulting actuary to the benefit plan for the Trustees: Tab 8.

13. Following the 2007 strike all FIR members followed FIR's advice and recovered all benefit premiums (dental, MSP, life insurance, AD&D and extended health benefits) paid on behalf of all employees during the period of the strike, including those employees already on benefits at the commencement of the strike. All FIR members pro-rated recovery for partial months worked due to the strike. During a strike WI premiums are not paid by anyone and, therefore, no one was required to repay WI premiums for any period during the strike.

14. FIR agrees that employees in receipt of WI, WCB, or lay-off prior to the strike are entitled to continue to receive their salary replacement during the period of the strike (unless they become fit to return to work at which point salary replacement ceases).

15. Local 1-80 of the Union filed a grievance against Western Forest Products respecting the payment of benefit premiums during the 2007 strike: Tab 9.

16. The issue was discussed by the USW and FIR in a Right of Reference proceeding under the Coast Master Agreement but the parties did not agree to send the Trustees Resolution language to the Industry Interpreter for determination. Subsequently FIR decided to take carriage of the grievance as an industry issue covering all FIR companies.

Issues

i) Were the Employers entitled to recover the pro-rated benefit premium costs for partial months the employees were on strike (July and October 2007)?

ii) Were the Employers entitled to recover benefit premium costs for the entire period of the strike for employees

who were on lay-off, weekly indemnity, or WCB, prior to the commencement of the strike?

[4] Finally, although this matter spans two collective agreements (June 15, 2003 – June 14, 2007 and June 15, 2007 – June 14, 2010) the parties agree that the provisions in dispute remain the same.

III. Summary of Arguments

[5] The Union argues that employees who are on Weekly Indemnity, EI, Worker's Compensation Benefits (WCB) or on layoff, occupy a different status, prior to and during a strike, than employees who are working and elect to go on strike. This status is due to the fact that the benefits and premiums which they receive are vested. As a result of the collective agreement vesting both the benefits and the premiums, the Employer is prohibited from recovering these premium costs during a strike.

[6] Second, the Union asserts that although the Employer is entitled to recover premium costs for any full month during which a strike took place, it is not entitled to recover such premium costs on a pro-rated basis because the collective agreement obliges the Employer to pay the premium costs for an entire month, even if an employee should work only one day a month. Moreover, even if the Employer should have a contractual right to recover such premium costs the past practice creates an estoppel which precludes the Employer from such a recovery. Finally, the Union asserts that the Employer has no automatic right to deduct these premium costs from employees.

[7] The Employer replies that an employee has no legal right to claim the costs of premiums from an Employer during a strike. The collective agreement only compels payment of these costs when it is in effect. A strike, therefore, terminates any obligation the Employer has to pay such wages and benefits.

[8] Further, the Employer asserts that a distinction must be made between the payment of benefits and the payment of premiums. It argues that any vesting or accrual applies only

to the payment of benefits, and not to the payment of premiums. Thus, any time an employee has been on strike, and the Employer has paid premiums, that employee is obligated to reimburse the Employer - whether it be for an entire month or any part of a month.

[9] Finally, the Employer says that in regard to the issue of estoppel the Union has failed to establish any legal rights that requires the payment of benefit premiums during a strike; and further, that past practice does not establish any such legal right. Finally, there has been no unequivocal representation by the Employer that it would not recover any premiums that it has paid on behalf of its employees.

IV. Analysis and Decision

[10] I will begin with a review of the collective agreement and the provisions at issue.

[11] Article 17 sets out the Health and Welfare benefits negotiated under the collective agreement; these include insurance coverage (group life insurance, accidental death and dismemberment) weekly indemnity, and medical coverage, including extended health and a dental plan. There is no issue as to the particulars of any specific benefit; rather, it is the global issue of who bears responsibility for the premium costs of these benefits during a strike. As a result, the Union placed an emphasis on the following General Principles set out under Article 17(5)(a) to (f). Those provisions read as follows:

> (a) Premium cost for insurance shall be paid for by the Company.
>
> (b) Participation in the Plan is to be a condition of employment.
>
> (c) Any new employee who has not worked in covered employment in the last eighteen (18) months will be eligible to become a covered employee on the first day of the month following completion of the probationary period. However, for such employee coverage for the Medical Services Plan and for the Extended Health Benefit will apply on the first day of the month following the date of employment.

