BRITISH COLUMBIA LABOUR RELATIONS BOARD

EMERGENCY AND HEALTH SERVICES COMMISSION (BRITISH COLUMBIA AMBULANCE SERVICE)

(the "Employer")

-and-

AMBULANCE PARAMEDICS OF BRITISH COLUMBIA - CUPE LOCAL 873

("CUPE")

-and-

B.C. GOVERNMENT AND SERVICE EMPLOYEES' UNION

("BCGEU")

PANEL:	Michael J. Adam, Vice-Chair
APPEARANCES:	N. David McInnes and Gary R. Fraser, for the Employer Linda Dennis, for CUPE Kenneth R. Curry, for BCGEU
CASE NO:	59035
DATE OF DECISION:	April 17, 2009
DATE OF REASONS:	September 25, 2009

REASONS FOR THE BOARD'S DECISION

Nature of the Employer's Operation

1 The Employer provides emergency medical health services throughout British Columbia, pursuant to Section 5(1)(h) of the *Emergency and Health Services Act*, R.S.B.C. 1996, c. 182. CUPE represents approximately 3600 full-time and part-time employees of the Employer engaged primarily in paramedical pre-hospital care, patient transfer and ambulance dispatch services. The BCGEU represents approximately 216 employees of the Employer who provide a wide range of administrative support services in respect of ambulance and other services within the Employer's statutory mandate.

2 The Employer provides emergency medical services on a province-wide basis, and has divided the province into four regions: Vancouver Island Region, Lower Mainland Region, Interior Region and Northern Region. Ambulance paramedics are dispatched from approximately 190 ambulance stations. In 2007/2008, the Employer handled approximately 375,000 pre-hospital calls and approximately 150,000 patient transfers, for a one-year total of approximately 525,000 calls. Call volumes have been increasing.

3 After a lengthy strike in 2000/2001, the Employer and CUPE reached a settlement in the form of the 12th Collective Agreement. The 12th Collective Agreement had a term of April 1, 2000 to March 31, 2005. The 12th Collective Agreement was amended in 2004 and its term was extended to March 31, 2009 pursuant to a Memorandum of Agreement dated September 11, 2004 (the "MOA"). References in this decision to the Collective Agreement refer to the 12th Collective Agreement as amended by the MOA.

Application for Designation of Essential Services

4 CUPE applied for the designation of essential services under Section 72 of the *Labour Relations Code* (the "Code") on February 24, 2009. At that time, CUPE and the Employer were engaged in collective bargaining. CUPE sought the designation of essential services in order to be in a legal strike position as of April 1, 2009.

5 Pursuant to Section 72(2) of the Code, the Minister of Labour and Citizens' Services (now the Ministry of Labour) directed the Labour Relations Board (the "Board") to designate the "facilities, productions and services that the Board considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia". That directive was issued on February 25, 2009.

6 The Employer and CUPE met with a Board mediator to discuss essential services designations and reached agreement on most, but not all, of the terms of an

Essential Services Order ("ESO"). At the conclusion of the mediation process, both the Employer and CUPE had a number of outstanding issues requiring resolution. Concurrently, the Employer and the BCGEU reached agreement on designations to ensure that essential services provided by BCGEU's members affected by CUPE's strike would be maintained. Approximately 106 BCGEU members have thus been designated to perform essential services during a strike by CUPE emergency medical personnel. The BCGEU did not otherwise participate in these proceedings.

7 In summary, the following issues remained outstanding between the Employer and CUPE, requiring adjudication.

1. Whether provision should be made in the ESO for employee availability and enhanced compensation?

2. Whether the services performed by District Supervisors are essential?

3. Whether the services performed by Dispatch Supervisors are essential?

4. Whether Low Acuity Air and Ground Transfer services are essential?

5. Whether the scanning of Patient Care Information System ("PCIS") Forms is essential?

6. Whether the continued use of Impedance Threshold Devices ("ITD") is essential?

7. Whether and to what extent Workplace Technology Services ("WTS"), (a division of Common Business Services within the Ministry of Labour and Citizens' Services) should be granted unrestricted access to the Employer's premises?

8 I was assigned as a Panel of the Board to adjudicate the parties' outstanding issues.

9 On March 31, 2009, after two days of hearing and by consent of the parties, I issued BCLRB No. B70/2009 ("Interim ESO") pending final adjudication of the outstanding issues. In the Interim ESO, I set out the designations and other terms agreed to by the parties during mediation, and made interim determinations of all outstanding issues set out above pending further adjudication of those issues. In general terms, I resolved the outstanding issues in the Interim ESO by following the Board's orders from the parties' dispute in 2000/2001, as set out in BCLRB No. B54/2001 ("2001 ESO"), amending BCLRB No. B297/2000 ("2000 ESO").

10 The 2000/2001 dispute is the only other occasion where the Employer and CUPE were involved in a labour dispute requiring the designation of essential services. Hence, the parties had limited experience and precedent to draw upon in resolving the current dispute. At the time the 2000/2001 dispute occurred, the Employer did not have any employees represented by the BCGEU or any other trade union.

Agreements Reached By the Parties

11 Some of the agreements reached by the parties during mediation established a context for the adjudication of the outstanding issues. Specifically, the parties agreed to the following:

1. All pre-hospital care services (i.e., paramedical ambulance services) are essential, meaning all existing pre-hospital care service levels shall be maintained during the dispute. Those levels have not been explicitly defined by the parties.

2. All ambulance dispatch services are essential, meaning all existing ambulance dispatch service levels shall be maintained during the dispute. Those levels have not been explicitly defined by the parties.

3. All ground and air transfers (except low acuity transfers) are essential and shall be maintained during the dispute. (The Employer contends that low-acuity ground and air transfers are also essential and applies for the designation of those services; CUPE opposes that designation.)

4. The scheduling of employees will be in accordance with existing practice. Hence, the Employer will continue to schedule the majority of employees through its central scheduling system. Unit chiefs will continue to schedule those employees, primarily in rural and remote areas, who are not scheduled through the central scheduling system. This is in contrast to the Board's standard global order in essential services disputes which normally requires the union to schedule its members to work.

12 The parties reached a number of other agreements that are set out in the ESO which I will not set out here.

Other Key Factors

13 In addition, certain other facts are of key importance.

14 First, pre-hospital care, non-low acuity transfers, and dispatch services together comprise the majority of the work of the CUPE bargaining unit. Fewer than 100 of CUPE's 3600 members perform work that falls outside the designated services.

15 Second, the Employer has approximately 140 excluded staff, most of whom are not qualified to perform paramedical or dispatch services. Hence, excluded personnel have a very limited capacity to replace bargaining unit members in performing designated essential services. Even if every excluded employee who is qualified to work as a paramedic or dispatcher does so, the vast majority of CUPE members would still be required to work to meet agreed upon essential services designations.

16 Third, the parties did not designate the level of services that are essential by position, shift and location. Consequently, the ESO does not contain detailed staffing schedules. Instead, the parties agreed that the ESO would merely state that "all existing service levels" are essential in pre-hospital care and dispatch services, and that scheduling will continue in accordance with existing practice. The parties did not define "existing service levels" in any particular area of the province at any particular date and time.

17 Finally, the parties have agreed that scheduling of employees will be in accordance with standard practice, meaning that the majority of paramedics will be scheduled by the Employer. Normally, the Board's standard global order requires the union to schedule qualified members to perform designated essential services.

18 There are a number of reasons for this approach. First, it recognizes the fact that the union normally controls access to its members' labour during a strike or lockout, and allows the union to allocate and share available essential work amongst its members. Second, it places a direct responsibility on the trade union to ensure that its members recognize that essential services must be maintained as a condition of their right to strike. Third, the union may be better able to persuade its members to come to work during a strike or lockout, thus facilitating compliance with the ESO and enhancing the ESO's efficacy. While these are some of the general principles on which the scheduling provisions of the Board's standard global orders are typically based, their application in any particular essential services dispute will vary. Their application in the present dispute has not yet been adjudicated.

Request for Reasons

19 The strike commenced on April 1, 2009, as authorized by the Interim ESO.

20 On April 17, 2009, after six days of hearing, I issued BCLRB No. B85/2009 (the "2009 ESO"), which determined the outstanding issues between the parties and replaced the Interim ESO. Given that the strike had commenced, the urgent need for a determination of the outstanding issues, and the Board's jurisdiction to amend, vary or revoke its ESO's under Section 72(9) during the course of the dispute, I issued the 2009 ESO as a "bottom line" decision, without reasons.

21 In issuing these reasons for the 2009 ESO, I note that the labour dispute between the parties remains ongoing. The parties are presently engaged in two

separate mediation processes, one to resolve their collective bargaining dispute and another to resolve outstanding essential services issues, the latter arising out of a number of outstanding applications to amend the 2009 ESO that are presently before me in adjudication, but have been adjourned pending resolution of preliminary issues. I have delayed issuing reasons for the 2009 ESO for a variety of reasons over the course of the labour dispute, including the fact that the parties have at various times been engaged in settlement discussions regarding various aspects of the 2009 ESO. I did not wish the issuance of reasons to distract them from those discussions. That continues to be a concern given current mediative efforts that are underway.

