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BY WEB PORTAL

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In the matter of the *Canada Labour Code (Part I—Industrial Relations)* and a referral by the Minister of Labour to the Canada Industrial Relations Board pursuant to section 87.4(5) thereof involving a question respecting the application of section 87.4(1) concerning Canadian Pacific Railway Company (now known as Canadian Pacific Kansas City Railway), employer; Teamsters Canada Rail Conference, certified bargaining agent. (037673-C)

After consideration of all of the submissions of the parties concerned, the parties will find enclosed the Reasons for decision issued by a panel of the Canada Industrial Relations Board (the Board) composed of Ginette Brazeau, Chairperson, and Elizabeth Cameron and Angela Talic, Members.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'Clement Law', with a long horizontal flourish extending to the right.

Clement Law
Acting Team Leader, Registry

Encl.

c.c.: The Honourable Steven MacKinnon (by Web Portal)
Jean-Daniel Tardif



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Reasons for decision

Canadian Pacific Railway Company (now known as
Canadian Pacific Kansas City Railway),

employer,

and

Teamsters Canada Rail Conference,

certified bargaining agent.

Board File: 037673-C

Neutral Citation: 2024 CIRB **1153**

August 9, 2024

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, and Mesdames Elizabeth Cameron and Angela Talic, Members.

Counsel of Record

Mr. Ian Campbell and Ms. Trisha Gain, for the Canadian Pacific Railway Company (now known as Canadian Pacific Kansas City Railway);

Mr. Michael Church, for the Teamsters Canada Rail Conference

These reasons for decision were written by Ms. Ginette Brazeau, Chairperson.

I. Introduction

[1] The notion of what constitutes an “essential service” may appear, at first glance, to be evident or straightforward. However, the definition one will give this term very much depends on the lens through which one assesses the issue.

[2] A service or an activity can be essential or critical for the economic well-being and financial stability of an individual, a business or a country.

[3] However, when considering what is an essential service under the *Canada Labour Code* (the *Code*), the question is different and very narrow. The Board must determine whether an interruption of rail transportation due to a strike or lockout would result in a threat to the safety or health of the public that would be immediate and serious.

[4] For the reasons that follow, the Board has concluded that a work stoppage at the Canadian Pacific Railway Company (now known as Canadian Pacific Kansas City Railway) (CPKC) will not result in such an immediate and serious danger.

II. Background and Facts

[5] CPKC and the Teamsters Canada Rail Conference (TCRC or the union) have been engaged in collective bargaining for the renewal of two collective agreements covering a unit of 3,200 running trades employees and a unit of 85 rail traffic controllers.

[6] On March 4, 2024, the TCRC and CPKC agreed that none of their services or activities needed to be maintained during a work stoppage. CPKC's letter confirming its agreement states the following:

Further to your Maintenance of Activities letters dated February 21, 2024, the Company agrees there are no services that the parties need to continue to jointly supply in the event of a legal strike or lockout, as provided for and contemplated in Section 87.4 of the *Canada Labour Code*.

Should current legislation or other fundamental circumstances change, the Company reserves the right to change this position and take whatever steps are necessary and appropriate.

[7] CPKC filed a notice of dispute with the Minister of Labour (the Minister) on February 16, 2024. The Minister appointed conciliation officers to the dispute on March 1, 2024. The TCRC conducted a strike vote among its members and, on May 1, 2024, announced that they had voted in favour of strike action.

[8] In accordance with the provisions of the *Code*, the parties were to acquire the statutory right to strike or lockout on May 22, 2024.

[9] On May 9, 2024, the Minister made a referral to the Board pursuant to section 87.4(5) of the *Code*, asking it to determine whether the agreement entered into by the parties was sufficient to prevent an immediate and serious danger to the safety or health of the public in the event of a work stoppage at this employer. A very similar referral was made at the same time involving the Canadian National Railway Company (CN) and the TCRC. The referrals have the effect of suspending the parties' right to strike or lockout until the Board disposes of these matters.

[10] The relevant portions of the referral involving CPKC and the TCRC state the following:

WHEREAS the employer operates a total rail network of approximately 32,000 kilometres and was responsible for transporting 124 million tonnes of goods valued at approximately \$165 billion in 2023, including, for instance, essential goods such as propane;

...

WHEREAS concerns have been raised that a disruption of the services provided by the employer could endanger the health or safety of the public;

WHEREAS, for instance, on May 2, 2024, the Minister of Labour received letter from the Canadian Propane Association (see Annex to this instrument) detailing grave concerns that a disruption in the employer's services would prevent the transportation of propane, which is used throughout Canada for critical purposes such as home heating, power generation during emergencies, and heating in community hospitals and seniors' facilities, among other important things;

AND WHEREAS the Minister of Labour is of the opinion that a question exists with respect to the application of subsection 87.4(1) of the *Code* to the employer, the union and the employees in the bargaining unit;

NOW THEREFORE the Minister of Labour, pursuant to subsection 87.4(5) of the *Code*, hereby refers to the Canada Industrial Relations Board the question of whether the agreement entered into by the parties is sufficient to ensure that subsection 87.4(1) is complied with and asks that the Canada Industrial Relations Board determine the action, if any, that is required in order for the employer, the union and the employees in the bargaining unit to comply with subsection 87.4(1) of the *Code* in the event of work stoppage

[11] Upon receipt of the ministerial referral, the Board invited the parties to provide written submissions. Given that the parties in this case—as well as the parties involved in the CN ministerial referral—agree there are no services to be maintained, the Board was of the view that it was appropriate to solicit input from other sources to assist it in answering the Minister's question. Accordingly, pursuant to its powers under section 16(f) of the *Code*, the Board issued a public notice inviting affected groups and organizations to provide their written submissions and

views on certain questions arising from the two referrals. The Board has received 54 submissions in response to this notice.