(d) Coverage will be portable in all units covered by collective agreements between members of Forest Industrial Relations Limited, the Interior Forest Labour Relations Association, the Council on Northern Interior Forest Employment Relations, Canfor Limited, Northwood Pulp and Timber Ltd., Weldwood of Canada Limited and the United Steelworkers of America, and there shall be no waiting period for qualified employees changing employers within the Industry.

(e) Coverage during layoff will be provided as follows:
(i) Employees with one (1) or more years' seniority – for six (6) months;
(ii) Employees with more than four (4) months' but less than one (1) year's seniority - three (3) months.

(f) In order for reinstatement of layoff coverage to occur there must be a return to regular full-time employment. An employee returns to regular full-time employment when he is employed for ten (10) working days within a floating period of thirty (30) consecutive days.

Also, an employee who returns to work for at least one (1) working day and less than ten (10) working days will be covered for that month, in addition to any layoff coverage to which he was entitled, if the recall occurred during the period of layoff coverage.

[12] From these general principles we can draw the following conclusions: first, the Employer is responsible for the cost of all premiums; second, that the Health and Welfare Benefit Plan is a condition of employment; third, new employees are covered on the first day of the month after the completion of their probationary period (thirty working days); the exception to this are medical and extended health benefits which are triggered at the beginning of the next month following the date of hire; fourth, employees who are on lay-off, and who have more than one year's seniority, are entitled to an extended six month benefit coverage; fifth, employees whose seniority lies between the range of four months and one year, are entitled to three months extended coverage while on lay-off; sixth, if a lay-off exceeds the three and/or sixth month timeline, the appropriate benefit coverage can be

reinstated for that employee if they have worked for at least ten working days within a thirty consecutive day period; seventh, and finally, if a laid off employee is reinstated for at least one day their coverage is reinstated for one extra month.

[13] There is nothing in Article 17, or in the collective agreement as a whole, that requires the Employer to pay the cost of premiums during a strike. Similarly, there is nothing in the collective agreement which addresses the issue of the Employer's ability, to either recover or not recover, the premiums paid by it during the course of a strike. Nor is there any language in the collective agreement that addresses the Employer's right to the pro-rated recovery of premiums for partial months during which a strike took place or its right to recover premiums paid on behalf of those who were on disability claims – e.g. weekly indemnity – during a strike.

[14] It is not disputed that when an employee goes on strike, and withdraws their labour, they surrender or relinquish their wages and benefits. This is because the collective agreement is terminated and all obligations of the Employer to pay any compensation to employees (wages and benefits) ceases. Therefore, the Employer is free to terminate all benefits and contributions when a strike occurs.

[15] However, in actual practice, many Employers and Unions have historically made arrangements outside the collective agreement to ensure that benefit contributions continue during a strike in order to safeguard an employee's coverage. The parties in this collective bargaining relationship have done precisely this and it is these collateral agreements, and/or past practices, which must therefore be examined.

[16] At a meeting between Terry Lineker, President of FIR and Bob Matters, USW Wood Council Chief Negotiator, that took place just as the strike commenced, Lineker agreed to continue benefit premiums during the strike, stating to Matters, "We will do what we have done in the past." Lineker was not aware of all FIR members practices in the past but he was aware of a resolution passed by the Health and Welfare Benefit Trustees in 1993. That resolution reads as follows:

CONTINUATION OF BENFITS – LABOUR DISPUTE

The Trustees discussed the new Labour Code, which lays down conditions for continuation of benefits during strike or lock-out, but which allows other arrangements to be made by agreement between Management and Unions. Moved, Seconded and Carried to formally adopt the past industry practice (as in the 1981 and 19986 strikes), for the period that Section 62 of the Labour Code remains in effect.

The key features of the past practice are:

- Premiums continue to be paid for all benefits except WI.
- Premiums are paid by the employer, reimbursed by employees after return to work.
- Benefit coverage continues as usual except for WI:
    - For disabilities beginning before work stoppage, WI payments continue;
    - For disabilities beginning during work stoppage, WI waiting period starts on the day other employees return to work.

[17] This commitment is in the form of a resolution which "formally adopt[s] the past industry practice (as in the 1981 and 1986 strikes)".