22 Nonetheless, the 2009 ESO was issued on April 17, 2009. Since then, CUPE has requested written reasons and reiterated that request a number of times. Although the parties have brought numerous applications to amend or vary the 2009 ESO which might have rendered the need for reasons academic, it appears at the present moment as if reasons are still sought and the need for them has not become a moot issue.

23 Accordingly, I issue the following reasons for the 2009 ESO. In doing so, I have confidence the parties will not allow the issuance of these reasons to distract them from their efforts to mediate a resolution to their labour dispute.

The Parties' Evidence

24 During the six days of hearing, I heard testimony from five witnesses and received hundreds of pages of documentary evidence.

25 The Union called two witnesses: Bryon Longeway, a Unit Chief in Sooke, B.C. and a long-time paramedic; and John Strohmaier, the Union's President and an experienced dispatcher. Both Longeway and Strohmaier were extensively cross-examined by Employer's counsel.

26 The Employer called three witnesses: Michael Sanderson, the current Executive Director for the Vancouver Post; Fred Platteel, the former Executive Director of the Commission (and 33-year member of the Employer's organization with direct experience in the 2000/2001 essential services dispute and in a variety of aspects of the Employer's operation); and Dr. Jim Christenson, the Employer's Vice-President of Medical Programs since September 2005 and a specialist in emergency medicine. Sanderson was the Employer's principal witness. Platteel's direct evidence was focused mainly on the 2000/2001 dispute as it relates to the issues of availability and premium pay. Christenson's direct evidence was limited to the ITD and hospital transfer issues. All three Employer witnesses were subjected to cross-examination.

27 Essential services disputes are expedited proceedings. All five witnesses were given considerable leeway to present evidence based on information and belief, by agreement of the parties. Where facts were undisputed, I have relied on the

submissions of counsel to establish those facts in evidence, also by agreement of the parties.

Key Principles

28 Some of the key principles that guided my analysis are as follows.

29 First, the 2000 ESO and the 2001 ESO serve as precedents or as a starting off point in this dispute, except to the extent the underlying circumstances have materially changed or their terms were based on the "without prejudice" agreement of the parties.

30 Essential services disputes are expedited proceedings. In most cases, the ESO is negotiated by the parties with or without the assistance of a Board mediator; in such cases, adjudication is not required. In the rare case where the parties cannot negotiate essential services levels and/or the terms under which those services will be maintained, the Board may hold a hearing. Both the mediation/settlement process and the adjudicative process are facilitated by the parties' and the Board's ability to rely upon prior ESO's as a precedent or starting off point. Valuable resources would be wasted and unacceptable delay created if the parties and the Board were required to re-invent the ESO every time an essential services dispute arises between the same parties.

31 Second, the Board does not normally amend its standard global ESO unless there are compelling reasons to do so; normally, only the designated level of services changes. Given the complexity of implementing essential services designations and the desirability of consistency and predictability, the Board and the labour relations community rely on a broad common understanding of the standard global order to give effect to ESO's. While amendments to the standard global order are sometimes necessary to address unique circumstances in particular industries or workplaces, a compelling basis for deviating from the standard must be evident.

32 Third, the question of whether or not a facility, production or service is essential is separate from the question of who performs the work involved. CUPE argued in many instances that because excluded personnel could be deployed to perform certain services, those services should be characterized as non-essential. The character of the services (i.e., essential or non-essential) must be determined separately from who will perform the work, whatever its character.

33 The Board's standard global order (in health care at least) requires the employer to schedule its excluded personnel to work 60 hours per week and to use those who are qualified "to the best extent possible", which normally includes performing bargaining unit work in place of striking union members. The 60-hour provision was included in the Board's 2000 and 2001 ESO's. The 60-hour provision has often been construed as requiring excluded employees to perform, roughly speaking, 40 hours of essential bargaining unit work, and 20 hours of essential excluded work.

34 CUPE has sought to have certain services declared non-essential on the basis that they can then be performed by excluded personnel. Who performs the services is only determined after the character of the services has been determined. If the services are non-essential, CUPE members are not obliged to perform the work. If the services are essential, either excluded personnel or CUPE members or both must perform them in order to ensure compliance with the ESO. Whether excluded personnel perform the work and to what extent is normally a matter to be determined by the Employer in accordance with its obligations under the ESO.

Determination of Outstanding Issues

35 Given the discrete nature of the outstanding issues to be adjudicated, I will set out the nature of the dispute, my analysis and my decision for each issue in turn.

1. Employee Availability and Compensation

Nature of the Dispute

36 Employee availability was an issue in the 2000/2001 dispute, and was addressed in the 2000 ESO. In 2000, the parties agreed that the Employer would schedule employees during the dispute in accordance with its standard practice. The parties agreed that employees would be required to be available for work consistent with their historical levels of availability, which was in turn defined by reference to their actual availability during a specific period of time.

37 The Employer seeks to have the standard global order amended to include historical availability language, similar to that negotiated in 2000. CUPE opposes inclusion of historical availability language, instead proposing that the Collective Agreement be strictly applied (employees are only required to submit minimum availability).

38 CUPE recognizes that reliance on the Collective Agreement alone will not be sufficient to ensure availability of employees necessary for the maintenance of essential services. Consequently, CUPE proposes including in the standard global order one amendment to the Collective Agreement – namely, that the Employer be granted the ability to use the mandatory recall language of Article 16.04(c) in its discretion at any time to fill shifts that are not otherwise staffed by the strict application of the Collective Agreement (at the double time rates of pay prescribed by the Collective Agreement). In the normal course, CUPE takes the position that Article 16.04(c) is only available to compel *full-time* employees to work in the case of emergencies, and not to deal with normal staffing shortfalls which CUPE says are occasioned by the Employer's failure to adequately staff its operation. CUPE proposes to extend the application of Article 16.04(c) during the dispute to part-time employees and to non-emergency situations to support its proposal regarding employee availability.

39 In other words, while the parties both accept that the Collective Agreement alone will not produce sufficient employee availability to ensure the maintenance of essential services (in the context of the Employer continuing to schedule employees), the parties differ markedly as to how to address that issue.

40 To secure CUPE's agreement requiring employees to be available for work consistent with their historical availability, the Employer agreed in 2001 to CUPE's proposal that employees receive premium pay for all shifts worked. Thus, the 2001 ESO modified the Collective Agreement by agreement of the parties to provide enhanced premium pay in exchange for the historical availability requirement.

The Parties' Positions

41 CUPE argues that the enhanced premium pay language should be included in the 2009 ESO because it increases the pressure on the Employer to settle the dispute by increasing its costs. The Employer opposes inclusion of the enhanced premium pay provisions on two grounds: (1) that enhanced premium pay prolonged the strike in 2000/2001 by creating a strong disincentive for CUPE members to accept settlement; and (2) that enhanced premium pay would constitute an amendment to the Collective Agreement that is not necessary to ensure the provision of essential services, and is thus beyond the Board's jurisdiction under Section 73(2).

42 The Employer argues that historical availability language must be incorporated into the 2009 ESO in order to give effect to the parties' agreement that all existing pre-hospital care, non-low acuity transfers and dispatch services are essential. CUPE argues that such language was not required to meet agreed upon staffing levels, would amount to an unnecessary modification of the Collective Agreement and that its inclusion in the 2009 ESO was not dictated by the fact that it was a term of the 2001 ESO because the provision was included on a "without prejudice" basis by agreement of the parties, and not on the direction of the Board. CUPE argues that the Employer should be required to staff ambulances and dispatch centres by applying the language of the Collective Agreement, as modified in CUPE's proposal.

43 The Employer argues that requiring employees to be available consistent with historical levels of availability is not a modification of the Collective Agreement, but merely a recognition that absent a work stoppage and the resulting withdrawal of labour, the Collective Agreement establishes incentives and requirements that generate levels of employee availability that are normally adequate to staff its operations. The Employer argues that if employees are allowed to alter their behavior during the labour dispute by restricting their availability, the Employer may or may not be able to staff designated essential services. Maintenance of essential services will be left to chance. The Employer argues that CUPE assumes its members will respond to the incentives they face under the Collective Agreement in a particular way, notwithstanding the countervailing incentives created by their desire to maximize pressure on the Employer to grant them a more favourable settlement. The Employer argues further that allowing broader use of mandatory recall under Article 16.04(c) will not resolve the issue, since it

is not always possible to contact employees who are off duty, and when they are not scheduled to work in advance, employees are not always fit to report even on a mandatory basis. Moreover, employees will simply make themselves unavailable initially, recognizing that with 100% designations in place, they will be called into work at double time rates under mandatory recall in any event, which will in turn prolong the strike as it did in 2000/2001.

44 CUPE argues that the issue of historical availability, the use of mandatory recall and the payment of premiums (i.e., enhanced compensation) must be examined together.

