ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 0520-14-U
Unfair Labour Practice
Unifor and its Locals 127 and 35, Applicant v Navistar Canada Inc., Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - March 18, 2015

DATED: March 18, 2015

Catherine Gilbert
Registrar

Website: www.olrb.gov.on.ca

Address all communication to:

The Registrar
Ontario Labour Relations Board
505 University Avenue, 2nd Floor
Toronto, Ontario M5G 2P1
Tel: 416-326-7500
Toll-free: 1-877-339-3335
Fax: 416-326-7531

Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0520-14-U**

Unifor and its Locals 127 and 35, Applicant v **Navistar Canada Inc.**, Responding Party

BEFORE: Bernard Fishbein, Chair

APPEARANCES: Anthony Dale, L.N. Gottheil, Robert Chernecki, Ken Lewenza, Jeff Wareham, Joe Lucier, Alex Zamfir and Doug Wright for the applicant; Robert Salisbury, John Illingworth, Robert Soccio and Henry Van Vroenhoven for the responding party

DECISION OF THE BOARD: March 18, 2015

1. This is an application under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") filed by Unifor and its Locals 127 and 35 (hereinafter collectively referred to as "the Union") against Navistar Canada Inc. ("Navistar") alleging violations of section 17 of the Act – the duty to "bargain in good faith and make every reasonable effort to make a collective agreement" – by Navistar.

Background

2. This case arises out of a somewhat unique set of facts, and not the usual context in which a section 17 complaint arises. At the urging of the Board, the parties entered into an Agreed Statement of Facts and the case was argued on the basis of that without the need of any *viva voce* evidence. The Agreed Statement of Facts is quite detailed and lengthy and for purposes of this decision, it may be summarized here.

3. Navistar operated a truck manufacturing facility in Chatham, Ontario. The production employees and the office employees were covered by two different collective agreements with the Union, the most recent of which was effective from January 31, 2007 until June 30, 2009. In November of 2008, there were approximately 1,135 hourly production employees and approximately 101 office employees covered by the Union's collective agreements. At the beginning of November 2008, a series of lay-offs began so that by June 30, 2009 all unionized production and office employees had been laid off – the same date that the collective agreements expired. Negotiations had commenced for the renewal of the collective agreements earlier and a "no board" report had issued on June 13, 2009 so that by June 30, 2009, the parties were in a lawful strike and lock-out position and the collective agreements ceased to operate. Not surprisingly, no strike or lock-out occurred but Navistar and the Union continued negotiations with meetings on November 18 and December 9, 2009; February 16, August 19 and September 29, 2010; January 20, March 8, May 5 and May 19, 2011. No collective agreement was reached.

4. On about July 28, 2011, Navistar advised the Union that the Chatham facility was to be permanently closed "as part of Navistar's North American manufacturing restructuring initiative". Accordingly, on about August 2, 2011, Navistar sent a letter to each unionized employee advising them of the closure of the plant. Negotiations for a collective agreement were then replaced with negotiations for a closure agreement. To that end, the parties either met or communicated by telephone or e-mail on August 19-21, 2011; September 6, 16, 19, 20 and 23-25, 2011; October 17, 18, 25 and 26, 2011; December 22, 2011; January 4, 5, 17, 19, 23 and 25-27, 2012; February 6, 21, 24 and 28, 2012; and March 5, 2012.

5. By December of 2011, Navistar and the Union had reached a tentative agreement (subject to the complete resolution of a closure agreement) on the following items:

(i) Continuation of bargaining rights
(ii) Recall rights
(iii) Employee records
(iv) Post-employment health care benefits
(v) Treatment of employees in receipt of WSIB benefits
(vi) Certain conditions pertaining to the Health Security Agreement
(vii) Employee Assistance Plan

(viii) Worker Adjustment Centre funding
(ix) Grievances
(x) Supplemental Unemployment Benefits Fund
(xi) Post-closure dispute resolution procedure
(xii) Final release and agreement

6. In particular, the post-closure dispute resolution procedure addressed how any dispute concerning either parties' compliance, or with respect to how the interpretation or administration of the closure agreement would be dealt with. In particular, the parties had agreed that any such dispute would be subject to an arbitration provision which included recognition of the application of section 49(1) of the Act concerning the power, authority and jurisdiction of any selected or appointed arbitrator.

7. However, on two significant issues, Navistar and the Union had failed to reach agreement:

(a) terms and conditions for the wind-up of the defined benefit non-contributory pension plan;

(b) issues with respect to severance pay and termination pay pursuant to the *Employment Standards Act, 2000* ("ESA") and any payments in addition to those required by the ESA.

8. Navistar asserted that some individuals would be exempt from the ESA requirements of severance pay pursuant to paragraph 9(1)3 of O. Reg. 288/01:

> **9.** (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:
>
> 3. An employee who, on having his or her employment severed, retires and receives an actuarially unreduced pension benefit that reflects any service credits which the employee, had the employment not been severed, would have been expected to have earned in the normal course of events for purposes of the pension plan.

