

SUBMISSION OF
PACIFIC WESTERN TRANSPORTATION LTD.
TO
THE SECTION 3 COMMITTEE

Pacific Western Transportation is pleased to make the following submission to the Section 3 Committee (the "Committee") established by the Minister of Labour to provide advice to the Minister on certain issues pertaining to the *Labour Relations Code* in British Columbia. The Report of the Committee was released on August 31, 2018 (the "Report"). Interested parties were invited to submit responses by November 30, 2018.

We write in response to Recommendation No. 12, and in particular the impact of including re-tendering of contracts for "bus transportation" in the successorship provisions of the *Code*.

Successorship represents an exception to the general principle that employees decide whether they are represented by a Union. In the sale of a business, union certification and the existing collective agreement follow the business (i.e. a successorship). That approach is, in part, designed to thwart any anti-union mischief veiled behind a change in ownership. In British Columbia (and most Canadian jurisdictions), successorship does not apply to re-tendering of contracts for a number of good reasons. Tendered contracts are for a fixed term, which is known to employees, the employer, and the Union from the outset. A business bidding on a contract for tender is not bound by the existing collective agreement, and has no obligation to hire existing employees. The purpose of tendering is to enhance competition between employers, and to allow the entity offering the tendered contract to capture the fruits of that competition. In the world of bus transportation, that means improved costs, efficiency, and safety for British Columbia municipalities.

In our respectful view, extending successorship to certain re-tendering situations is warranted. The Report says the changes to successorship are needed to protect "precarious" workers. We agree. However, transit operators, mechanics, and other non-excluded employees of businesses that provide "bus transportation" are not "precarious". The proposed changes would reduce competition and increase costs for municipalities. Increased costs would be passed on to the transit riding public, many of who are actually in financially "precarious" situations.

More importantly, the proposed change would overbear the will of employees who have declined to unionize following a tendering process. If a union wants to represent employees involved in "bus transportation," that union should be made to obtain the requisite support of employees. The proposed changes would allow unions to achieve through legislation what they have been unable to achieve at the ballot box. That is especially relevant given that many of the other proposed changes in the Report are designed to make certification easier for unions and employees who want to be represented by a union (e.g. a shortened voting period, longer card validity, etc.), and to more severely sanction employers who interfere with union organizing campaigns (e.g. a lower threshold for remedial certifications, and changes to first contract mediation and arbitration). Not only would the proposed changes reduce competition between companies bidding on a tendered contract, it would also reduce competitions between unions, and potentially leave employees more tightly bound to one union when they would be better served by another.

Finally “bus transportation” as a statutory definition is exceedingly vague, and could capture everything from municipal transit, to school and work camp transportation, and hospital shuttles to intercity bus routes (which are already challenging to operate in British Columbia, see Greyhound).

For all the forgoing reasons, we strongly urge the Committee to remove the recommendation that retendering of “bus transportation” contracts be swept into the successorship provisions of the *Code*.

Pacific Western Transportation

Founded in 1957, Pacific Western Transportation (PWT) is the largest privately-owned people transportation company in Canada. Today PWT offers comprehensive transportation services and solutions across the country, with over 4,100 employees and numerous business locations. Our operations are separated into four divisions: Motor Coach, Employee/Industrial Transportation, Student Transportation, and Transit. PWT’s varied operations are unified by a company-wide commitment to the Core Values first established by our founder R.B. (Bob) Colborne. At the heart of these core values is an unwavering dedication to customer service and safety, as supported by our Safely Home brand. At PWT, our people are our greatest asset.