[12] In its review of these public submissions, the Board grouped the issues raised by the affected groups and organizations into five themes:

1. Concerns related to commercial or economic interests (i.e., loss of business, increased costs for small businesses, and Canada's reputation as a reliable trade partner);
2. Concerns regarding domestic and global food security (i.e., dependence on rail for transportation of fertilizers, potash and canola products necessary for food production);
3. Potential impact on the supply of diesel and/or propane in certain critical areas (i.e., for the purpose of emergency response services, for use in remote communities in northern British Columbia, or as a contingency in the province of Manitoba, which currently relies on rail due to the outage of the Winnipeg Products Pipeline);
4. Potential immediate impact on the supply of water treatment materials for several municipalities (i.e., limited on-site supply of water treatment chemicals and availability of liquid chlorine); and,
5. Requests that the Board provide advance notice of its decision or that it extend the notice period required to be given by the parties of a strike or lockout.

[13] The Board invited the employer and the union to comment on these issues in their written submissions.

[14] The Board does not intend to repeat in detail the submissions of the affected groups or those of the parties. It will only provide a brief summary of their positions and some of the relevant information and facts that were provided in support of their contentions. In coming to its determination, however, the Board did review and consider all the materials on file.

III. The Parties' Submissions

A. CPKC

[15] The ministerial referral involving CPKC is worded differently than the referral involving CN, making reference only to "goods such as propane."

[16] For this reason, CPKC focused its initial submissions on the transportation of propane and provided detailed information regarding its involvement in the transportation of this product that will be reviewed below. It included and referenced several studies and reports to support its statements. In particular, the Board reviewed and found the following reports helpful: The Conference Board of Canada, *Canada's Propane Supply Chain Reliability and resilience* (August 2021); The Conference Board of Canada, *Supply Trains: Security and Resilience in Canada's Propane Market* (October 7, 2021).

[17] CPKC submits that the parties are best positioned to determine whether certain services must be maintained. It argues that the Board must give significant weight to the fact that the parties' positions are aligned in this case. It relies on *Canadian National Railway Company*, 2005 CIRB 314 (*CN 2005*) and indicates that the Board already addressed the issue of maintenance of activities involving the railways and found that a strike or lockout at CN did not pose an immediate and serious danger to the safety or health of the public. CPKC submits that there is no reason why the conclusions reached in *CN 2005* would not apply to it today. It submits that, similar to the circumstances of that case, neither CPKC nor TCRC have provided evidence or information that would require that the transportation of propane or any other goods to be maintained during a work stoppage.

[18] CPKC indicates that these parties have experienced work stoppages over the past 20 years without any reports of a danger to the health or safety of the public within the meaning of the *Code*. It further submits that no concerns were raised previously nor is it aware an immediate and serious danger having materialized in the context of a previous rail strike. It submits that there is no information to suggest that circumstances have changed for this round of collective bargaining. In any event, it submits that should circumstances change during a work stoppage, the Board has the ability to revisit the issue.

[19] CPKC acknowledges that it plays an important role in the Canadian economy as a critical player that supports the supply chain. However, it contends that the majority of the submissions filed by affected groups and organizations cite concerns that are economic in nature and are not relevant to the specific question that the Board must address in its analysis of section 87.4 of the *Code*.

[20] CPKC also explains that the rail network can not operate unless it is fully activated given the highly regulated environment and its obligations under the *Canada Transportation Act*. It states that it would not be feasible to transport only a small volume of freight, or just one product.

[21] CPKC, also requests that the Board provide a cooling-off period to allow it to implement the necessary contingencies and provide certainty around the first date on which a legal work stoppage may occur. It submits that the Board has broad remedial authority to make this order under sections 16(p) and 21 of the *Code*.

B. The TCRC

[22] The TCRC submits that the ministerial referral is deficient and does not demonstrate a *prima facie* case for the Board to question the parties' agreement with respect to the maintenance of activities. There is no evidence that the employer or the union have failed to comply with their obligations under section 87.4 of the *Code*. Given the past bargaining history between these parties, the agreement reached on the maintenance of activities and the Board's decision in *CN 2005*, it invites the Board to answer the Minister's question without conducting an oral hearing or a detailed inquiry and to do so expeditiously. It argues that despite previous labour disputes between these parties, there is simply no evidence that they resulted in an immediate and serious danger to the safety or health of the public.