[18] The reference to the 1986 strike is significant. In respect to the matter of the payment of premium benefits during a strike, and their reimbursement by employees, the 1986 strike contains the only written agreement between the parties in regard to this issue. On July 29, 1986 the President of the IWA, Jack Munroe, and the President of FIR, Keith Bennett, as well as the Trustees of the IWA Forest Industry Health and Welfare Plan, signed an agreement in respect to the payment of premiums during a strike, and their reimbursement by employees following a strike. It should be noted that Munroe and Bennett were also Trustees of the Health and Welfare Plan. That Agreement reads as follows:

AGREEMENT

With Respect to Continuation of Benefits Under
I.W.A. – Forest Industry Health & Welfare Plan

In that Jack Munro on behalf of the I.W.A. and its members has authorized employers to recover from employees on their return to work following any strike or lock-out the amounts of premium advanced on their behalf by the employers, since the full cost of the premiums for coverage is paid by employees, and in that Keith Bennett on behalf of F.I.R and its companies has committed those companies to advance in respect of their covered employees the premiums necessary to provide certain benefits during the period of any strike or lock-out consequent on the cancellation of the 1983-86 Coast Master Agreement, the Trustees hereby agree that benefits under the Plan during such period shall be provided for those who were covered employees immediately prior to the commencement of such period as follows:

1. In the case of disabilities incurred before the commencement of such period, weekly indemnity benefits shall be payable during the period subject to the provisions of the text of the Health and Welfare Plan.

2. In the case of disabilities incurred during such period, weekly indemnity benefits shall be payable in the case of surgery being performed, hospitalization, or an accident, commencing the date the strike or lock-out ends, and the other employees at the claimant's place of employment returned to work or were available for work at the end of such period and shall be payable in the case of illness commencing from the sixth day following the date the other employees at the claimant's place of employment returned to work or were available for work at the end of such period. In the case of disability resulting in hospitalization which begins during such period and which had been scheduled before such period, weekly indemnity benefits shall be payable.

3. Group Term Life Insurance and Group Accidental Death and Dismemberment Insurance shall continue during such period.

In that F.I.R. and the I.W.A. have also agreed to similar advance payment of premiums by the employers with respect to continuing the basic medical, extended health and the dental coverage provided for in the 1983-86 Coast Master Agreement, subject to the recovery of such premiums following return to work, F.I.R. undertakes to

> advise its member companies with respect to the continuation of basic medical, extended health and dental coverages and health and welfare benefits.
>
> (emphasis added)

[19] This Agreement, a tripartite agreement binding the Union, the Employer and the Health and Welfare Plan, is what I construe to be the formally adopted "past practice", as it was referred to by the Trustees in 1993. However, it is in the form of a written agreement and not simply a "past practice". One reason it was raised in 1993 was because of the then recent B.C. *Labour Relations Code* amendments; in particular, Section 62, of which more will be said later.

[20] I conclude that it is this document which sets out the terms of the practice between the parties for each subsequent strike since 1986, (as is set out in paragraph 6 and 7 of the Agreed Statement of Fact). I also conclude that it is this written agreement which forms the basis of the agreement between Lineker and Matters at the beginning of the 2007 strike. In other words, I conclude that it is the terms of the 1986 Agreement which are the terms under which the subsequent strikes were governed in regard to the payment of benefit premiums, and their recovery, including the 2000 strike, the 2003 strike and the 2007 strike.

[21] Having determined that this tripartite agreement governed the 2007 strike, it should be noted that the collective agreement, and the Health and Welfare Trust Agreement, are separate legal agreements, and are governed by different legal obligations and responsibilities. The fact that the 1986 agreement is a tripartite agreement, and includes all three parties (Union, Employer and the Trustees of the Health and Welfare Plan) is necessary in order to make such scheme both legally and practically enforceable.

[22] Much of the Agreed Statement of Facts addresses the issue of past practice. The first use of this term arose in the resolution of the Health and Welfare Trustees, dated April 1, 1993. It set out the following "key features" of the past practice: first, that premiums are paid by the Employer and later reimbursed by the employees after they return to work. This contractual commitment is first set out in the 1986 Agreement. Second, WI benefit

coverage applies to those who were on disability before the commencement of the strike; and for those who incur disabilities during the work stoppage the waiting period starts on the day that other employees return to work. These again reflect the stated commitment set out in the 1986 agreement. However, one feature of the past practice noted in the 1993 resolution is that premiums continue to be paid for all benefits, "except WI".