Some of PWT’s operations are unionized and some are not. PWT is agnostic in that regard, and stands ready to do business within a unionized or non-unionized environment. In British Columbia, PWT operates municipal transit services for the following municipalities:

- (a) Prince George Transit, certified to Teamsters Local 31
- (b) Whistler Transit, certified to Unifor Local 114
- (c) Squamish Transit, certified to Unifor Local 114
- (d) Pemberton Transit, non-union
- (e) Port Alberni Transit, certified to ATU Local 1747
- (f) Northwest Transit Systems (Prince Rupert, Port Edward, Terrace, Kitimat, Hazelton, and the Skeena Regional Transit System), non-union
- (g) Peace River Country Transit (Fort. St. John and surrounding area), non-union

PWT has also agreed to assume some intercity lines recently abandoned by Greyhound. PWT provides patient transfer services for Northern Health, as well as school bus service, including in Prince George.

All of the above services are provided on the basis of tendered contracts. The proposed change to successorship of re-tendered contracts for “bus transportation” seems to be tailored to directly impact PWT’s business.

Transit Industry in B.C.

Municipal transit contracts in British Columbia are typically tendered for bidding by B.C. Transit in partnership with the municipality or region who will be served by the successful bidder. All rolling stock (e.g. busses) and physical plant are typically owned by B.C. Transit.

If B.C. Transit or an affiliated municipality wants to ensure that the successful bidding company uses union labour, the appropriate way to ensure that is through the tendering process. An example of that B.C. Transit setting conditions for wages as part of the bid process is set out at paragraph 16 of *Greater Vancouver Community Services Society (handyDART Division) (Re)*, BCLRB Decision No. B357/99, where B.C. Transit's RFP included the following terms and conditions:

A collective agreement is pending between the incumbent handyDART contractor, Western Society for Senior Citizens' Services, and its employees who were members of the Independent Canadian Transit Union (ICTU) Local 1. The employees are now represented by the Canadian Auto Workers Union (CAW). The most recent collective agreement between the incumbent and its employees was effective from April 1, 1996 to April 2, 1998. This collective agreement may be viewed at the library of the Labour Relations Board, 1125 Howe Street, Vancouver, B.C.

The successful Operating Company shall offer employment to all required unionized employees who are employed by the incumbent handyDART contractor at the time that this Request for Proposals is advertised. Continuity of employee seniority is also a requirement of this Request for Proposals. (emphasis added)

The terms the incumbent has with its employees and any work rules, practices, and company policies, except for the wages, benefits and employment seniority, is not a requirement of this Request for Proposals.

That case is a good example of how extending successorship to re-tendering of bus transportation can hurt the ability of employees to choose between unions. In that case, the Board rejected CAW-Canada, Local 4100's successorship application. In those circumstances, the new operator was certified to the Teamsters, whose representational rights were preserved. If the recommended change applied at that time, both the employees and the Teamsters would have been worse off.

The law of successorship

The relevant portions of section 35 of the *Code* state:

35 (1) If a business or a part of it is sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Code before the date of the disposition and the proceedings must continue as if no change had occurred.

(2) If a collective agreement is in force, it continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by the purchaser, lessee or transferee, as the case may be.

Currently, the Board applies a well-established two-part test under section 35. First, it determines the nature and components of the primary employers' business. Second, it determines if there has been a discernible "continuity in the business", or part of it (e.g. assets, goodwill, logos, trademarks, customer lists, accounts receivable, existing contracts, inventory, employees, work). In

short, the Board will closely examine the particular facts to determine if there has simply been a transfer of work – with the primary employer still remaining in the business - or whether there has been a transfer of the business, or part of it. The former situation will not attract the *Code's* successorship provisions while the latter will.

Successorship provisions were never intended to capture genuine re-tendering or a loss of a business to a competitor: see *Terrace Association for the Mentally Retarded*, BCLRB No. 221/87 and the cases cited therein.

The purpose of section 35 is to protect established certification and collective agreement rights from an employer changing its form, but the business of the employer continuing to exist. Re-tendering is not a mere change of form.