[23] In essence, the TCRC argues that the right to strike cannot be interfered with because of commercial interests and inconvenience, which are not factors in the Board's analysis of whether a service or activity is necessary to prevent an immediate and serious danger to the safety or health of the public. These parties should be able, like others governed by the *Code*, to exercise their right without interference by the Minister and this referral process.

[24] The TCRC submits that the Minister has predetermined the issues by indicating that certain commodities, like propane are essential. It argues that the Minister's referral is improper, premature and prejudicial to the parties and to the Board's authority to inquire into these matters.

[25] Further, the TCRC questions the motives for the ministerial referral as it was not asked or invited to consider performing certain services during a legal work stoppage. It indicates that the referral appears to be responding to industry and economic interests, neither of which are factors

for the Board to consider in its inquiry. It urges the Board to confirm that the parties' agreement complies with the *Code* and that no services need to be maintained in the event of a work stoppage.

[26] The TCRC reminds the Board that section 87.4 of the *Code* does not give it any jurisdiction to deal with matters that may result in economic hardship or inconvenience to the public. Further, any restrictions on the right to strike, even if they are to protect the public's safety or health, must be limited to the strict level necessary, and only imposed where there is clear evidence that demonstrates they are required.

[27] The TCRC indicates that it is simply impossible to answer the Board's questions in the face of the broad and unlimited scope of the Minister's referral in terms of products and geography. It takes the position that the ministerial referral is unfair and unnecessary. However, in an attempt to assist the Board, it provided some data and information that will be reviewed under each theme below.

[28] In response to the employer's request for a cooling-off period, the TCRC indicates that a new notice period is not necessary and will only serve to dampen union morale. In the alternative, it states that a new cooling-off period should be no more than seven days. It also indicates that it offered CN and CPKC a staggered notice period but that this was rejected.

IV. Decision Without a Hearing

[29] Both parties agree that the Board can make its determination without holding an oral hearing. They both filed fulsome submissions in response to the ministerial referral and provided detailed information in response to the submissions received from affected groups and organizations.

[30] Section 16.1 of the *Code* provides that the Board may render a decision without holding an oral hearing. In this matter, the Board is satisfied that the material, documentation and written submissions on file are sufficient to render a decision without holding an oral hearing.

V. The Law

[31] A union's right to strike and an employer's right to lockout are essential components of the collective bargaining process and are expressly protected by the *Code*.

[32] The Supreme Court of Canada (SCC) has recognized that the right to strike is an indispensable component of collective bargaining and is therefore protected by the *Canadian Charter of Rights and Freedoms*. In *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, Justice Abella wrote the following:

[3] The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations. ... The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.

[33] A meaningful process of collective bargaining that provides workers with the ability to collectively withdraw their services for the purpose of negotiating better terms and conditions of employment through a collective agreement is recognized and protected in the *Code*. The Preamble to the *Code* includes a recognition that the Parliament of Canada is committed to free collective bargaining as the preferred method to resolve disputes. This includes the right of either party to use their economic levers, through a strike or lockout, to reinforce their respective demands and achieve a resolution.

[34] However, in balancing these rights with other interests, Parliament also saw fit to provide for the protection of the public against an immediate and serious danger to their safety or health. This has generally been recognized as a proper and defensible limitation on the right to strike.

[35] The relevant provision of the *Code* reads as follows:

87.4 (1) During a strike or lockout not prohibited by this Part, the employer, the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods to the extent **necessary to prevent an immediate and serious danger to the safety or health of the public.**

(emphasis added)

[36] This provision was added to the *Code* in 1998 and proclaimed into force on January 1, 1999. In interpreting and applying the maintenance of activities provision, the Board has consistently limited its interventions to what is strictly necessary to prevent an immediate and serious danger to the safety or health of the public.

[37] In *NAV CANADA*, 2002 CIRB 168, the Board stated the following:

[227] ... Any restrictions on the right to strike, even though imposed in the interests of health or safety, must appropriately respect the importance of the right in the context of the *Code*. Free collective bargaining is seriously compromised if the right to strike may not be exercised by employees to counteract the employer's economic power. ...

[228] **Accordingly, it is the Board's view that any abridgement of the right to strike must be to the minimum level required to cautiously protect the health or safety of the public.** Accordingly, if the Board is assured that the risk or danger is not "immediate" or "serious," or if the operation of facilities, production of goods or supply of services in question can be limited or will not reasonably be necessary to protect public health or safety or to prevent an immediate and serious danger, the Board should determine such services not to be required.

(emphasis added)

[38] Hence, the Board's task is to balance the principle of free collective bargaining with the protection of the safety and health of the public. As discussed in *Maritime Employers Association*, 2020 CIRB 927 and confirmed by the Federal Court of Appeal in *Maritime Employers Association v. Syndicat des débardeurs (Canadian Union of Public Employees, Local 375)*, 2023 FCA 93 (*MEA FCA*) (leave to appeal to the SCC refused), the Board will require "significant evidence" or "direct and convincing" evidence to support a limitation on the constitutionally protected right to strike.