[23] This particular issue of past practice ("except WI") differs from the Agreed Statement of Facts, (paragraph 9(i)(ii)(iii)), including the strike in 1986 (referred to in the 1993 resolution) as well as the strikes in 2000 and 2003. In those strikes the Agreed Statement of Facts indicates that the past practice was that in "most cases" FIR members companies recovered benefit premiums in respect to those employees who were working prior to the commencement of the strike, and were "on strike for the entire month." Second, in "many cases" FIR member company did not recover benefit premiums from employees who were working prior to the commencement of the strike for "partial months", during which those employees were on strike; however, there were some cases where Employers did recover "on a pro-rated basis" for partial months. Third, and in contradiction to the 1993 resolution, in "many cases" FIR member employers did not recover any premiums (thus having paid them) from employees who were already in receipt of benefits prior to the commencement of a strike. There were some FIR members that did require repayment, but "sufficient evidence is not available at this time", to confirm this practice. However, one Employer did recover benefit premiums for an employee on WCB. I, therefore, do not find the 1993 resolution of assistance, at least in regard to its purported recital of past practice.

[24] Following the completion of the strike in 2007, (July 21 to October 21, 2007), FIR sent out an Advisory Letter that related its view that its members were entitled to recover the cost of premium benefits on a pro-rated basis, and also recover against those employees who were on disability claims at the commencement of the strike. This letter, dated October 26, 2007 reads as follows:

Re: Recovery of Benefit Premiums After the Strike

Further to the FIR Guidelines for Administration During Strikes contained in AL 10-07, (Continuation of Benefits), this letter is to inform you about collecting benefit premiums from USW employees for time spent on strike.

The amount of recovery should vary from operation to operation because it is based on the duration of the strike at each operation. For example, for an operation that was struck on July 21, 2007 and had crews returning to work on October 31, 2007, the strike lasted 3 months and ten days and the employer should recover, by deduction from payroll, 3 and 10/30 month's premiums paid for:

1. Health and Welfare Plan
   (at the leave of Absence rate of $54 per month – Group Life and AD&D Coverage only)
2. Medical Services Plan
3. Dental Plan
4. Extended Health Benefits Plan

The current monthly premiums payable for FIR member companies for items (2), (3) and (4) are attached for your reference and you will need these to calculate each individual's recovery amount. A sample calculation of the employer's recovery for an employee with a family of three, who was involved in a 3-month and ten-days strike, would be:

$$3.33\ (54+108+98.15+60.97) = \$1,069.33$$

Employees are required to reimburse employers and it may be done by payroll deduction (see Article III, Section 8 of the Master Agreement) but you may want to consider deducting these amounts over more than one pay period.

Employees who were on disability claim at the commencement of the strike are not exempt from the provision requiring reimbursement of benefits and the calculation of their reimbursement should be on the same basis as above.

In cases where the employer is unable to recover contributions (because, for example, the employee does not return to work and refuses to pay), legal action in Small Claims Court is an option.

Please contact the undersigned if you have any questions.

[25] FIR had sent out similar Advisory Letters following the 2000 and 2003 strike; and although both of those letters (July 18, 2000 and December 18, 2003) set out the view that Employers were entitled to recover premiums on a pro-rated basis, neither letter indicated FIR's view that recovery of premiums should be made against those who were on disability claims at the commencement of a strike. As stated, the collective agreement does not deal expressly with the recovery of premiums by the Employer, on either a pro-rated basis, or the recovery from employees on disability claims.

[26] In such circumstances, it is appropriate for an arbitrator to resort to "extrinsic evidence" – negotiation evidence and/or past practice – as an aid to the interpretation of the collective agreement and/or collateral documents. *Re John Bertram & Sons Co. Ltd. and IAM Local 1740* (1967) 18 LAC 362 (Weiler). The purpose of such an interpretative exercise is that the conduct of one or both parties may clarify what they mutually intended when they negotiated a particular provision. Such a doctrine, while helpful, must be carefully applied. In *Re John Bertram & Sons Co. Ltd, supra* Arbitrator Weiler set out the following rules in applying past procedure as an interpretative aid:

> Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.
>
> (para. 13)

[27] First, as stated, there is an absence of contract language that directly addresses these two issues, recovery on a pro-rated basis and recovery from those receiving benefits on layoff.

[28] Second, as set out in the Agreed Statement of Facts, there has been no consistent industry practice.

[29] Third, Lineker was not aware of the variety of practices on behalf of FIR members and the Union had no knowledge of the practices of individual employers when it came to either the pro-rating of benefits or the recovery of premiums from those on disability claims.