45 CUPE argues that it is no surprise that in 2000/2001, the strike lasted many months and remained "friendly" until the end. In the current dispute, CUPE advocates a different approach. Specifically, CUPE says that while the premium pay provisions from the agreement reached in 2000/2001 should be incorporated into the 2009 ESO to increase the financial pressure on the Employer to settle, the historical availability provisions should not form part of the 2009 ESO. CUPE argues that by seeking to include the historical availability provisions in the 2009 ESO, the Employer is seeking to abandon the terms of the Collective Agreement. Instead, CUPE says that the only modification that should be made to the Collective Agreement is that the Employer can choose to compel all employees to report for work using Article 16.04(c) at any time, not just in cases of emergency.

46 CUPE argues that the Employer seeks to ignore the minimum availability requirements of the Collective Agreement, substituting "historical availability" instead. The Employer has not sought to increase minimum availability requirements since 2004, and therefore must be assumed to be content that they provide for adequate levels of availability in the normal course. CUPE says that under the prior Collective Agreement, the Employer could not compel part-time employees to work more than one day every three months; in contrast under the current Collective Agreement, most part-time employees are required to be available a minimum of eight days per month, or face seniority penalties. Hence, CUPE argues that with the increased minimum availability requirements, the Collective Agreement alone should be a sufficient mechanism for staffing designated essential services while maximizing disruption of the Employer's operation.

47 CUPE adds that the Employer's historical availability proposal also ignores other factors under the Collective Agreement, such as: the absence of any obligation on part-time employees to "shop" their unused availability to secondary operators (i.e., ambulance stations); the fact that full-time employees cannot be compelled to work beyond their regular platoon schedule (although many do make themselves available for overtime work); the options available under the Collective Agreement to address availability problems, such as the ability to change the shift of a full-time irregular employee without penalty on 24 hours notice or the ability to create additional full-time positions. The Employer has failed to account for the wide range of tools at its disposal to secure employee availability.

48 CUPE also argues that in addition to the options available to the Employer to secure employees to perform essential services, the incentives created by the Collective Agreement itself will motivate part-time employees to make themselves available for work despite the labour dispute. If they do not make themselves available, part-time employees will lose relative seniority within the bargaining unit, have less access to work, diminish their opportunity for remuneration, diminish their opportunity for full-time work, and diminish their ability to secure the preferred shifts. Moreover, if a part-time employee elects to submit only minimum availability during the strike, he or she will be at the mercy of a "greedy neighbor" who decides to take advantage and work the shifts his co-worker has given up.

49 CUPE argues that as long as the ESO allows the Employer access to Article 16.04(c) in all cases where other provisions of the Collective Agreement have not provided for adequate employee availability, essential services levels can be met. Once the initial schedule is developed having regard for employees' voluntary availability, the Employer will have the option of following the usual "ring down" under the Collective Agreement and Work Allocation Guide ("WAG") to fill vacant shifts, or turn immediately to Article 16.04(c). CUPE argues that the Employer can use mandatory recall in Article 16.04(c) to force employees to work. If the Employer elects not to incur the inconvenience of the normal "ring down" procedure to fill shifts, then the premium pay rates associated with mandatory recall will be more costly, however, the choice will be the Employer's to make. The Employer will have to balance the cost and inconvenience of its various options.

50 Finally, CUPE states that this is necessary because if the Employer's position prevails (i.e., no obligation to staff in accordance with Article 16.04(c) and historical availability), only 20-35 CUPE members will be out of work from a workforce of approximately 3600. Absent the pressure created by requiring the Employer to staff in accordance with the Collective Agreement, without historical availability, CUPE argues that the strike will simply never end.

51 By way of reply, the Employer argues that CUPE is asking the Board to experiment and hope things work out and essential services levels are maintained. The Employer argues, however, that CUPE's position is based on a "speculative construct" of employee behavior that ignores the facts. The Employer points to Platteel's uncontroverted evidence that during the 2000/2001 strike, the paramedics he spoke to did not want the strike to end. A tentative agreement was rejected, in part because the paramedics were being paid to work their regular hours (i.e., losing no work) at premium rates of pay (i.e., enhancing their income). Hence, they had no incentive to end the labour dispute. The combination of 100% designation of existing services and premium pay eliminated any incentive for CUPE members to accept a settlement. Settlement would have resulted in employees working the same number of hours but at significantly reduced pay.

52 The Employer argues that CUPE's contention that if the Collective Agreement is simply allowed to run, employees will make themselves available for work due to greed or to avoid loss of seniority is fanciful and without foundation. Employees will not make themselves available for work at straight time rates if, by making themselves unavailable initially, they will ultimately receive double time rates of pay for the same hours worked. No paramedic would be available for a Call-out ("Kilo") shift at $2.00 per hour or for a Standby ("Fox") shift at $10.00 per hour (shifts expressly provided for in the Collective Agreement and staffed adequately when there is no labour dispute) when he or she can make double time with a four-hour minimum by being brought in on mandatory recall. Ultimately, all shifts will have to be filled at double time by mandatory recall. Absent a requirement to be available in accordance with one's historical availability, employees will wait for the double time shifts.

53 The Employer also led evidence that during normal operations, the Employer rarely relies on mandatory recall. The incentives in the Collective Agreement are adequate to produce sufficient availability of employees. No additional incentive is generally required to encourage employees to be available for work.

54 Finally, the Employer argues that by virtue of Article F3.12 of the Collective Agreement, the Employer is required to limit its number of part-time employees to the minimum necessary to staff its operations. In other words, when determining how many part-time employees to hire and retain on its payroll, the Employer must base that decision on the *actual* availability of part-time employees and not on *minimum* availability required under the Collective Agreement. The Employer argues that CUPE cannot have it both ways – relying on minimum availability when there is a labour dispute and on actual availability when there is not. The Employer argues that its part-time employee complement is established in conjunction with actual (i.e., historical) availability not minimal availability, by agreement of the parties. CUPE should not be permitted to resile from that agreement for its convenience during a work stoppage to gain a bargaining power advantage.

Analysis and Decision

55 Employee availability and premium pay compensation are not normally at issue in essential services disputes. In most disputes, less than 100% of the union's members are designated as essential. Consequently, the personnel available exceeds the personnel required for the maintenance of designated essential services. Similarly, in most disputes, designations take the form of the specific positions to be filled each hour and each day of the week. Once those designations have been made, the union (not the employer) staffs the designated shifts.

56 In this dispute, all existing service levels are designated essential, but those existing service levels are not specifically defined. Instead, because the Employer responds to emergency health incidents, it must staff so as to have sufficient capacity to respond to emergencies that arise. Consequently, the Employer continues to establish

service levels on an ongoing basis during the course of the dispute, and staffs accordingly, assigning employees to work in the normal course.

57 In most essential services disputes, if some employees are unavailable to provide essential services, the employer feels no pressure either because fewer than 100% of the employees are required to work or because the immediate burden to staff essential services is on the union, since the standard global order requires the union to schedule its members to work.

58 In this dispute, if employees are not available to work, the Employer must bring in personnel on short notice at premium rates, an expense that the Employer would not incur to the same degree if employees were available at their normal levels generated by the Collective Agreement. CUPE thus sees the restriction of employee availability as a valuable mechanism to put added pressure on the Employer to settle the dispute. I note, however, that if the parties had not agreed to deviate from the Board's standard global order in regards to scheduling, employee availability issues would not rest with the Employer.

59 Regular full-time paramedics work pre-scheduled shifts. Irregular full-time paramedics are not assigned a permanent shift schedule or operator, but are assigned to "fill holes" in the schedule when regular full-time paramedics are absent due to vacation, illness, injury, training or other reasons. Many regular and irregular full-time paramedics also work overtime to cover vacant full-time shifts or extra call-out or standby shifts normally worked by part-time employees.

60 Part-time paramedics are hired to work for their "primary operator". Each part-time employee must be available for work with their primary operator a minimum of eight (8) shifts per month (except those hired before the 2004 MOA was negotiated, who are required to be available only one shift every three months). If he or she is not available for those eight shifts, he or she will lose seniority for that month. In practice, most part-time paramedics submit considerably more than the required minimum eight shifts each month, and in many cases, the part-time paramedic makes some or all of his or her unused primary operator shifts available to secondary operators. Once part-time paramedics have provided their availability to their primary operator, a shift schedule is created using the WAG. If the first draft of the schedule has gaps in it, these gaps can be filled by paramedics who have indicated they are available for work at secondary operators. A part-time paramedic cannot accept a shift at a secondary operator unless he/she was available to work the same shift for his/her primary operator. If the gaps remain unfilled, the Employer can upgrade the shift to make it more attractive or, as a last resort and in emergencies only, use mandatory recall.

61 An example of how this works in practice is helpful to understand the process. A part-time paramedic lives in Abbotsford. She is hired in Boston Bar, which is her primary operator. Abbotsford is generally staffed using full-time paramedics, because the demand for emergency medical services is more consistent with a large urban

centre. Boston Bar is staffed entirely with part-time paramedics, since the demand for emergency medical services is much lower, consistent with a small rural or remote location. Despite that fact, there are approximately 61 part-time paramedics attached to the Boston Bar station. Assuming each part-time paramedic provides minimum availability per month, the total availability far exceeds what is needed to staff Boston Bar. Hence, the part-time employees' additional availability can be made available to secondary operators, allowing the part-time paramedic to pick up shifts closer to home – in Abbotsford, Chilliwack, Surrey, Maple Ridge, etc. for example. By structuring its operations in this manner, the Employer provides adequate coverage in rural areas, while providing capacity to fill in for absences in larger metropolitan areas.