9. The parties recognized that, accordingly, the determination of some of the pension issues could have an impact on which employees received ESA severance and the quantum of such payment. This was still true at the time of the hearing.

10. On March 23, 2012, Navistar wrote to the Deputy Superintendent of Pensions at the Financial Services Commissions of Ontario ("FSCO") requesting a partial wind-up of the pension plan. The parties differed on a number of issues with respect to the wind-up of the plan. Without going into detail, suffice it to say that the answer to some of those issues would affect entitlement to ESA severance pay pursuant to paragraph 9(1)3 of O. Reg. 288/01.

11. On March 7, 2013, FSCO issued a Notice of Intended Decision. It largely accepted the Union's position. Navistar appealed the Notice of Intended Decision issued by FSCO to the Financial Services Tribunal ("FST"). The FST issued a decision on July 11, 2014, largely upholding the FSCO decision. Navistar sought to appeal the decision of the FST to the Ontario Superior Court of Justice Divisional Court. That hearing is tentatively scheduled for April 2015 (after the hearing in this application was concluded). Both Navistar and the Union have, not surprisingly, agreed that they will resolve all outstanding pension issues (and those relevant portions of a closure agreement) in compliance with the outcome of the FSCO, FST proceedings, or any related appeal.

12. Again, in addition, the Union sought (and was still seeking at the time of the hearing) "transition payments" for employees not entitled to termination and/or severance pay under the ESA.

13. Although several proposals had been exchanged, the parties were unable to agree. As a result, on March 19, 2012, Navistar wrote to the Union and advised that its latest proposal

> "… is now off the table in its entirety …"

and it would be

> "… proceeding to the Financial Services Commission of Ontario for their determination of the relevant pension matters".

14. Up until November 2012, Navistar paid individual employees who sought, on their own accord, severance pay provided the employee executed a form prepared by Navistar entitled:

> "Irrevocable Recall Rights Election"

wherein the employee purported to:

> "… renounce all seniority rights and rights to recall to employment [an employee] may have now or in the future …"

and acknowledged that the employee had:

> "… no claims of any kind or nature whatsoever against [Navistar], … relating to my employment, the termination thereof other than specifically provided for in this agreement …"

and by which the employee also agreed:

> "… not to file any grievance or any other claim or to commence any action with respect to my employment, the termination of my employment or this irrevocable election to sever my employment and to renounce my recall rights."

15. Approximately 153 employees received severance pay from Navistar upon signing this document.

16. However, in November 2012, Navistar advised the Union that if any employee

> "… may fall within the group of CAW members whom may become entitled to receive an actuarially unreduced pension, the Company will hold in abeyance the severance payment, pending the determination of whether or not the particular CAW member will or will not receive an actuarially unreduced pension."

17. Since that point in time, no severance payment has been made to any employee. Meanwhile, on or about March 27, 2012, the Union commenced a class action proceeding on behalf of certain of its members in the Ontario Superior Court of Justice against Navistar (two of the Union's bargaining unit executive were named as class action

plaintiffs). The class action sought, on behalf of all employees who were represented by the Union and

> "… were constructively dismissed and/or terminated from employment upon the announcement of the closure of the defendant's facility on or about July 28, 2011 and who:
>
> (i) have not executed a full and final release that prohibits them from commencing an action in regard to their dismissal or cessation of employment;
>
> (ii) did not file a complaint pursuant to the *Employment Standards Act, 2000*; unless he or she withdraws or has withdrawn the complaint within the time specified in that Act.",

inter alia, compensation in lieu of notice and general damages in the amount of $10,000,000.00.

18. Navistar brought a motion to strike out the Statement of Claim on grounds which included, *inter alia*, that any alleged individual contracts of employment did not exist. On May 9, 2013, the class action was dismissed. On February 7, 2014, the Ontario Court of Appeal dismissed the appeal brought by the Union.

19. On May 16, 2013 (subsequent to the dismissal of the class action but before the Court of Appeal hearing), the Union had written to Navistar, without prejudice, seeking a comprehensive closure agreement proposal that would address all outstanding issues. Navistar responded that the Union had already rejected its last proposal and it would therefore await any further proposal from the Union. The Union made proposals on June 17, 2013. Navistar rejected this Union offer. Afterwards, Navistar and the Union engaged in discussions on August 13, 2013, which were agreed to be "off the record".

20. On or about October 17, 2013, the Union, "for the record", presented to Navistar an offer to settle all outstanding issues between the parties arising out of the closure ("the Union's last offer"). With respect to severance pay, the Union proposal was:

> "**Severance pay** — Company accepts last proposal of Union OR accepts the following terms.

> Any dispute with respect to entitlement to severance pay as per ESA for any or all on-roll employees is sent to grievance arbitration to a mutually agreed arbitrator who has all the powers and authority of a s. 48 arbitrator under OLRA and law, including the authority to make a full remedy if warranted (no claim will be made for any employee who has received ESA severance pay)(in default of mutual agreement on appointment MOL will appoint)."

The Union was also still seeking "transition payments" for employees not entitled to the ESA severance.