[30] Fourth, this lack of knowledge includes persons who have direct responsibility (Lineker and Matters) for both the negotiation and application of the collective agreement.

[31] I therefore, conclude that the industry past practice is of no assistance in the interpretation of the 1986 Agreement, which I have concluded applies to the 2007 strike. Therefore, the terms of the 1986 Agreement must be examined in the absence of any consistent practice.

Issue I

[32] The parties have framed the first issue in the Agreed Statement of Facts as follows:

> i) Were the Employers entitled to recover the pro-rated benefit premium costs for partial months the employees were on strike (July and October 2007)?

[33] Once again we start with the general principle that when an employees goes on strike they forfeit the right to any wages or benefits payable under the collective agreement. In regard to the specific issue of benefits, Chair Don Munroe in *Crown Life Insurance Company and Office and Technical Employees' Union, Local 15* (August 15, 1981) BCLRB No. 52/81 stated the following:

> We start from the premise that it cannot be too surprising to trade unions or their members that an employer would discontinue premium or benefit coverages upon the commencement of a strike in respect of those employees who participate in the strike. Absent unusual circumstances, such a step should not be viewed as constituting a penalty or coercion or intimidation within the meaning of either Sections 3 or 5 of the Labour Code. Certainly, such a step is coercive in the general sense that it is designed to bring about an alteration of position which might not otherwise have occurred. But the whole system of strikes and lockouts is coercive in that general sense. And, as we suggested above, a cut-off of premium or benefit coverages is a fairly normal and predictable consequence of a resort to such economic sanctions. It is entirely possible that such a step would constitute a violation of some contractual relationship between the parties (and that might well be the situation here; if so, there are mechanisms for an expeditious resolution). However, in the normal case it would be somewhat puzzling to the industrial relations community to discover that it constituted an offence against the Labour Code, the very statute which expressly permits the use of even more powerful economic inducements for the resolution of bargaining disputes.

[34] In view of this Employer's fundamental right not to pay such premiums during a strike, both its obligation and its right to recover any such premiums paid, must be found either in the collective agreement (which we have found does not exist), the 1986 Agreement, or any statutory provisions and/or the arbitral law.

[35] The strike lasted from July 21 to October 21, 2007. The Union does not dispute that the Employer is entitled to be reimbursed for any full month for which employees were on strike – specifically, August and September 2007. However, it says that the Employer is not entitled to be reimbursed, on a pro-rated basis, for any days in which employees were on strike; approximately 10 days in July 2007 and the first 20 days in October 2007 (having also worked the remaining days in each of those months).

[36] The Union points to one of the provisions under the General Principles in Article 17(5)(f), which states that employees who work for just one day are entitled to have their benefits covered by the Employer for the remainder of the month. Thus, the Union asserts,

the Employer is obligated to provide benefit coverage for an entire month notwithstanding that the Union was on strike for part of that month. This is because the benefit has been triggered by the employee having worked the one required day.

[37] First, I adopt the reasoning of Arbitrator Jackson in *Teamsters Local Union No. 213 and Tree Island Industries Ltd.*, Award no. A-19/97 where she noted that although the Employer was obligated to pay 100% of the cost of Health and Welfare benefits, this obligation only covered that portion of the month when the collective agreement was in force. Therefore, the provision in the collective agreement, requiring "monthly contributions", did not reflect an agreement by the parties that the Employer was still required to pay a full month's worth of contributions, notwithstanding a strike/lockout occupied a part of that month. She stated the following:

> When the agreement is not in force for the whole month, monthly contribution must, in our view, refer to a contribution for that portion of the month that remains once the strike has ended. That, we say, is the "monthly contribution".

[38] Arbitrator Jackson further noted that during a strike or lockout the Employer loses revenue, whilst the employees lose wages and benefits. She noted that it was not consistent with a "common sense approach" that the Employer would lose its workforce, and its corresponding revenue, but employees would still be entitled to demand the same benefit contributions. (Arbitrator Jackson concluded that the Employer had not filed a timely grievance in regard to its "set-off" claim, and thus, in the end, declined to rule on this issue of pro-rating the recovery of premiums.)

[39] I have concluded that it is the obligation of the Employer to pay the Health and Welfare benefits under Article 17 only when the collective agreement is in effect, and that no such obligation exists when employees are on strike. As a result, if there is no obligation at law to pay such premiums, nor does one arise under the collective agreement as a whole, the payment and recovery of such premiums must then be a matter of either a collateral contract or statute.