[39] The maintenance of activities provision places great responsibility on the parties to a dispute. They have intricate knowledge of their operations and are best positioned to identify those situations that may endanger the safety or health of the public (see *CN 2005* at paragraph 33). In the present matter, the parties agree that no services need to be maintained in the event of a work stoppage.

[40] When faced with a question regarding the maintenance of activities, whether from a party or through a ministerial referral, the Board relies on the employer and the union to put relevant and accurate facts and evidence before it. The Board is also mindful of its dual role in ensuring the protection of the public during a work stoppage while supporting the parties' efforts and right to engage in free collective bargaining. The *Code* requires that the Board satisfy itself as to whether the requirements of section 87.4(1) are met and that no immediate and serious danger to the safety or health of the public would result from a work stoppage.

[41] In this case, the Minister has asked the Board to determine whether the agreement between CPKC and the TCRC that no services need to be maintained during a work stoppage meets the requirements of section 87.4(1) of the *Code*. In the face of the parties' agreement that no services need to be maintained, the Board found it prudent to seek input from potential affected groups or organizations to assist it in responding appropriately to the Minister's referral in an expeditious manner.

[42] The Board notes, however, that despite the approach taken in this case, it is not its role to engage in a full inquisitorial process (see *MEA FCA*, at paragraph 107). As CPKC noted in its submissions, "section 87.4 of the *Code* was not intended to be used as a fishing expedition that endeavours to find a danger or risk to the public that the parties have already confirmed does not exist." The Board's role in determining which services or activities must be maintained during a work stoppage, if any, must be limited to an inquiry into what appears as significant evidence of a real and obvious threat to the safety or health of the public. The Board is not required to engage in a search for any issues that could potentially arise during a work stoppage. There would be no end to such a process. The Board must therefore rely on direct and convincing facts and information that, on their face, raise concerns of an immediate and serious danger to the safety or health of the public.

[43] The Board now turns to the themes identified in the submissions received from the affected groups and organizations, as well as the parties' information provided in response to the Board's questions. The Board will not repeat or address each submission or each example of likely disruptions that have been brought to its attention. It will only cite certain examples and provide its analysis on each of the themes.

[44] In the referral related to CPKC, the Minister refers to "goods such as propane," which it qualifies as "essential goods." As the referral mentions propane specifically, CPKC takes the position that the Board should not inquire into other goods or commodities and should limit its assessment of potential concerns that fall within the limited scope of the ministerial referral. Notwithstanding this position, CPKC did address the themes identified by the Board.

VI. The First Four Themes

A. Economic Hardship or Economic Interests

[45] The majority of the submissions received from groups and organizations focused on the economic consequences of a work stoppage in the rail industry. There were indications that a work stoppage would result in increased business costs, challenges or delays in shipping products, leading to personal and commercial hardships and damage to Canada's reputation as a reliable trading partner.

[46] For example, the Canadian Federation of Agriculture indicates that a prolonged labour dispute would have an "indirect impact on the Canadian economy, but also a direct impact on Canadian shippers and producers by pushing grain sales outside peak price periods, resulting in a loss of customers and sales to other jurisdictions, resulting in vessel demurrage bills, contract extension penalties, contract default penalties, additional trucking costs, etc."

[47] The Ontario Chamber of Commerce submits that "a simultaneous work stoppage by both CN and CPKC railways would severely impact businesses across the province at a time when the fluidity and efficiency of our supply chains are required to ensure continued recovery and economic growth."

[48] The Government of Saskatchewan states that "rail is critical to our economy, to our ability to compete in the global market, and to the livelihoods of our producers. ... Even a minor labour disruption will result in lost contracts, shutdowns, lost revenues and reduced taxation revenues to the Governments of Canada and Saskatchewan."

[49] Cereals Canada indicates that "due to the distance to market and the economics of shipping a bulk product, our value chain has no alternatives to rail transportation."

[50] The Board acknowledges that a labour dispute in the rail industry could result in significant hardship given that the Canadian economy depends largely on a reliable and integrated supply chain to get the commercial goods to market. However, the examples given by several groups do not meet the very narrow legal test that the Board must apply, that is, whether the work stoppage would result in **an immediate and serious danger to the safety or health of the public**.

[51] In the context of a labour dispute involving a ferry service, the Board explained that the purpose of section 87.4 of the *Code* is not to shield the public from personal difficulties or economic consequences:

[105] It is true that members of the general public and the business community, which have come to count on the regular running of the ferry service, would suffer some inconvenience and likely be affected from an economic viewpoint in the event of a lengthy strike. However, the purpose of section 87.4(1) is not to shield the public from personal difficulties or economic consequences flowing from a strike or lockout not prohibited by the legislation. The *Code* requires that operations be continued to the extent necessary to prevent an immediate and serious danger to the safety or health of the public.