62 In addition to full-time shifts, the Collective Agreement provides for three other types of other shifts. A Kilo shift is a shift where the paramedic carries a pager and is not required to be at the station during the shift to take calls. He/she must be able to get to the station within a prescribed time, and must remain fit for duty. The paramedic receives $2.00 per hour while on-call, and if called into work, receives a minimum of four (4) hours pay regardless of how long the call takes to complete. A Fox shift is a shift where the paramedic is required to be present at the ambulance station for the duration of the shift. A Fox shift provides greater coverage than a Kilo shift. The paramedic receives $10.00 per hour while on standby, and if required to respond to a call, the paramedic receives a minimum three (3 hours) pay regardless of how long the call takes. A Spareboard shift is a shift where the paramedic fills in for a full-time paramedic who is absent.

63 Work allocation for part-time employees is governed by a number of detailed Collective Agreement provisions, specifically:

> F3.08 Work Allocation – Spareboard and On-Call Shift Coverage
>
> F3.09 Short Notice Bookoff
>
> F3.10 No-Notice Bookoff
>
> F3.11 Work Allocation by Employee Category

64 Article F3.12 of the Collective Agreement is particularly important in the context of the current dispute. Article F3.12 provides that:

> Each operator will employ the minimum number of employees to cover the maximum amount of work.

65 The Employer argues that by virtue of Article F3.12, the Collective Agreement does not contemplate that the minimum availability requirements will be sufficient to staff the ambulance service in the normal course. If part-time employees provide greater availability than is minimally required under the Collective Agreement, which the evidence indicates is the case and which CUPE does not deny, the Employer accepts

that it is and has been precluded by Article F3.12 from hiring additional part-time employees to meet its staffing requirements. In other words, the Collective Agreement mandates that the Employer calibrate its part-time employee complement to be just sufficient to satisfy its actual staffing requirements, having regard for normal part-time availability; the Employer does not carry excess part-time employees to deal with potential staffing shortfall that would arise if there were to be reduced employee availability.

66 In the context of the parties' dispute, I find that the Employer's proposed approach – namely requiring historical availability -- is consistent with the Board's and the parties' obligation to ensure the provision of designated essential services levels throughout the course of the dispute. I find that CUPE's proposed approach would place the ongoing provision of essential services in serious jeopardy, and simply does not provide the degree of assurance necessary for the protection of the public.

67 The Board's principal responsibility under Section 72 is to ensure that essential services are designated and maintained. While the objective is to limit as much as possible the designation of essential services to increase the pressure on both sides to settle the dispute, the parties agreed to the designation of 100% of pre-hospital care, non-low acuity transfers and dispatch services. Having agreed to 100% designations of the Employer's core services on the one hand, CUPE's proposed approach seeks to impair the Employer's ability to schedule employees to perform that work by allowing employees to reduce or limit their availability. I find that in that regard, CUPE seeks to achieve through its proposal regarding availability that which ought to have been pursued, if at all, through the designation process. If paramedics and dispatchers are essential, they must also be available (at least at levels consistent with their availability when there is no strike or lockout).

68 I accept the Employer's position that the 2009 ESO must contain a requirement that employees be available for work in accordance with their historical levels of availability. I reject CUPE's position that employee availability should be dictated solely by the provisions of the Collective Agreement, with modification to Article 16.04(c) to allow the Employer access to mandatory recall in its discretion. In my view, CUPE's proposal results in a more fundamental alteration of the Collective Agreement, and is designed entirely to shift bargaining power in the dispute from the Employer to CUPE. While CUPE asserts that its proposal is intended to ensure the maintenance of essential services, I find instead that its principal purpose is to maximize the cost and inconvenience to the Employer in scheduling paramedics during the dispute. Moreover, I find it provides no assurance of sufficient availability.

69 First, the issues of availability and compensation only arise because of the agreements reached between the parties that: (1) 100% of existing pre-hospital care is essential; and (2) that scheduling shall be in accordance with current practice, i.e., that most paramedics will continue to be scheduled by the Employer, not CUPE. If essential services designations had been made by day, time, and shift and if CUPE was

responsible for scheduling its members to work, employee availability would not be an issue in this dispute; hence, this is a dispute the parties have in large measure manufactured by virtue of the agreement they have made.

70 While the benefit of the Employer doing the scheduling accrues to both CUPE and the Employer, the burden of securing employee availability rests entirely with the Employer. I find that such an approach is not consistent with Section 72(8) of the Code.

71 The parties have a joint obligation to ensure the provision of designated essential services in full measure without limitation or restriction: Section 72(8). I do not accept that where the parties agree to provisions that deviate from the Board's standard global order, as is the case here, that either party can then turn to the Board and take a position designed to take advantage of that agreement to the other party's detriment. In my view, if parties wish to agree to something that is non-standard, the parties are both responsible for ensuring that the approach they have agreed to ensures provision of essential services. CUPE's proposal does not satisfy that requirement in my view, leaving too much to chance and by placing the entire burden of staffing on the Employer.

72 Second, CUPE's position regarding employee availability is inconsistent with its agreement that 100% of existing services are essential. CUPE cannot on the one hand agree that 100% of existing service levels be designated as essential and on the other hand take a position on availability that would allow its members to be unavailable to perform those designated services. Having agreed to the designation of 100% of existing service levels, CUPE cannot take a position in regards to employee availability that fails to *ensure* provision of those designated services *in full measure* and without limitation or restriction: Section 72(8). CUPE seeks to restrict the Employer's access to the very labour required to staff essential services, services CUPE agrees are essential.

73 I also find CUPE's proposed approach is unrealistic in terms of its analysis of the incentives part-time employees will face in regards to availability. While CUPE is careful to point out the incentives its members face under the Collective Agreement, CUPE failed to address the countervailing disincentives that become part of the equation in a strike situation – namely to systematically withdraw or reduce availability to pressure the Employer for a favourable collective bargaining settlement. That incentive is enhanced by the other aspect of CUPE's position – the proposal that those working be compensated at double time rates on mandatory recall. In these circumstances, CUPE's proposed approach would not ensure the provision of essential services, and ignores strong employee incentives to reduce their availability. I am not persuaded that mandatory recall would be sufficient to make up any shortfall.

74 Third, I do not accept that a requirement that employees be available for work consistent with their historical levels of availability is a material departure from the Collective Agreement. Instead, the historical availability requirement simply replicates the normal operation of the Collective Agreement, and is necessary to counterbalance

the incentive on employees to reduce their availability to put pressure on the Employer to settle the collective bargaining dispute. In the absence of a strike, CUPE members make themselves available to work in accordance with their historical availability, by definition. Absent a work stoppage, the Collective Agreement creates incentives that generate a particular aggregate level of employee availability normally sufficient to staff the ambulance service. By requiring employees to be available consistent with their historical levels of availability, the ESO will simply replicate how employees normally respond to the incentives created by the Collective Agreement, factoring out the work stoppage. Hence, the historical availability requirement does not detract from or alter the Collective Agreement, it honours it. Most importantly, the historical availability requirement does not enhance the bargaining power of either party, but is instead neutral as between the employer and the trade union and its members.

75 If I am wrong in that conclusion, and the historical availability requirement is a modification to the Collective Agreement, I am satisfied that it is an amendment consistent with Section 73(2) of the Code, being an amendment "necessary to implement the designation of essential services".

76 Fourth, with regards to CUPE's enhanced premium pay compensation proposal, I reject CUPE's position for four reasons.

77 First, Platteel's evidence was that the combination of 100% designations of pre-hospital care and dispatch services and premium pay created compelling disincentives for settlement on the part of CUPE members. A person who is working his or her regular hours at double time while on strike is unlikely to accept a collective bargaining settlement that would result in him or her working those same hours at regular rates of pay. Platteel's conversations with paramedics in 2001 confirmed that these disincentives were operating in the manner that I have just described.

78 Second, Strohmaier admitted in cross-examination that the purpose of the additional compensation in the 2000 agreement was to put pressure on the Employer to settle and not because it was necessary to implement essential services levels. Section 73(2) of the Code allows the Board to alter the Collective Agreement if the alteration is necessary to ensure the maintenance of designated essential services. CUPE tendered no authority for the proposition that the Board has jurisdiction under Section 73(2) or otherwise to alter the Collective Agreement to bring additional pressure to bear on one party or the other.

79 Third, even in the absence of Strohmaier's evidence, I am not persuaded that an amendment to the compensation provisions of the Collective Agreement is necessary to implement the designation of essential services: Section 73(2). While the premium pay provisions were included in the 2001 ESO, they were included by agreement of the parties, not at the direction of the Board. The Employer submitted that it agreed to the premium pay provisions in 2000 to avoid having to litigate the issue of historical availability. The Employer's evidence on that point was uncontested. As Platteel

stated, the Employer had no prior experience with the essential services designation process, was unsure of the strength of its legal position, and had been directed by the Ministry to ensure emergency medical services were not interrupted.