[40] Proceeding then to the terms of the parties' collateral contract, we must review the 1986 Agreement. The opening words read as follow:

> In that Jack Munro on behalf of the I.W.A. and its members has authorized employers to recover from employees on their return to work following any strike or lock-out the amounts of premium advanced on their behalf by the employer, ...

[41] I conclude that these words expressly state that employees will reimburse the Employer the *amounts of premium advanced on their behalf.* This commitment is not qualified in any respect. There are no words that modify or restrict the Employer's right to recover the actual amounts of premiums advanced on behalf of employees: for example, that an Employer will not receive any reimbursement for premiums actually paid on behalf of employees for strikes that are less than a month in duration. I also conclude, that the Union in these opening words, has additionally authorized the Employer to deduct directly from employees any outstanding premium payments advanced on their behalf.

[42] Moving to the statutory regime, the 1993 resolution by the Health and Welfare Trustees made an express reference to Section 62 of the B.C. *Labour Relations Code*. That resolution stated that they would adopt the industry practice for the "period that Section 62 of the *Labour Code* remains in effect." Section 62 reads as follows:

> Continuation of benefits – (1) If employees are lawfully on strike or lawfully locked out, their health and welfare benefits, other than pension benefits or contributions, normally provided directly or indirectly by the employer to the employees must be continued if the trade union tenders payment to the employer or to any person who was before the strike or lockout obligated to receive the payment.
>
> (a) in an amount sufficient to continue the employees' entitlement to the benefits, and
> (b) on or before the regular due date of that payment.
>
> (2) If subsection (1) is complied with
> (a) the employer or other person referred to in that subsection must accept the payment tendered by the trade union, and

(b) a person must not deny to an employee a benefit described in that subsection, including coverage under an insurance plan, for which the employee would otherwise be eligible, because the employee is participating in a lawful strike or is lawfully locked out.

(3) A trade union and an employee may agree in writing to specifically exclude the operation of this section.

(emphasis added)

[43] This particular provision was incorporated into the B.C. *Labour Relations Code* as a result of the September 1992 Subcommittee Report of Special Advisors (Baigent, Ready and Roper) in its Recommendations for Labour Law Reform. The Subcommittee, stated that the purpose of this provision is as follows:

> Continuation of Benefits
>
> It is often the practice in this Province that, during the course of a lawful strike or lockout, the employer will agree with the union to maintain health and welfare benefits for the duration of a strike so long as the union pays both the employee and employer costs of maintaining the benefits. In the absence of such agreements, an employee may well find it difficult, if not impossible, to replace these coverages during a lawful strike or lockout. This exposes the employee and his or her family to substantial risk in the event of illness, disability or death.
>
> In the absence of an agreement, the question of the benefit continuation can be a significant obstacle to a resolution of the collective bargaining dispute. We believe that the legislation should ensure that employees and their families are not left without benefit coverage if the union is prepared to undertake the full costs of maintaining the benefits. Accordingly, we have recommended an amendment which would provide for the continuation of health and welfare benefits (excluding pensions) for the duration of a lawful dispute, so long as the union absorbs the total cost. With this amendment, an issue which can, but need not, stand in the way of resolving the collective bargaining dispute, can be removed.
>
> (pages 56 – 57)
> (emphasis added)

[44] Therefore, if a trade union tenders payment to an Employer that is sufficient to cover an employee's entitlement to benefits, then the Employer is obligated to accept those payments, and the benefits must continue.

[45] First, I note that the Special Advisors, in setting out the purpose of the continuation of benefits during a lockout/strike, states that the Employer is obligated to do so only *"if the union is prepared to undertake the full cost of maintaining the benefits"*, and further, only "*so long as the union absorbs the total cost.*"

[46] Second, Section 62 provides that a Union must only tender "*an amount sufficient to continue the employee's entitlement to the benefits.*" Therefore, a Union would only be liable to pay for that portion of the month that was sufficient to continue an employee's entitlement. In other words, the Union would be entitled to pro-rate the costs of benefits for an employee during a lawful strike. Thus, this statutory scheme is consistent with both the common law (*Dayco, infra*) and the arbitral law (*Tree Island, supra*) relied upon in this matter.

[47] I therefore conclude, that in relation to the 2007 strike, the Employer is entitled to recover the pro-rated benefit premium costs for the partial months that employees were on strike in July and October 2007.