Recommendation No. 12

The Report proposes the following change to the successorship provisions of the *Code*:

Recommendation No. 12

A. Section 35 of the Code be amended by adding the following subsections:

(1.1) This section applies if a contract for services for

(a) building cleaning, security or bus transportation, or

(b) the health sector, including food, housekeeping, security, care aides, longterm or seniors' care

is re-tendered and substantially similar services continue to be performed, in whole or in part, under the direction of another employer.

Even on a plain reading of the recommended change, “bus transportation” is a non-sequitur. Very little of the Report’s justification for recommendation number 12 applies to “bus transportation”, however its inclusion seems to be based on the following reasoning:

We heard similar stories of the effects of re-tendering on workers in other contracted services including building cleaning, security, food, and bus services. In many cities and municipalities, bus services are provided by contractors through a Request for Proposal (RFP). When the contracts are re-tendered, the collective agreement ends, employees are invited to a job fair to re-apply for their jobs and are often hired at lower wages. The Union is required to re-organize and attempt to negotiate a new collective agreement.

The cost of labour is one of the most important competitive factors in all of these circumstances. The contract re-tendering issue is most pronounced in sectors with the greatest precarity. In our view it is no more socially desirable to allow cost savings through

reducing labour costs and eliminating established collective bargaining rights by the re-tendering of contracts than it is in the sale or transfer of a business. Both require the protection of the successorship protections of the Code.

There is no factual basis for the forgoing passage, and it seems to be little more than parroting the public relations position of one particular union. Those employed in “bus transportation” are not in precarious employment. The assertion that employees are “often hired at lower wages” by the company assuming a tendered contract is factually incorrect as set out below. Competition for qualified transit operators and mechanics is high, especially outside of the Lower Mainland. In any event, if a city or municipality wants to guarantee a certain wage for transit operators or mechanics (or even require that any bidding company be unionized) the appropriate way to do that is through requirements of the bidding process, as was the case in *Greater Vancouver Community Services Society*, above.

Impact of other changes recommended in the Report

The following recommendations from the Report, if adopted, will make it easier for unions to organize employees, including those employed in bus transportation. The proposed changes will also allow the Board to more heavily sanction employers from interfering with that process:

1. **Restriction on Employer Free Speech. (ss. 6(1) and 8).** The Report recommends a return to the employer free speech framework as it was prior to 2002 amendments to the *Code*. Employers would be limited to “statements of fact or opinion reasonably held” rather than the current, broader standard, which protects all views provided those views do not amount to “intimidation or coercion”. The Report also recommends removing protected employer speech as an exception to what would otherwise be an unfair labour practice.
2. **Easier remedial certifications.** Remedial (automatic) certifications are often sought by unions as a remedy for unfair labour practices, but are rarely awarded by the Board. The Report recommends that the threshold for a remedial certification be lowered. Unions would no longer be required to establish that the union “would likely have obtained requisite support” but for the unfair labour practice. Instead, a remedial certification would be available where the Board thought it “appropriate and equitable”.
3. **Changes to certification timelines.** Consistent with recent messaging from the Labour Relations Board, the Report recommends shortening the time for a certification vote from 10 days to 5 days, which would provide less time for employers to communicate with employees in advance of a vote. Currently, union membership cards are valid for 90 days. The Report would extend that to 6 months. Both timeline changes benefit unions in the course of an organising drive.
4. **Changes to first contract mediation and arbitration.** Presently a strike vote is required before a union can apply to the Board for mediation (and potentially arbitration) of a first collective agreement. The Report proposes removing that requirement. In the case of remedial certification, mediators would be permitted to take into account the conduct of an employer which led to remedial certification.

In light of those changes, it is even less appropriate to impose a union on “bus transportation” employees following a re-tendering process. If adopted, those changes will mean that employees who want to be represented by a union will have more support in organising in British Columbia than at any time in the past 20 years.