80 Fourth, even if I were to accept CUPE's contention that increasing the pressure on the Employer to settle the dispute is a proper basis for the Board to alter the Collective Agreement under Section 73(2), I would only do so if the effect of the alteration was to put roughly equal pressure on both sides to settle. CUPE's proposed amendment is completely one-sided – enhancing its bargaining power by fortifying its members' ability to remain on strike while diminishing the Employer's bargaining power by increasing its costs during a strike. I do not accept that it is the Board's role to enhance the bargaining power of either party through its essential services designation process, even though doing so would likely bring the dispute to an end more quickly.

81 In conclusion, I find that the Employer has demonstrated a compelling basis to alter the Board's standard global order in the context of this particular dispute and in light of the parties' agreement regarding scheduling to require employees to be available for work consistent with their historical levels of availability. I find that the historical availability requirement is necessary to ensure the maintenance of designated essential services, and conforms with the requirements of Section 73(2) (if indeed it constitutes an alteration of the Collective Agreement at all). I find that the historical availability language is neutral as between the parties, and serves only to replicate the operation of the Collective Agreement absent the work stoppage. I adopt the language proposed by the Employer as incorporated in BCLRB No. B85/2009.

82 I find that CUPE has failed to demonstrate a compelling basis to alter the Board's standard global order to provide for enhanced premium pay during the labour dispute. I find that enhanced premium pay, as proposed, will only prolong the strike. Enhanced premium pay is not necessary to ensure provision of designated essential services, and therefore would not be consistent with Section 73(2) of the Code. Finally, the enhanced premium pay provisions would simply enhance CUPE's bargaining power while diminishing the Employer's. While Board ESO's should be crafted in a manner that promotes settlement by placing balanced pressure on both sides (usually by minimizing the scope of designated services), I do not accept that this is properly achieved by enhancing one party's bargaining power to the detriment of the other party.

2. District Supervisors

Background Facts

83 The Employer has two District Supervisor positions in the Vancouver Post staffed on a 24/7 basis, one District Supervisor position in the Victoria Post staffed on a 24/7 basis, one day shift District Supervisor position in Kamloops staffed on an 11/7 basis, and one day shift District Supervisor position in Kelowna staffed on an 11/7 basis. The

District Supervisor position was created pursuant to the MOA dated September 11, 2004.

84 The issue is whether or not the services performed by the District Supervisors are essential.

The Parties' Positions

85 The Employer argues District Supervisors perform work that is essential. The Employer says that the District Supervisor position was created as a direct replacement for Duty Unit Chiefs ("DUC's") in accordance with Article 5.1 of the September 11, 2004 MOA. That provision stipulated that DUC positions shall be reposted provincially as District Supervisor positions within a specified time period. The DUC's worked throughout the previous labour dispute, and Longeway agreed that the duties performed by the DUC's and the District Supervisors are essentially the same.

86 Although there is no Form "B" from the 2000 ESO or the 2001 ESO specifically designating DUC's as essential, the Employer contends they were included under "pre-hospital care" at that time. The Employer argues that had the DUC's been excluded from the pre-hospital care designation in 2000/2001, the parties would have expressly stated that to be the case as they have done in the current dispute by excluding quality improvement personnel from the designation for Dispatch Operations.

87 With regard to the specific duties that make District Supervisors essential, the Employer argues that without District Supervisors providing district-wide coordination during the peak periods and high volume areas in which they work, pre-hospital care services will fall below the 100% designated levels. Specifically, if District Supervisors are not essential, coordination with other agencies at multi-casualty incidents, liaison work with hospital emergency departments to ensure ambulances are released and returned to service as quickly as possible, equipment issues, and staffing issues would all be compromised.

88 The Employer also points to its cross-examination of Strohmaier where he admitted that while the task of clearing the backlog of ambulance crews at hospitals is essential to allow paramedics to perform their work, it is not work that has to be performed by District Supervisors. The Employer argues that Strohmaier's evidence demonstrates the reality of CUPE's position – the work of District Supervisors is essential, but that excluded managers should perform that work.

89 CUPE agrees that the DUC's worked during the last labour dispute, but stated that is simply because CUPE opted not to withdraw their services, i.e., they worked on a "without prejudice" basis in effect. CUPE argued that the work performed by the District Supervisors can be performed by the District Superintendents and the Platoon Superintendents, and therefore is not essential. If the Superintendents are not able to attend a multi-casualty incident immediately, CUPE argued that the paramedics arriving

at the scene can coordinate with other services in the same manner as is currently done pending the arrival of District Supervisors.

Analysis and Decision

90 I find that the work performed by District Supervisors is essential. The fact that work may be performed by excluded personnel under the terms of an ESO does not change the nature of the work and whether it is properly designated as essential.

91 Strohmaier acknowledged that the work performed by District Supervisors is essential, but stated that excluded personnel can perform it. Moreover, even if I were to disregard Strohmaier's evidence, I am satisfied that the duties performed by the District Supervisors, especially those related to managing backlog of ambulances at hospital emergency departments and coordination of multi-casualty incidents is essential, and that without those services, ambulance crews would be unable to provide the designated level of pre-hospital care. While the Employer may be able to cover this work using excluded Superintendents, that does not change the fact that the work of District Supervisors is essential to prevent immediate and serious harm to the health, safety and welfare of the residents of B.C. during the parties' labour dispute.

3. Dispatch Supervisors

Background Facts

92 There are four dispatch centres in B.C. Three regional ambulance dispatch centres are located in Vancouver, Victoria and Kamloops. The Provincial Air Ambulance Coordination Centre ("PAACC") is located in Victoria, and is responsible for dispatching all air ambulances throughout the province.

93 Dispatch Centres are staffed by a combination of dispatchers and call-takers. In Vancouver, shift supervision in dispatch centres is provided by a Dispatch Officer and a Dispatch Supervisor. Both positions are in the bargaining unit. In Victoria, Kamloops and the PAACC, shift supervision is provided by Charge Dispatchers. The parties agree the Dispatch Officers' services are essential, and form part of the designation of dispatch operations as a whole. Similarly, the parties agree that Charge Dispatchers' services are essential on the same basis. The parties disagree as to the status of Dispatch Supervisors.

94 The staffing breakdown in the four dispatch centres is as follows:

	Vancouver	Victoria	Kamloops	PAACC
Dispatch Supervisor	6	0	0	0
Charge Dispatchers	0	5	5	1
Dispatch Officer	7	0	0	0

Dispatchers (EMD)	57	16	26	14
Call-taker (EMCT)	21	10	6	0
QI	6	2	1	0
Transfer Specialization	5	0	0	0
Part Time Staff	0	4	4	3
Other (Logistics etc)	4	0	0	0
TOTAL	**106**	**37**	**42**	**18**

Peak Staffing	20	7	10	5
Low Staffing	11	5	5	2

95 The Vancouver Dispatch Centre handles more calls than all of the other centres combined. For example, Vancouver handled 304,000 calls in 2007/2008 compared to a combined total of 220,000 for Victoria and Kamloops combined. Vancouver is a significantly larger operation than the other dispatch centres. The call volumes and staffing levels demonstrate that to be the case.

96 In the 2000/2001 dispute, each of the four dispatch centres was supervised by a Charge Dispatcher. The Charge Dispatchers were declared essential by agreement of the parties and worked throughout the labour dispute. In 2005, the Employer and CUPE entered into a "Memorandum of Agreement – Dispatch Supervision" which led to the establishment of the Dispatch Supervisor position in the Vancouver Dispatch in express recognition at that time of the need for enhanced and effective supervision.

The Parties' Positions

97 The Employer argues that CUPE's position – that the Vancouver dispatch is adequately supervised by one person, the Dispatch Officer – is untenable given the size and scope of that operation compared to the other centres. Although Strohmaier – an experienced dispatcher -- testified that there was really no need to establish the Dispatch Supervisor position, Strohmaier's evidence contradicts the agreement reached in 2005. The Employer argues that Strohmaier – who signed the 2005 MOU – Dispatch Supervision – is simply tailoring his evidence to support his position that the Dispatch Supervisor is non-essential, and that he should be bound by the position taken by the Union in 2005, as recorded in the MOU. Moreover, the Employer pointed out that Strohmaier has not worked in the Vancouver Dispatch on a regular basis for 12 years, and has only worked 27 shifts since August 2008. Hence, the Employer argues that Strohmaier's perspective is ill-founded and self-serving.

98 From an operational standpoint, the Employer argues that the support provided to call-takers by the Dispatch Supervisors in Vancouver is essential to the health and welfare of those requiring ambulance services. Call-takers are the entry level position in

the dispatch centre. They take the calls that initiate the process of emergency medical response. They are required to get the right information into the dispatch system to allow the calls to be properly prioritized. They may be required to remain on the line with the caller while the ambulance paramedics are being dispatched. The calls they receive can be stressful and traumatic. Dispatch Supervisors support and supervise the call-takers while the Dispatch Officers supervise and support the dispatchers. Given the call volumes and scope of the work performed in Vancouver, the Employer argues that both supervisory positions provide services that are essential.