Issue II:

ii) Were the Employers entitled to recover benefit premium costs for the entire period of the strike for employees who were on lay-off, weekly indemnity, or WCB, prior to the commencement of the strike?

[48] It is not in dispute that employees who are in receipt of WI, WCB or on lay-off prior to the strike, are entitled to continue to receive their benefits during the period of the strike, unless they become fit to return to work at which time salary replacement ceases. (para. 14 Agreed Statement of Facts). It is essential, in sorting out this issue, to understand the reasons for this.

[49] Generally, there are two types of benefits under a collective agreement. One type of benefit derives from work or service that is being provided on an ongoing basis. This benefit is tied directly to the actual hours or days worked; wages are a good example. However, a second type of benefit accrues over time and is related to an employee's status. For example, vacation may be tied to years of service (seniority). This is an accrued benefit, and even if an employee is off work for a period of time, they do not lose whatever benefit has accrued (although they may not continue to accumulate additional benefits while off work).

[50] The first type of benefit is seen to flow from the employee's daily or weekly compensation package. Thus, when an employee is not working, for example, they are on strike, they are not receiving either the wages or benefits which comprise their compensation package.

[51] However, the second type of benefit may be characterized as an "accrued" or "vested" benefit, and even in those instances where a collective agreement has terminated, these benefits still remain. The Supreme Court of Canada in *Dayco (Canada) Inc. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada),* [1993] 2 S.C.R. 230, in dealing with group insurance benefits of employees under an expired collective agreement, commented on the nature of collective agreements, and the benefits derived under them, both during the life of those collective agreements, and their subsequent termination:

> A collective agreement is rather like a contract for a fixed term. At [page 271] the end of the term, the contract or agreement is said to "expire" by mutual agreement. But the contract is not thereby rendered a nullity. It ceases to have prospective application, but the rights that have accrued under it continue to subsist. This termination or expiration can be contrasted with the contractual notion of rescission, whereby the contract is rendered null and void, and the parties have no obligations thereunder: see Anson's Law of Contract (26th ed. 1984), at pp. 411-32. Thus it should not be seen as a novel concept that grievances can arise after the expiration of a collective agreement that relate to rights accruing under that agreement. It seems to me that it would take very clear words to

demonstrate that the parties intended to rescind their agreement by agreeing to enter into a succeeding agreement. Rather, the presumed intention is only that the prospective relationship between the parties is to be governed by the new agreement, and that the old agreement ceases to have any relevance to that ongoing relationship.

....

The new agreement "displaces" the old one, which is no longer in force. But this is with respect to the current employment relationship, and says nothing about the previously accrued rights of the parties; see also Re United Steelworkers, Local 5951 and Medland Enterprises Ltd. (1963), 14 L.A.C. 55. Another example of the importance of context is seen in Brown & Beatty, supra, where the authors speak of a new agreement "extinguishing" the terms of the old agreement. This may be an unfortunate term, which suggests some retroactive rescission of contractual obligations between the parties. However, it is clear from the cases cited by the authors that any extinguishment has prospective effect only. Other cases on this point are reviewed below, and I have found no case that suggests that accrued rights are expunged once a new collective agreement is negotiated. Moreover, I see nothing differentiating the promise to pay retirement health benefits from promises to pay regular wages or vacation pay. All of these can be enforced after the termination of the agreement. Any other conclusion would render meaningless a wide range of promises to employees that might extend beyond the expiration of a collective agreement. In addition to the unpaid wages and retirement benefits, disability benefits owing to former employees and pension benefits to retired workers would also be placed in jeopardy.

It goes without saying that these propositions do not affect the prospective relationship between the parties to a collective agreement. During the interregnum, if any, between collective agreements, the parties are free to govern their current employment relationship in any way they choose; see Paccar, supra. The employer is free to disregard the terms of previous collective agreements and set new [page 273] terms of employment. As such, it is certainly true that in the vacuum that may arise between collective agreements workers have no subsisting rights from the collective agreement that govern their current employment relationship. However, the old collective

> agreement is not rendered a nullity. Rights that have accrued under that agreement remain enforceable.
>
> (para 45 – 47)

[52] The arbitral jurisprudence has long upheld the right of employees, who are on benefits prior to commencement of strike, to have those benefits continue during the course of a strike: *Re Teamsters Local Union No. 213 -and- Tree Island Industries Ltd.,* Award no. A-19/97 (Jackson; *Re Foothills School Division No. 38 v. Alberta Teachers' Assn.* (2005), 142 L.A.C. (4th) 230 (Sims; *Re Corporation of City of Waterloo and Canadian Union of Public Employees, Local 1542* (1979), 25 L.A.C. (2d) 120 (O'Shea); *Re York Region Board of Education and CUPE Local 1196, Re* (1990), 11 L.A.C. (4th) 345 (Marszewski); *Weston bakeries Ltd. – Bakery Confectionary and Tobacco Workers International Union, Local 468 (re),* (1996) B.C.C.A.A.A. No. 270, 57 L.A.C. (4th) 120 (Albertini).