A case study: Northwest B.C. Regional Transit

In July 2017, PWT responded to a B.C. Transit RFP to provide municipal transit services for the Prince Rupert Transit System, the Port Edward Transit System, the Terrace Transit System, the Kitimat Transit System, the Hazeltons’ Transit System and the Skeena Regional Transit System (collectively the “Northwest Transit Systems”).

At the time, the Northwest Transit Systems were operated by First Canada (a competitor to PWT), who was certified to CUPE.

In October 2017, B.C. Transit informed PWT that they were the lead proponent and the parties entered into a 30 day negotiation to conclude a signed contract. The process concluded in December 2017, which provided PWT with just over three months to commence operations.

During the transition process PWT worked with B.C. Transit to ensure a smooth transition of services. PWT attempted to collaborate with First Canada to recruit its employees for continued employment with PWT, but First Canada was unwilling to cooperate.

Despite First Canada’s refusal to cooperate, PWT rehired more than 50% of the employees of First Canada. PWT now pays all employees in the region at least 3% higher wages than they earned while represented by CUPE. Employees are not paid less as stated in the Report, they are paid more. Those employees are not precarious. Hourly wages are set out below:

- Conventional Transit (i.e. big bus) operators are paid \$24.53 per hour, plus benefits;
- Community Transit (i.e. smaller bus) operators are paid \$23.73 per hour, plus benefits; and,
- Custom Transit (i.e. door to door service for disabled clients) operators are paid \$21.96 per hour, plus benefits.

Those wage increases are in line with PWT’s strategy to win contracts not by reducing wages, but by paying similar and most often slightly higher wages than our competitors.

PWT also provides those employees with a comprehensive benefits package, including 4% RSP matching. Not surprisingly there has been very little turnover. PWT is able to achieve increased wages for employees without a cost increase to the payor municipalities. Safety is similar or better than under First Canada and CUPE. Service has also been increased, including to Hazelton, between Kitimat and Terrace, and a new Kitimat Handi-Dart service which PWT implemented on relatively short notice. None of that would have been possible if PWT and its employees were compelled by legislation to accept the historical CUPE certification and collective agreement.

The Teamsters have attempted to organise PWT’s employees in the Northwest Transit Systems, but has been unsuccessful. Those employees, and others in a similar position in the future, should not have their will overborne by legislation. They should be free to choose a

different union, or no union at all, as is the current case in British Columbia, and true for bus transportation in every other jurisdiction in Canada, set out below.

Other jurisdictions

The Report says this about other jurisdictions and the proposed changes:

Several Canadian jurisdictions have enacted successorship provisions dealing with contracting out and contract re-tendering. Nova Scotia authorizes a successorship declaration where an employer contracts out or agrees to transfer bargaining unit work in order to defeat or undermine collective bargaining rights or avoid collective agreement obligations. For many years (but not currently), Saskatchewan extended successorship to building cleaning, food services and security services provided in a building owned by the province or municipal government or in a hospital, university or other public institution. The Canada Labour Code,

RSC 1985, c. L-2 provides limited protection for employee remuneration when contracts are re-tendered in security and other designated services. Ontario recently re-enacted successor rights when contracts are tendered and re-tendered in the building cleaning, food services and homecare sectors with provision for extension by order in council to other service providers that, directly or indirectly, receive public funds.

Like the rest of the justification for recommendation 12, the forgoing is ill-fitting with respect to “bus transportation”. The above excerpt from the Report is capable of being misleading when it comes to re-tendering bus transportation contracts specifically.

There is not a single jurisdiction in Canada that considers the re-tendering of a “bus transportation” contract to be a successorship.

We note that the *Ontario Labour Relations Act* was recently amended, Nov 21, 2018, and repealed s. 69.2 which said that contract re-tendering successorship may apply to other types of service providers if enacted by regulation. The amendments did not touch s. 69.1 of the LRA which provides that contract re-tendering successorship applies only to the building services sector in respect of contracts for cleaning, food and security services.