99 Sanderson testified (based on his discussions with Stephen Clinton, the Director of the Vancouver Dispatch Centre) that where call-takers have difficulty fielding particular calls, need direction, require technical support or require personal support, the District Supervisor provides those services. If call-takers lack the necessary support and make errors or omissions in the course of their work, the public will be placed at immediate and serious risk. Sanderson testified that both the Dispatch Supervisor and the Dispatch Officer are needed in the dispatch centre to provide the appropriate span of control for support, direction and problem-solving.

100 Strohmaier testified that despite signing the 2005 MOU – Dispatch Supervision, he believes the Dispatch Supervisor position is not essential to the operation of the Vancouver Dispatch centre. Strohmaier testified that there are frequently long periods of time during which the Dispatch Supervisor is not in the room, demonstrating that his presence is not required, and that the work can be performed by the Dispatch Officer, the dispatchers and the call-takers.

101 As in the case of District Supervisors, CUPE emphasized that regardless of the nature of the work performed by Dispatch Supervisors, insofar as it is essential, it can be covered by excluded personnel.

Analysis and Decision

102 I find that the Dispatch Supervisor position in Vancouver dispatch is essential. Given the significantly greater scope of the Vancouver operation, I find that the supervision provided by both the Dispatch Supervisor and the Dispatch Officer is necessary and essential within the context of the Vancouver dispatch centre operation. The support provided by the Dispatch Supervisor to the call-takers is essential to the performance of their duties, which have in turn been designated as essential by agreement. The role of the Dispatch Supervisor is integral to the overall operation of the Vancouver dispatch centre. I find that if supervision is left entirely to the Dispatch Officer, the delivery of essential dispatch and pre-hospital care services will be undermined to such an extent as to pose an immediate and serious risk to the health, safety and welfare of the public. In particular, the support, guidance and direction provided by the Dispatch Supervisor to call-takers in the normal course of their duties is integral to the maintenance of the services designated as essential.

103 I also find Strohmaier's testimony that the Dispatch Supervisor position is inconsequential is inconsistent with the expression of mutual intent set out in the Preamble to the 2005 MOU – Dispatch Supervision. Had CUPE led evidence to show that between 2005 and 2009 it had raised concerns with the Employer that the position was not enhancing the effectiveness of supervision in the Vancouver dispatch, as had been contemplated when the MOU was negotiated, perhaps CUPE's position would have been more tenable.

4. Low Acuity Ground and Air Transfers

Nature of the Dispute

104 The Employer is responsible for transferring patients to and from medical facilities within B.C. The Employer's data indicates that in 2008 more than 150,000 ground transfers took place in B.C. -- in excess of 12,000 transfers per month and 400 per day. In addition, the Employer transferred 8,700 patients by air ambulance in 2007/2008.

105 In 2000/2001, the Employer classified air transfers as Priority 1, 2 or 3, with "3" being the lowest priority. At that same time, ground transfers were classified as Priority 1, 2, 3, 4 or 5, with "5" being the lowest priority. Priority levels are assigned by CUPE bargaining unit personnel in dispatch based on information provided by the transferring health care facility in accordance with a decision flowchart, called a Transfer Call Assessment Tool.

106 In 2000, the Employer and CUPE agreed on the essential services designations for ground and air patient transfers: see BCLRB No. B297/2000. The Board initially designated air transfers as essential, by agreement of the parties, as follows:

> All existing service levels designated as Priority 1 or 2 will be maintained, subject to review after 2 days.
>
> Priority 3 transfers are deemed non-essential subject to a review after two days.

107 Similarly, the Board initially designated ground transfers as essential by agreement of the parties as follows:

> All existing service levels designated as Priority 1, 2 or 3 will be maintained subject to review after two (2) days.
>
> Priorities 4 and 5 are deemed non-essential subject to a review after 2 days.

108 During the first few months of the 2000/2001 dispute, CUPE members continued to perform Priority 3 (now Alpha) air transfers and Priority 4 (now Bravo) and 5 (now

Alpha) ground transfers, despite the fact that these services were non-essential. In mid-February 2001, CUPE directed its members to cease performing these transfers, relying on the terms of BCLRB No. B297/2000. Specifically, CUPE directed its members to implement what it called "Job Action Level 2", which included the direction to "[c]ease all Priority 4 & 5 ground transfers/Priority 3 air transfers", effective February 15, 2001.

109 Strohmaier testified that although this directive was issued, it was never acted upon, and therefore whether or not low acuity transfers are essential has not been tested in a live dispute.

110 Platteel gave evidence to the contrary. Platteel testified that the withdrawal of low acuity transfer services had an immediate and significant negative impact on hospitals, resulting in backlogs in emergency departments, which in turn took ambulances out of service when they could not drop off patients at emergency wards and be released. The Employer explained that patient transfers free up beds in hospital wards, which in turn allows patients to be transferred from emergency departments to hospital wards, and which in turn allows ambulances to drop off patients. When one part of the system ceases to operate, the other interdependent parts of the system are adversely affected.

111 In February 2001, the Employer applied to the Board on an expedited basis to amend BCLRB No. B297/2000 in response to CUPE's Job Action Level 2 directive. The application was settled on the basis that all air and ground transfers are essential, regardless of their priority level. That agreement was incorporated into a new 2001 ESO issued under BCLRB No. B54/2001.

112 Since 2000/2001, the Employer has changed its priority categories: "A" (Alpha) (Routine Transfers); "B" (Bravo) (Scheduled Transfers); "C" (Charlie) (Less Urgent Transfers; "D" (Delta) (Urgent Transfers); and "E" (Echo) (Emergent Transfers). Most importantly, within each of these categories are a number of subcategories, each with an associated "minimum level of care". Within Alpha, Bravo and Charlie categories, for example, there are a number of subcategories (three, five and seven subcategories respectively), all of which require a paramedic except subcategory "24", which is the code for "No Medical Care" required. Where no medical care is required, the qualification stipulated is "Stretcher Handling" only. All other subcategories in Alpha, Bravo and Charlie require some level of paramedical qualification.

113 Health care facilities throughout the province determine the demand for air and ground transfer services, not the Employer. Demand for patient transfers is driven by the needs of patients within the health care system. The Employer cannot refuse to provide service. The Employer only determines the priority level, i.e., when the transfer occurs, not if. Longeway agreed in cross-examination that the Employer does not have discretion to turn transfer patients away, even if an ambulance is not technically required.

The Parties' Positions

114 CUPE takes the position that low acuity air and ground transfers are non-essential, seeking to replicate the 2000 ESO. CUPE argues that the essential nature of these services was not tested in 2000/2001, and that other circumstances have changed subsequently to render these services non-essential.

115 For example, in April 2008, the Provincial Government transferred $32 million dollars from the Employer's budget to the budgets of the Health Authorities, based on expenditures for patient transfers the previous year. CUPE argued that by virtue of the provision of these additional funds, the health authorities have the financial means to transfer low acuity patients without resorting to the use of ambulances and paramedics. CUPE argued that in accordance with the directive posted in the hospitals by the Fraser Health Authority, for example, staff must now consider means of transportation (family, friends, taxi, new service providers, etc.) other than ambulances. Hence, CUPE argues low acuity transfers can be completed without using paramedics and ambulances, and therefore such transfers are non-essential. CUPE asserts that Alpha ground transfers fall within this category.

116 CUPE also argues that where trained personnel are required to transfer low acuity patients, such transfers can be accomplished by excluded personnel performing bargaining unit work. On that basis, CUPE argues low acuity air and ground transfers are non-essential. CUPE asserts that Bravo ground transfers and Alpha air transfers fall within this category.

117 The Employer argues that the provisions of the 2001 ESO should be applied, with all transfers being designated as essential. When paramedics performing low acuity transfers were withdrawn in 2001, the adverse impact on the health care system was serious and immediate, putting patient health, welfare and safety at immediate risk. Moreover, the backlogs in hospital emergency departments immediately impaired the provision of designated pre-hospital care services by paramedics, because ambulances could not drop off patients and be released back into service.

118 When the Employer agreed that low acuity transfers were non-essential in 2000, the evidence confirms that it had not consulted with the health authorities. Sanderson testified that he has consulted with health authorities extensively during the time leading up to the present dispute, under the auspices of an emergency medical services working group. Based on such consultation, Sanderson testified that he concluded all transfers are essential, and that those patient transfers that do not require an ambulance and/or paramedic were already being done without same, save in exceptional cases.

119 The Employer argues that if health authorities are calling an ambulance for patient transfers, they are doing so because an ambulance is required. Since the budgetary changes referred to by CUPE, health authorities must now pay for patient

transfers from their own budgets, and therefore have an incentive to minimize their use of more costly ambulance services. While ambulances may still be called on occasion when they are not strictly speaking necessary, as asserted by CUPE, Sanderson explained that where alternative service providers are not available and the patient must nonetheless be moved, transfer by ambulance is the only recourse, and the movement of the patient is no less essential simply because no ambulance or paramedic is necessary.