[53] The rationale for this approach is that an Employer is not entitled to change the "status" of an employee already on benefits during the course of a strike. For example, an employee who is receiving disability benefits when a strike commences, occupies a status that is not based upon active employment; rather, their status derives from an accrued or vested right under the collective agreement. Therefore, the Employer is not able to terminate unilaterally these benefits in response to the commencement of a strike as it can with an active employee.

[54] However, the Employer states that this principle applies only to the actual benefits, and not to the payment of premiums. They assert that the payment of all premiums fall within the same class of benefits, and therefore there is no obligation on the Employer to pay any such premiums.

[55] First, the difficulty with this approach is that it vests one part of a benefit but not the other – the Employer's obligation to pay 100% of the premium. There is nothing in the collective agreement, or in the nature of the specific benefit, that compels the separation of the premium from the benefit.

[56] Second, the payment of all premiums do not fall within the same class of benefits. The payment of premiums, for those on disability claims, are not based on the fact that their status is that of an active employee. Thus, the payment of these premiums does not fall within the category of premiums that are paid as part of "a days wages".

[57] Third, it is important to return to the opening words of the 1986 agreement:

> In that Jack Munro on behalf of the I.W.A. and its members has authorized employers to recover from employees on their return to work following any strike or lockout the amounts of premium advanced on their behalf by the employers ..."

[58] These words, I conclude, deal expressly with those employees who are actually returning to work, and thus inferentially, do not apply to those employees who are not returning to work; in other words, they apply to "active" employees, and not to those who occupy a different status, such as those on a disability claim.

[59] Finally, I note Arbitrator Jackson's conclusion in *Tree Island, supra*, where she held that not only the benefits, but also the contributions, had vested prior to the collective agreement terminating due to a strike:

> This claim concerns those employees off work before the strike due to layoff, illness or accident. With respect to these employees, it is our view that the retroactive effect of the successor collective agreement is to entitle those employees to have the entire August contributions made by the Employer. In reaching this conclusion, we have found the reasoning in the following cases persuasive.
>
> In Re: York Region Board of Education, supra, a legal strike commenced on the very same day the grievor would have commenced his sick leave. The question was his entitlement to sick leave benefits for the period of the strike. His sick time off work continued past the end of the strike; for the post-strike period he did receive sick leave benefits. A similar fact situation arose in City of Hamilton, supra.
>
> In both cases the grievances were successful. The arbitration boards relied on two factors: the retroactivity clauses in the

> successor collective agreements and that the employees' entitlement to sick leave pay would have continued during the entire period in issue had it not been for the strike. The rationale was that the employee absent from work on sick leave at the time the strike commenced should not have his status changed by the fact of the strike unless that employee would have been otherwise able to work in that time period and chose not to do so because of the strike.
>
> We agree with the reasoning in those two decisions. We apply the same rationale to those employees at Tree Island who were absent from work before the strike commenced - by reason of layoff, sickness or accident – and receiving benefits under Appendix "A". <u>These employees had, in effect, a right to continued contributions that had vested before the collective agreement terminated.</u> The grievance should succeed insofar as these employees are concerned.
>
> (para. 105 – 108)
> (emphasis added)

[60] I therefore conclude that the Employer is not entitled to recover benefit premium costs for the entire period of a strike/lockout for employees who were on lay-off, Weekly Indemnity or WCB prior to the commencement of the strike.

[61] However, the Employer is entitled to recover the pro-rated benefit premium costs for the partial months when employees were on strike (July and October 2007).

[62] As a result of my conclusions, I do not need to address the parties arguments in respect to the doctrine of estoppel.

[63] It is so awarded.

[64] Dated at the City of New Westminster in the Province of British Columbia this 19th day of November 2008.

Stan Lanyon

Stan Lanyon, Q.C.