“Bus transportation” is a carbuncle on the face of the proposed changes to successorship in B.C., and unlike some of the other proposed changes, British Columbia would stand alone if re-tendering of bus transportation contracts amounted to a successorship.

A case study: Ontario and Alberta

The current system of successorship works. In two recent cases, one in Alberta and one in Ontario, the historical union has successfully organized PWT employees following a re-tendering of a bus transportation contract. Those historical unions have been successful at winning the support of employees through the ballot box. They have not insisted on legislative amendment to circumvent foundational principles like employee self-determination.

In or around January 1, 2017, PWT won the transit contract for municipal transit in Whitby, Ontario, through a public retendering process. That transit service had historically been operated by Coach Canada, and certified to Unifor Local 222. After a brief period of organizing, Unifor Local 222 again obtained a certification for PWT's operations in or around August 2017. The parties concluded a first collective agreement in October 2018. Employees who wished to remain unionized were able to do so. Whitby was able to capture the costs benefits of a competitive tendering process. No legislative change was required.

Airdrie, Alberta, is another illuminating case study PWT won the retendering of the Airdrie municipal transit contract, and began operating in September, 2017. Prior to September, 2017, Airdrie Transit was operated by First Canada, and certified to the Teamsters.

Following the transition, PWT rehired more than 50% of existing employees. PWT offered wages that were about 3% higher than under the contract with First Canada and Teamsters. In fact, in September, 2017, PWT gave transit operators the rate that they would have had to wait until August 1, 2018 to get in September of 2017. There has not been substantial turnover PWT's price to the municipality was the same or very similar to the price with First Canada. However, there have been improvements in quality for the same price, including a substantial benefit of PWT storing all of the local buses indoors, where they used to be out in the elements at the First Canada facility.

The system works. Where employees want to unionize following a retendering process, they do so. In any event, PWT typically rehires most existing employees, and does so at higher wages than they had earned while certified to a Union.

Conclusion

We commend the Committee for many of its forward thinking recommendations, some of which will serve employers, employees, and unions, and continue to make British Columbia a great place to work and do business. However, recommendation number 12, as it applies to "bus transportation" is ill advised, and does not fit with the justification for the rest of the recommended changes to successorship which are said to be necessary to protect "precarious" workers:

- (a) Transit operators, mechanics, and other support staff are not in "precarious" employment;
- (b) There is no factual basis for the assertion that PWT or its competitors do not rehire existing employees, or pay lower wages – the opposite is true on both counts;
- (c) The Report contains a long list of changes that are designed to make organizing easier for unions and employees who want to be represented by a union. Those changes are sufficient to encourage higher union density in "bus transportation" if that is a goal of the Report, as it seems to be;
- (d) Extending successorship to re-tendering of bus contracts, without a valid reason, represents an unacceptable dilution of the retendering process generally. Interfering in the re-tendering process would result in reduced competition and increased costs for municipalities;

- (e) Increased costs will ultimately be downloaded onto the transit riding public, many of whom have very little ability to pay more for transportation;
- (f) The proposed statutory term “bus transportation” is so vague that it verges on meaningless. It is also arbitrary (why buses and not light rail? Is a HandiDart a bus?);
- (g) The current system works. When employees want to unionize following retendering of a bus transportation contract, they do;
- (h) No other jurisdiction in Canada does now, or has ever, extended successorship to re-tendering contracts for “bus transportation”; and,
- (i) Absent a compelling reason, employees should be free to determine whether they want to be represented by the historical union, a different union, or no union at all. The Report contains no compelling reason applicable to “bus transportation”.

For all the forgoing reasons, we urge the Committee to remove “bus transportation” from the recommended changes to the law of successorship and re-tendering contracts in British Columbia.

We would welcome any opportunity to provide further feedback or additional evidence about the reality of our industry in British Columbia.



Greg J. Nichols
Vice President, Transit

Pacific Western Transportation
1041 Great Street
Prince George, BC V2N 2K8