(*La Cooperative de transport maritime et aérien*, 2015 CIRB 767, application for judicial review dismissed in *La Cooperative de transport maritime et aérien v. United Steelworkers, Local 9538*, 2015 FCA 287)

[52] In *Maritime Employers Association*, the Board recently reviewed its case law of the past two decades with respect to its interpretation and application of section 87.4 of the *Code*. It is clearly established that the Board has no jurisdiction to consider the economic impacts, financial hardships or harm to the national economy that can result from a work stoppage. The Board has no role in ensuring that the economic, commercial or other public interest considerations are insulated from the impact of a strike or lockout. Its analysis is limited to those considerations related to an immediate and serious danger to the safety or health of the public, nothing more.

[53] Several organizations made reference to government policies that were implemented during the COVID-19 pandemic that deemed rail services an essential service. More specifically, they cited Public Safety Canada's "National Strategy for Critical Infrastructure" or its previous version that was developed during the pandemic ("Guidance on Essential Services and Functions in Canada During the COVID-19 Pandemic"). A review of this latter document indicates that the purpose of this policy was to advance more coherent actions among federal, provincial and territorial initiatives and identify those critical infrastructure services and functions that would be maintained to ensure the health, safety and economic well-being of the population. A long list of services and functions were deemed essential, and the policy was meant to help the private sector self-identify as essential for the purpose of the various regulations and restrictions that were in place at the time.

[54] The Board understands that many individuals or organizations may view this list or this document as a definitive statement as to what services are considered essential. However, that document and the list of “essential” services were developed in a specific context and for a different purpose than the objective pursued by the legislative requirements that apply during a labour dispute. The concerns for the protection of the economy in addition to the safety and health of the public figured prominently in the development of the pandemic policies. These policies do not have the effect of modifying the provisions of the *Code* that limit the requirements to preventing an immediate and serious danger to the safety or health of the public.

[55] The Board must therefore disregard those submissions and examples that relate to the economic impact of the work stoppage and the financial or reputational consequences on individuals, organizations or the country as a whole.

B. Concerns Regarding Food Security

[56] Certain organizations indicated that a work stoppage involving the rail industry would lead to domestic and global food insecurity. They state that farmers, food producers and consumers rely on the railways to transport fertilizers, potash and canola products, all of which are involved in food production.

[57] For example, the Canola Council of Canada indicates that “approximately 80–90% of the canola seed, oil and meal produced in Canada relies on rail to reach domestic and global markets.” The Keystone Agricultural Producers explain that “during the last crop year both railways moved a combined total of 55.68 million metric tons (MMT) of grain throughout Canada. Although much of this grain was destined for overseas markets, there is still a considerable amount of grain moved by rail for domestic use.” The Wheat Growers Association states that “grain and fertilizer are among the highest volume products transported by rail, and there is no viable transportation alternative available for the gross tonnage of grain used for both human and animal feed, as well as fertilizers such as potash.”

[58] In response to concerns raised in the public submissions, CPKC indicates that fertilizer demand in Canada is seasonal. Sales peak in May, during the planting season, and then there is lower demand in the fall around harvest season. It explains that Canada is the world’s largest

producer of potash and that 95 percent of this product is exported internationally. CPKC transports this product to ports in Vancouver, British Columbia or Portland, Oregon to be loaded on vessels for transport overseas. Further, it states that over a 24-month period ending on April 30, 2024, 82 percent of fertilizer products transported by CPKC on its Canadian rail network was destined for foreign markets.

[59] Given the use of these products, and the fact that seeding has already occurred, CPKC submits that there is no indication of how a temporary interruption in the transportation of fertilizers could jeopardize food security of Canadians. In its view, any risk to the safety or health of the public is both remote and entirely speculative.

[60] With respect to canola, CPKC explains that 90 percent of canola grown in Canada is exported for use in over 50 different countries around the world. The remainder 10 percent is sent to domestic crushing and refining plants of which there are 14 located across Canada. CPKC indicates that 88 percent of the canola loads it transported during a 24-month period ending on April 30, 2024, was destined for export outside Canada.

[61] Although it is unable to comment on the end use of the canola products delivered in Canada, CPKC points to the 2021–2022 crop year during which the supply of canola decreased by 30 percent due to drought. It experienced a corresponding reduction in canola shipments during that same period. It indicates that there is no evidence that this resulted in a food shortage that endangered the health or safety of Canadians.

[62] The TCRC notes that none of the affected organizations have provided concrete examples from past rail strikes that a work stoppage actually resulted in a shortage of products that led to food insecurity. For example, it points to some submissions that raise concerns with the shipments of tissue and toilet paper, canned tuna and canola oil, but that provide no linkage on how lower stocks of these products would create an immediate and serious danger to the safety or health of the public. It submits that these claims are vague and speculative and do not meet the threshold required under section 87.4 of the *Code*.

[63] The Board accepts that, at the time of this decision, the peak season for the need and use of fertilizers has passed. Further, a review of the information provided leads the Board to conclude

that the majority of the fertilizer and canola products that CPKC transports are destined for markets outside Canada. There is no convincing information in the submissions from affected groups that would lead the Board to conclude that a work stoppage at CPKC would result in an immediate shortage of these commodities in Canada that would then lead to food insecurity and result in an immediate and serious danger to the public. While the Board recognizes that a disruption in the transportation of these commodities by rail could affect Canada's reputation abroad as a reliable source of these agricultural products, the possibility of a threat to domestic food security is too remote and speculative.