120 The Employer argues that CUPE has misconstrued the transfer priority categories, and has assumed incorrectly that all Alpha and Bravo ground transfers and all Alpha air transfers require no medical care. The Employer points out that under the Transfer Call Assessment Tool, only A-24 and B-24 calls are "no medical care" required calls (as are C-24 calls, though these were not addressed by the parties).

121 In February 2009, for example, the Employer points out that of the 4,071 Alpha transfers in B.C., only 162 were classified by bargaining unit dispatchers as A-24, meaning that a paramedic was not required. Accordingly, the Employer argues that despite the low priority Alpha classification, 96% of all February 2009 Alpha calls required medical care. Finally, the Employer argues that the remaining 4% of Alpha calls still required an ambulance to transport a stretcher. If a patient did not require either medical care or a stretcher, the Employer argues that there would not have been an ambulance call at all; by the time the hospital has called the ambulance dispatch, all other options have been exhausted. While the Employer concedes that an ambulance may be called when it is not required in exceptional circumstances, such as when an alternative service provider is unavailable, the need to move the patient is critical and hence the availability of an ambulance in such situations is essential.

122 The Employer explained that while Alpha calls are the lowest priority calls, that does not necessarily mean they are low acuity calls. In most cases, the transfer is classified as low priority not because of the acuity of the patient, but because the transfer is pre-scheduled in advance. The patient being transferred on this basis may still require a high level of care. Hence, the Employer argues that referring to calls as "low acuity" is misleading. Instead, the issue is whether or not an ambulance and/or paramedic is necessary to transfer the patient. The Employer submits that if an ambulance is being called to transfer a patient, the system ensures that for one reason or another, the provision of the service by an ambulance or paramedic is essential.

123 Finally, the Employer argues that in comparison to 2000/2001, resources within the health care system are scarcer than ever before. Backlogs in hospital emergency rooms and in specialized wards because patients cannot be transferred will have a more immediate and more dramatic adverse impact than in 2000/2001. Consequently, there is no justification to return to the 2000 ESO; the 2001 ESO must be adopted.

Analysis and Decision

124 CUPE has provided no compelling reason to deviate from the 2001 ESO. Consequently, I designated all ground and air transfers as essential. I am persuaded that the budgetary changes made in 2008 increased the probability that hospitals will avoid using ambulances except where necessary either for medical reasons or to accommodate the transportation of a stretcher. Where an ambulance is used to transfer a patient when an ambulance or paramedic is not required, I accept that will usually be because an alternative service provider is not available and the transfer cannot be delayed until one is available. Hence, the transfer is essential.

125 I also accept that only a very small portion of transfers within the Alpha and Bravo ground transfers and Alpha air transfer categories require no medical care, and most of those require an ambulance as the mode of conveyance. It would be virtually impossible, in my view, to parse out the calls that could be serviced by excluded employees who are not trained as paramedics. Moreover, even if it were possible to parse those transfers out, the fact excluded employees might be able to do them does not make such transfers any less essential.

126 Finally, I accept that if the disputed transfers do not take place in a timely manner, the adverse impact on hospital emergency departments and specialty wards poses an immediate and serious risk of harm to the health, safety and welfare of the residents of B.C.

127 To give effect to my decision, I amended the Form "B's" for "Airevac" services (i.e., air transfers) and "Ground Transfer" services as follows:

FORM B: DETAILED SERVICE LEVELS

Employer Name: BCAS

Type of Program: Airevac

Work Location: Multiple locations Province-wide

(1) # of Excluded Staff at this Work Location: None

(2) Work at this Work Locations is: (check one)

√	**Essential**		**Non-Essential**

All existing service levels will be maintained, subject to a review after 2 days.

FORM B: DETAILED SERVICE LEVELS

Employer Name: BCAS

Type of Program: Ground Transfers

Work Location: Multiple locations Province-wide

(3) # of Excluded Staff at this Work Location: None

(4) Work at this Work Locations is: (check one)

√	**Essential**		**Non-Essential**

All existing service levels will be maintained, subject to a review after 2 days.

5. Patient Care Information System ("PCIS") Forms

Background Facts

128 Paramedics are required to complete a Patient Care Report ("PCR") each time they respond to a call. The form collects a variety of critical patient care and incident related information, including: patient identifying information; the time of various key events; location; attending personnel; vital signs; medical history prompting the call; medications, examination results, allergies; other services on scene; treatment steps taken; supplemental trauma; vehicular injury indicators; supplemental cardiac arrest/DOA; and cardiac arrest/major trauma timeline.

129 The PCR is completed in triplicate, with one copy submitted to the hospital Admitting Department, a second copy provided to the hospital generally, and the third copy retained by the Employer. As part of paramedics' day-to-day duties, they return to the ambulance station and scan the PCR form into the computer system. The Employer's computer system then processes the scanned copy, extracting from it information that is then downloaded into various database systems (the PCIS) and the Employer's network. The information is then accessed as and when needed if issues arise, and is used on an ongoing basis to review and assess the performance of the Employer's operations.

The Parties' Positions

130 At the time of the hearing, the Employer had been assigning excluded personnel to scan PCR forms during the strike. The Employer says that it will continue to assign this work to its excluded staff, but that it does not accept that the scanning of the PCR forms is non-essential.

131 The Employer accepts that some purposes for which the form is used are non-essential. On the other hand, the Employer argues that the PCR form and the PCIS in turn is used for a number of purposes that are essential, including: to track exposure of paramedics to infectious patients, often in circumstances where immediate intervention is required (e.g., meningitis exposure); investigation of accidents involving paramedics; coroners' inquests and investigations; and other forms of legal proceedings. The Employer argues for these reasons, the PCR forms must, at a minimum, be submitted to the ambulance station, held and eventually scanned. These steps are necessary for the information to be used in some manner.

132 CUPE argues that the scanning of the form is not essential. The information collected on the PCR form is not lost if it is not scanned, it is merely more difficult to access. Such difficulty is to be expected in a labour dispute. If an emergency does arise, the hospitals have copies of the form, and would likely be responsible for initiating contact in the event of an emergency.

Analysis and Decision

133 I am not persuaded that the scanning of the PCR forms is necessary and essential to prevent immediate and serious harm to the health, safety and welfare of the residents of B.C. I have no doubt that the PCR serves a number of important purposes. Fortunately, the PCR forms will still be available to the Employer in the event an incident or situation arises that requires the PCR information to be accessed. Systems can be put in place for the retention and tracking of these forms that will allow access in a reasonable time if required. Moreover, the PCR forms are provided to the admitting hospital, and could be accessed through the hospital in question. CUPE does not suggest that its members can decline to complete the PCR forms nor decline to preserve them in their original form.

134 If the Employer determines that the scanning of the PCR forms is a priority, the Employer can continue to have that work performed by excluded personnel subject to those personnel otherwise satisfying their obligations under the ESO.

135 To give effect to the foregoing determination, I included the following in the ESO as Appendix "C":

APPENDIX "C"

SPECIFIC DUTIES DEEMED NON-ESSENTIAL

Without limiting the generality of Paragraphs 2(i)(a) or 2(b), the Employer shall not direct scheduled bargaining unit employees to provide the following services which the Board has determined are non-essential:

1. Scanning of completed Patient Care Record (PCR) forms.

6. Impedance Threshold Devices ("ITD")

Background Facts

136 The Employer participates in the Resuscitation Outcomes Consortium ("ROC"). As a member of the ROC, the Employer is currently involved in the PRIMED clinical trial, which has two components: (1) use of an ITD; and (2) an "analyze early/analyze late" protocol.

137 The purpose of the PRIMED clinical trial is to determine, in a real life setting, whether the use of an ITD increases survival rates in cardiac arrest patients. Additionally, the "analyze early/analyze late" aspect of the trial is designed to determine how long CPR should be delivered prior to defibrillation.

138 The PRIMED clinical trial is currently taking place in 35 ambulance stations in the Lower Mainland Region and 10 ambulance stations in the Vancouver Island Region, covering approximately 60% of the population of the province. Paramedics who work out of these stations are required to carry the ITD in their ambulances and to use the ITD in cases of cardiac arrest, where appropriate. That determination is left to the paramedic, however, the Employer reviews cardiac arrest incidents to determine if the ITD is being used in cases where its use is indicated and it was possible for the paramedic to do so.

139 The PRIMED clinical trial incorporates real and sham ITD's. The evidence confirms, however, that even where a sham ITD is used, the clinical trial has positive survival benefits for patients. One reason is the "Hawthorne effect", a phenomenon that occurs in clinical trial situations whereby patient outcomes tend to improve for both the test group (treated with real ITD's) and the control group (treated with sham or dummy ITD's) simply as a result of the conduct of the trial. A second reason is that both sham and real ITD's have a timing light built into the device which guides paramedics as to the correct ventilation of the patient, thereby enhancing survival outcomes. Without the light, studies have shown that ventilation rates are often suboptimal.