[64] Certain organizations pointed to the risk of global food insecurity given that Canada exports these agricultural goods to other countries. However, those statements were not supported by data or other demonstrable sources of data or facts. Further, when considering the Preamble and the legislative framework set out in the *Code*, it is apparent to the Board that the provisions related to the maintenance of activities are primarily aimed at ensuring the protection of the Canadian public. It would be reaching beyond the Board's jurisdiction and the interests that are contemplated in the *Code* to consider food insecurity on a global scale in the context of the present referral.

C. The Supply of Diesel and Propane in Certain Critical Areas

[65] The Canadian Fuels Association (CFA) submits that its members supply the fuels that power Canada's planes, trains, trucks, ships and automobiles and provide heating oil to many of Canada's rural and northern communities. It indicates that these fuels are obtained through a network of 15 refineries, eight clean fuel facilities and over 75 supply terminals and 12,000 retail outlets, which rely heavily on uninterrupted daily rail service.

[66] The Freight Management Association of Canada states that "propane, a dangerous good, is shipped from Alberta and Saskatchewan to eastern Canada by rail. Many communities rely on Propane for heating and cooking in rural areas. In these communities, many in northern Canada, are still experiencing cold weather and heating is required."

[67] The Ministerial referral made reference to a letter from the CPA to support the question put to the Board with respect to the requirements of section 87.4 of the *Code*. In its letter, the CPA highlights the various organizations and operations that rely or depend on propane, from the

production of cheese in Nova Scotia and the operation of greenhouses in Quebec and southern Ontario to the heating of community care centres in various locations. It also points to the critical requirement for fuel in emergency situations and underscores the wildfire season that may increase the reliance on fuel for generators and other equipment necessary for responders.

[68] CPKC does not deliver propane to end users. Rather, the propane it transports on its network is delivered to propane terminals or export depots. These third parties then store and deliver the product to end users. CPKC does not have detailed information on who the eventual end users are or the purpose for which the propane is used. Relying on specific studies, it indicates that the industrial sector was the largest user of propane in Canada in 2016 accounting for over one-third of total demand, while the commercial end-use sector was the second largest user of propane across Canada, accounting for close to one-quarter of the total. These were followed by the residential and the non-energy use sectors, each accounting for approximately 10 percent of the total.

[69] CPKC indicates that over a 12-month period ending on April 30, 2024, it transported approximately 42,000 car loads (cls) of propane over its Canadian rail network. It estimates that this represents roughly 0.26 percent of the total cls transported on its network over the period. It adds that 85 percent of this propane traffic is destined for export depots located on the Pacific coast or propane terminals in the United States and Mexico.

[70] The remaining 15 percent of propane transported on CPKC's Canadian rail network was delivered to Canadian propane terminals. CPKC estimates that this represents the equivalent of between 4–5 percent of Canada's total annual propane supply. Approximately half of these Canadian propane cls are delivered to propane terminals located in Western Canada, while about one third are delivered to Quebec. It occasionally delivers small shipments to a single terminal located in Saint John, New Brunswick but does not otherwise transport propane into or out of Atlantic Canada.

[71] CPKC provides a graph that indicates that the overall volume of propane transported on its rail network is lower in the summer months. In the winter months, its volume of propane transported to Eastern Canada increases while the demand in Western Canada does not fluctuate

to the same degree since the primary uses of propane in Western Canada are for industrial and agricultural applications.

[72] CPKC states that the plant in Sarnia, Ontario produces approximately 70 percent of the propane that is ultimately used in Ontario, Quebec and the Atlantic provinces. That propane is transported by rail and truck to the distribution terminals and in turn, will be transported into the wholesale and retail distribution network. Rail terminals are used to transport the propane across Canada and are relied upon most heavily in Eastern Canada markets since the pipeline from Western Canada ends in Sarnia.

[73] The August 2021 report from Conference Board of Canada indicates that the majority of distribution terminals are supplied by truck. In some cases, truck-in terminals are located along or near rail infrastructure to easily permit transload operations. It goes on to state that “transloading is slower and less efficient than constructing a fixed rail rack. It does, however, afford more flexibility to the supply chain, especially when obtaining necessary permits and suitable real estate is a challenge for propane distributors.”

[74] Based on the above, CPKC submits that pipeline, rail and truck are three primary modes of transporting propane in Canada. Accordingly, it contends that in the event of a work stoppage, pipelines and truck remain available as alternative methods of transporting the product.

[75] CPKC also explains that its rail network in British Columbia is located exclusively in the south of the province. As a result, it does not deliver diesel, propane or other fuels to destinations north of its main line in that province. Further, it points to the wildfires of 2021 that had the effect of halting all rail transportation (CPKC and CN) on the main line in British Columbia for an extended period between June 30 to July 16, 2021. Then again in November 2021, a flood caused the shutdown of that same line for approximately nine days. It indicates that these unfortunate situations did not result in an immediate and serious danger to the safety or health of the public.

[76] The TCRC presents an analysis of CPKC’s propane movements that suggests that there is little propane transported by CPKC in Eastern Canada, and less so in the summer. Further, it provides an analysis of the propane facilities on the CPKC network in Western Canada (from Thunder Bay to Vancouver). It suggests that the few propane facilities that are located on the

network are not busy at this time of year (May–June). It believes that propane is only delivered to Revelstoke, British Columbia and Thunder Bay, Ontario. In response to the CPA's contention, the TCRC indicates that Invermere does not receive delivery of propane by rail.

[77] The TCRC states that the vast and overwhelming majority of the fuel shipped by rail is not shipped to communities but to industrial centres, like those located in Coquitlam, British Columbia, for shipping to foreign markets. Further, it is of the view that propane is and can be moved by pipeline and truck if necessary. Accordingly, there is no need to maintain the movement of propane by rail in the event of a work stoppage. It indicates that many of CPKC's customers have stockpiled propane in advance of any potential work stoppage when they had notice of a potential work stoppage.

[78] The CFA brought a particular issue that initially did raise a concern for the Board. The CFA indicated that Manitoba was heavily reliant on contingency rail delivery because of an unplanned outage of the Winnipeg Products Pipeline, which supplies gasoline blends, diesel and jet fuel to the two primary terminals in Winnipeg, Manitoba. In their submissions, the parties informed the Board that the Winnipeg Products Pipeline has returned to operations. The TCRC provided a statement issued by Imperial Oil that confirms it has brought one of two pipelines back into service. The statement also indicates that rail and truck supply continue to ensure adequate supply to the region as Imperial Oil finishes the necessary maintenance work on the pipeline. CPKC indicates that the pipeline's second line is expected to become operational in mid-June 2024. Accordingly, it has already seen a reduction of its shipments destined for Winnipeg.

[79] The challenge with many of the other statements contained in the submissions from affected groups and organizations is that they are unspecific and appear too remote to reasonably conclude that they rise to the level of an immediate and serious danger. These types of fuel products may well be critical components of many operations, but it is unclear what impact, immediate or remote, a disruption in rail service would have on their supply.

[80] There is no concrete information or evidence relating to the stocks that are available at any one time at any of the 75 supply terminals and 12,000 retail outlets referred to by the CFA. However, the Board accepts that CPKC delivers only a portion of the products to the supply

terminals and that are used domestically. As detailed in CPKC's submissions, propane is also transported by pipeline and truck to supply the network of distribution terminals across the country.

[81] Propane and diesel are certainly critical products for many operations. The Board accepts that homes, care facilities, community centres, schools and agricultural farms and greenhouses, all require diesel or propane (or other fuels) for heating or cooling or to operate equipment necessary for their operations. It understands the challenges that a break in rail service can cause to an integrated supply chain. However, the Board's task is to assess what is required to ensure that the public would not face an immediate and serious danger to their safety or health if the rail service were to stop because of a work stoppage.

[82] The Board has considered the meaning of the term "immediate" in several cases. It has generally concluded that the danger must arise within a short time, and not necessarily "now" or not even within a few days (see *Atomic Energy of Canada Limited*, 2001 CIRB 122). Having said that, the Board has also required more than a speculative threat that may or may not materialize or that would likely not begin for a period after a work stoppage has commenced. The danger must be real and serious and not a mere inconvenience.

[83] Considering the information above, the Board cannot conclude that a work stoppage would result in a shortage of propane or diesel such that it would cause an immediate and serious danger to the safety or health of the public.

D. The Supply of Water Treatment Materials

[84] The Board received submissions from certain organizations that raised concerns with the potential impact of a work stoppage in the rail industry on the availability of water treatment materials. The City of Toronto and Halton Region state that "the railway strikes have the potential to impact municipal water and wastewater treatment operations through disruptions to the supply and sourcing of the bulk chemicals that are critical to municipal water treatment operations." They also indicate that "without critical chemicals, such as ferrous and ferric chloride, magnesium hydroxide, sodium hydroxide and sodium hypochlorite to name a few, the ability of wastewater treatment plants to properly treat wastewater may be hindered, which could cause a risk to the natural environment."

[85] Kemira, one of the largest providers of coagulants for water treatment in North America, submits that the chemicals it “produce[s] and ship[s] via rail play a crucial role in the treatment of waste water and the safe supply and treatment of drinking water for millions of people.” It states that the coagulants that are necessary for water treatment “can only be produced with an uninterrupted rail supply of raw materials.”

[86] Similarly, the Chemistry Industry Association of Canada states that “Canada’s chlorine producers manufacture 1.2 kilotonnes per day, and export over one-half kilotonnes per day to the United States. Those products are shipped by rail from major urban centers to communities across Canada. Due to the nature of chlorine, municipalities will typically have one to two weeks’ supply on site to support the delivery of safe drinking water”.

[87] CPKC indicates that it does not transport liquid chlorine across its Canadian rail network. It delivered a single car load to one Canadian customer over a 24-month period ending on April 30, 2024.

[88] The TCRC indicates that there is no information regarding the delivery of these materials directly to municipal treatment centres, nor is there information regarding which intermediaries stock and deliver these chemicals.