140 On April 2, 2009, after the strike had commenced, the Employer wrote to all paramedics issuing the following directions regarding the PRIMED clinical trial:

> 1. Paramedics are directed to continue maintaining and tracking ITD's in their ambulances in accordance with standard procedures; and
>
> 2. Paramedics are encouraged, where appropriate in the circumstances, and where trained to do so, to utilize the ITD's in accordance with the established protocols. It is recognized that there will be situations and circumstances where, for various reasons, paramedics do not utilize the ITD protocols.
>
> 3. As agreed the "early-late" defibrillation protocol should continue to be adhered to. This includes a requirement to continue to document and report Cardiac Arrest patients in the established manner.

The Parties' Positions

141 The parties agreed that clinical education services are non-essential. CUPE argues that clinical trials are part of clinical education, and therefore are non-essential.

142 CUPE also argues that, as Dr. Christenson testified, clinical trials are designed to teach us something by the testing of a hypothesis, which may or may not advance outcomes. While all such trials are launched in the hope that positive outcomes will occur, many are still discontinued. Hence, by their very nature, continuation of a clinical trial cannot be essential.

143 CUPE also argues the ITD is not used in all parts of B.C., nor in North America generally. They are also not used at all times – a proportion of the ITD's are sham devices, many paramedics are not trained in their use, many others are not familiar with their use, and ultimately the clinical trial may conclude that the ITD is not helpful. Hence, use of the ITD is not essential, since if it were, it would have universal application.

144 CUPE argues that if the use of the ITD is removed from the paramedics' responsibilities, less time will be consumed by non-essential duties, and therefore designated essential services can be performed with fewer paramedics, thus fulfilling one of the key objectives of the essential services designation process.

145 The Employer called Dr. Christenson to testify regarding the patient care outcomes associated with the use of the ITD. Dr. Christenson's evidence was that whether or not the ITD was a sham device or not, survival rates improved both because of the timing light incorporated into the device and due to the Hawthorne effect. Dr.

Christenson testified that based on his estimates, the use of the ITD may save the lives of cardiac arrest patients who would not otherwise survive if the ITD is not used.

146 The Employer supplemented Dr. Christenson's evidence by tendering in evidence an article by Dr. Jane G. Wigginton from the Emergency Medical Review, titled "The Inspiratory Impedance Threshold Device for Treatment of Patients in Cardiac Arrest", which discusses the methodology by which the ITD functions, the functioning of the timing light, and the basis upon which positive medical outcomes are achieved. No objection was raised as to the admissibility or accuracy of that article.

147 The Employer argues that there are no absolutes in patient care. Simply because a procedure or device is not in use in some parts of the province does not mean the procedure or device is not essential in those parts of the province where it is used. The Employer points out that there are many protocols and levels of intervention performed by paramedics in certain locations in the province that are not available in other locations.

148 For example, Advanced Life Support ("ALS") paramedics can administer treatments that a Primary Care Paramedic ("PCP") cannot, but ALS paramedics are only employed in major metropolitan centres. The Employer contends that the more advanced treatments provided by ALS paramedics cannot be described as non-essential simply because they are not available throughout the province, nor has CUPE suggested that only the treatments administered by all paramedics are essential. The Employer argues that it cannot be the case that only the lowest common denominator of pre-hospital care is essential.

149 The Employer argues that given the nature of the work performed by paramedics, what is essential is the highest level of care possible given the resources and personnel available in any particular area of the province.

Analysis and Decision

150 The parties have no dispute regarding Paragraphs 1 and 3 of the Employer's April 2, 2009 letter. CUPE's objection is focused entirely on the use of the ITD's as set out in Paragraph 2.

151 I find that the use of the ITD as directed in the April 2, 2009 letter is essential.

152 I am satisfied that the use of the ITD enhances survival rates for cardiac arrest patients when the ITD is used, and that if the use of the ITD is discontinued, it is probable that cardiac arrest patients may die who might otherwise have survived. Hence, I accept Dr. Christenson's evidence in that regard.

153 Given that the ITD is used to treat patients in acute life-threatening situations, its continued use is necessary to prevent an immediate risk of serious harm to the health and welfare of the residents of B.C. Although the ITD has not as yet become a standard treatment protocol for ambulance paramedics in B.C., I am satisfied that the ITD generates positive patient outcomes for patients suffering cardiac arrest. The risk of immediate and serious harm to individual patients suffering from cardiac arrest from not using the ITD has been established on the evidence.

154 To give effect to the foregoing determination, I have included the following in the 2009 ESO:

APPENDIX "D"

SPECIFIC SERVICES DEEMED ESSENTIAL

Without limiting the generality of Paragraph 2(c), the Union shall direct its members to provide the following services which the Board has determined are essential:

1. The Union shall instruct its members who work at stations which are part of the ongoing Resuscitation Outcomes Consortium clinical trial to continue to comply with the directions contained in the memorandum dated April 2, 2009, attached to this Appendix as Schedule "A".

7. Supplier Access – Workplace Technology Services ("WTS")

Nature of the Dispute

155 The Employer relies on a variety of computer hardware and software systems to deliver its services to the public. Those systems are supported, serviced and maintained by WTS, a division of Common Business Services within the Ministry of Labour and Citizens' Services.

156 WTS provides desktop support services, application server and database server hosting services, and voice and data communication services, to all government ministries and to some broader public sector agencies, including the Employer.

157 WTS is used by the Employer to support its administrative offices and dispatch services. WTS has contracts for some aspects of its service delivery, but also directly employs staff represented by the BCGEU. The Employer also employs BCGEU-certified technical staff to supplement WTS, in order to provide the level of responsiveness required to support a 24/7 operation and to provide specialized expertise. The Employer's technical support staff provide services that are layered on top of services provided by WTS; because WTS staff support the underlying networks and servers, their continued technical support is required for ongoing operations.

158 In June 2008, the Employer implemented a new dispatch application in the Lower Mainland, called NetCAD. The Employer plans to implement NetCAD in other locations in 2009. A joint team of Employer and WTS staff routinely work on-site in Vancouver and to a lesser extent in other centres to support the NetCAD project. Most of this work is scheduled for very early Sunday mornings, but can occur anytime in the event of an emergency, such as the failure of a piece of equipment.

The Parties' Positions

159 CUPE accepts that ongoing maintenance of the NetCAD system is integral to the delivery of pre-hospital care and dispatch services. CUPE argues, however, that other office systems such as e-mail, word processing and the like and systems that tie into the NetCAD system after the call event are not essential and need not be maintained during the strike. CUPE also argues that systems that are not tied into NetCAD are not essential.

160 Hence, CUPE argues that the standard global order is sufficient in that it allows access to suppliers who provide products or services that are necessary for the delivery of designated essential services. CUPE argues that access by WTS for the maintenance of NetCAD is therefore already provided, and that if clarification is needed, that clarification can be set out in the body of the decision or in an appendix to the 2009 ESO.

161 Finally, CUPE argues that if e-mail and word processing software systems breakdown, the Employer can rely on the telephone and typewriters to replace these systems.

162 The Employer contends that CUPE's argument draws an erroneous distinction between NetCAD and other systems. NetCAD cannot be separated from the other hardware and software systems; it is not a stand-alone collection of hardware and software. Instead, NetCAD operates on the same computer servers as the Employer's other systems. Maintenance and support of these systems cannot be distinguished in a meaningful way.

163 The Employer also argues that CUPE's position ignores the fact that the Employer and CUPE together must maintain pre-hospital care, dispatch and other services. Non-NetCAD systems are critical to those services. For example, in order to pay paramedics and dispatchers who perform essential services, the Employer needs to ensure that its computerized payroll system remains operational. Payroll systems are serviced by WTS. Similarly, the Employer relies on its word processing, e-mail and other systems to communicate throughout its organization, and such communication is integral to the delivery of essential services.

164 The Employer argues that WTS employees and contractors must be afforded explicit access to the workplace during the strike, and must be permitted to cross picket

lines, since if they are not, the provision of designated essential services would be compromised. The Employer argues that in this case, the issue of access is clearly different than the issue in the *Continuing Care Employer Relations Association,* IRC No. C233/92 decision referred to by CUPE, and that decision is readily distinguishable and should not be applied.

Analysis and Decision

165 I find that ongoing maintenance and support of the Employer's computer systems by WTS, including NetCAD, is critical to maintaining designated essential services. Consequently, I have included in an Appendix to the 2009 ESO a clarification that "Employees or contractors of WTS" are to be given unrestricted access to and egress from the Employer's premises to ensure the continued operation of designated services.

166 Furthermore, I accept that no meaningful distinction can nor should be drawn between NetCAD and any other part of the Employer's computer systems or network for the purposes of access by WTS and its contractors. I accept that WTS and its contractors perform work and provide support that is integral to the ongoing delivery of the dispatch and pre-hospital care services that have been designated essential.

167 To give effect to the foregoing determination, I have included the following in the 2009 ESO:

APPENDIX "E"

UNRESTRICTED ACCESS AND EGRESS

Without limiting the generality of Paragraph 2(iii)(a), the Union shall provide unrestricted access and egress to the following persons and/or deliveries as the Board has determined that such persons or deliveries are required for the continued operation of the facilities and services designated by this Order:

1. Employees or contractors of WTS.

LABOUR RELATIONS BOARD

"MICHAEL J. ADAM"

MICHAEL J. ADAM
VICE-CHAIR