[89] The Board reviewed the concerns expressed by the affected groups and organizations with careful attention. It notes that those submissions raised the potential shortages of certain products without definitive data or factual context. For example, the Board was not provided with direct information on the storage or stock of the chemical products that are available at any one time from the intermediary storage facilities. In any event, CPKC asserts that it does not transport liquid chlorine. The Board was not persuaded that a work stoppage would result in an immediate shortage of certain chemical products that, in turn, would pose an immediate threat to the safety or health of the public.

[90] Further, the Board does not accept that transportation by truck cannot be an alternative to move those products that are necessary to the functioning of critical operations such as water treatment facilities. As experience has shown in other types of outages on the rail network, some products can be moved by alternative means to cover those unfortunate breaks in the supply

chain. Although it is not ideal logistically or financially, there are alternative means of transportation that are available to transport these products.

VII. Review of Parties' Agreement

[91] It is important to note that should specific facts come to light during a work stoppage that raise concerns of an immediate and serious danger to the health or safety of the public, the matter can be brought back to the Board to review and confirm or amend this determination. Section 87.4(7) of the *Code* states the following:

87.4 (7) On application by the employer or the trade union, or on referral by the Minister, during a strike or lockout not prohibited by this Part, the Board may, where in the Board's opinion the circumstances warrant, review and confirm, amend or cancel an agreement entered into, or a determination or order made, under this section and make any orders that it considers appropriate in the circumstances.

[92] In such circumstances, the Board can assess and consider new information or evidence that may arise during a work stoppage and determine whether the agreement between the parties still satisfies the requirements of the *Code*.

VIII. The Notice Period

[93] CPKC requests that the Board impose a cooling-off period of 30 days that will allow it to implement the necessary contingencies and provide certainty around the date of a possible lawful work stoppage. It submits that this would put the parties back into the position they were in when the ministerial referral was made.

[94] Certain groups also made similar comments, urging the Board to provide advance notice of its decision and to allow sufficient time for stakeholders to take appropriate action to safely halt the transportation of certain products.

[95] The TCRC takes the position that an extended notice period is unnecessary and will only serve the employer. In the alternative, it states that any new cooling-off period imposed by the Board should be no more than seven days.

[96] The Board took into consideration the timing of the ministerial referral and the fact that the parties were entering the critical stage of bargaining when the ministerial referral was made and

the right to strike or lockout was suspended. Had there not been a referral, the parties and the affected groups and organizations would have had certainty with respect to the date on which a lawful work stoppage could commence. The stakeholders and the public would have been in a position to implement the necessary contingencies with a clear understanding of the timeline they were facing.

[97] In the absence of any cooling-off period imposed by the Board, the parties would be able to immediately serve a 72-hour notice of strike or lockout, leaving very little time for any party or customers to prepare for a work stoppage. This, in the Board's view, would increase the risks associated with the shutdown of rail operations and would not be conducive to harmonious labour relations.

[98] In these circumstances, the Board is prepared to put the parties back in the position they were in when the ministerial referral was made on May 9, 2024. On that date, there were 13 days left in the 21-day statutory cooling-off period that applied to these parties under section 89(1)(d) of the *Code*. Consequently, the Board imposes an equivalent 13-day cooling-off period for the purposes of section 89(1)(d) of the *Code*.

IX. Summary and Conclusion

[99] The Board has previously recognized that the parties are best placed to determine whether a strike or lockout would pose an immediate and serious danger to the safety or health of the public and which services, if any, are essential. CPKC and the TCRC have experienced work stoppages on five separate occasions since 2012—four strikes involving the bargaining unit of running trades employees and one strike involving the bargaining unit of traffic controllers. While all recognize that these labour disputes caused significant disruptions, no one has provided convincing evidence that a danger to the safety or health of the public materialized during those work stoppages or during any of the recent extended rail disruptions that have occurred. Further, the Board has concluded that there are no direct and convincing facts or information that raise concerns of an immediate and serious danger to the safety or health of the public.

[100] There is no doubt that a work stoppage at CPKC would result in inconvenience, economic hardship and, possibly, as some groups and organizations have suggested, harm to Canada's

global reputation as a reliable trading partner. While such possible harm is by no means insignificant, these are not factors that are to be considered by the Board when addressing a referral under section 87.4 of the *Code*.

[101] Having carefully reviewed the parties' submissions and the information received from various affected groups and organizations, the Board is satisfied that, at this time, a strike or lockout at CPKC would not pose an immediate and serious danger to the safety or health of the public. Accordingly, the Board is of the opinion that the parties' agreement on the maintenance of activities is sufficient to ensure compliance with section 87.4(1) of the *Code*.

[102] Given the circumstances of this case, the Board places the parties back in the position they were in on May 9, 2024, when the ministerial referral was made. Accordingly, the Board orders a 13-day cooling-off period for the purpose of section 89(1)(d) of the *Code*.

[103] This is a unanimous decision of the Board.



Ginette Brazeau
Chairperson



Elizabeth Cameron
Member



Angela Talic
Member