21. On November 13, 2013, Navistar rejected the Union's proposal and indicated that it would pursue its appeal to the FST.

22. The Union replied by letter dated November 25, 2013 indicating:

> "**The two major cost items remain pensions and severance pay.** With respect to pensions, the union's offer is simple and cannot be any more plain. The company will do whatever the minimum standards of the PBA call for in the plan wind-up. There can be no bargaining over that point.
>
> With respect to severance pay, the union's offer is that the company should pay severance pay according to the minimum entitlements in the Employment Standards Act, 2000. Again, there can be no bargaining over that point. In light of any disagreements over WHO is entitled to severance pay, the union says an arbitrator should decide that issue. Again, there is no real bargaining that can occur with respect to this request; the company has to honour the ESA 2000, the union asks for no more on that point.
>
> **The only issue that goes beyond the legal minimum is the issue of transition payments to workers not entitled to severance pay. This is a cost item.** The company has a duty to bargain with the union. The company itself has repeated this principle many times – it must bargain in good faith with the union after the closure announcement of July 28, 2011. However, since at least August 2013 the company has not engaged in bargaining. Your letter of November 13, 2013 is a non-starter; it does not define the company's position. The company says that

> the process before the FST should play out presumably before the company will bargain. But the parties cannot delay bargaining in that fashion. What is the company's position for settlement? What will constitute grounds for a deal? The process for the FST will not advance a settlement discussion because that process will define minimum entitlements. What is the company's position for settlement today? Please advise in detail with a support explanation".
>
> [emphasis added]

23. Navistar replied on November 27, 2013 indicating that since the FST hearing was less than two weeks away, at this point in time Navistar would turn its attention to the FST hearing but:

> "We are more than happy to resume our negotiations after the conclusion of the hearing, and we suggest we touch base at that time to discuss next steps."

24. Unfortunately, the FST hearings scheduled for December 2013 were cancelled due to the lack of a quorum among the members of the FST.

25. On December 13, 2013, the Union wrote to Navistar reiterating its position that Navistar ought to bargain with respect to the severance pay issues:

> "Accordingly, we return to the key issues between us which in our view can be simply stated – we can put them in the form of a question.
>
> (1) Will Navistar agree to put the issue of any disputed entitlement of any employee on the seniority list as of June 2009 to minimum standards ESA severance pay to an independent arbitrator for resolution?
>
> The union has proposed a transition payment for all employees found not to be entitled to severance pay under the ESA rules. If that sum of money is not acceptable,
>
> (2) What sum of money is acceptable?"

26. On December 23, 2013, Navistar responded, while disagreeing with much of the Union's characterization of events, agreeing that:

> "Navistar would be happy to resume our negotiations on a "without prejudice" basis subject to Unifor submitting a reasonable "without prejudice" settlement proposal for our review in preparation for such negotiations.

27. Following the Court of Appeal dismissing the appeal of the dismissal of the class action, the Union wrote to Navistar again, reiterating its demand that negotiations resume:

> "This is especially true when the union's offer to settle the pension issue is simple: each side will respect the outcome of the legal proceedings as that outcome simply defines minimum standards in the pension context. The other significant cost item for the Company is severance pay. Again, here the Union's position is simple – any dispute regarding ESA severance pay entitlement is sent to arbitration. Finally, the amount of transition pay to be awarded anyone not entitled to severance pay (potentially a very small group) is negotiable. Accordingly, we are putting our position expressed in the attached October 17, 2013 letter (and reaffirmed since) back on the table."

28. On March 3, 2014, Navistar responded indicating it was happy to resume negotiations on a "without prejudice" basis. Navistar proposed a face-to-face meeting in March 2014, subject to everyone's schedules, since the FST hearing had been rescheduled for early April 2014.

29. The Union responded on March 11, 2014 indicating:

> "… the identity of the attending parties, the scope of the meeting, and indeed the meeting location depends on the Company's response to two simple points:
>
> a) Will the company present a proposal for settlement at the meeting in response to the Union's last proposal and if so would the Company do so in advance of the meeting to allow the Union to save time in its analysis of same; and
>
> b) The Union says the negotiations must be on the record, save for the following point. We recognize that the issues of pension benefit entitlement and windup are the subject of litigation before the FST. As such, we recognize that any discussion of such pension issues cannot be relied upon or repeated by either side in connection with the FST proceedings. Everything else is on the record."

30. On March 17, 2014, Navistar responded indicating it was prepared to meet and provide a response to the Union's last offer which it would endeavour to provide in advance of the meeting. Navistar further agreed that these negotiations were on the record.

31. On March 24, 2014, Navistar tabled a comprehensive offer for settlement ("Navistar's last offer"). With respect to the issue of termination and severance pay, Navistar's proposal was:

> "Company will meet legislative requirements subject to final pension eligibility determinations."

Navistar was not prepared to make any "transition payments", i.e., to those employees not entitled to ESA severance.

32. Navistar also indicated that it still stood by its previous agreement to the post-closure dispute resolution procedure.

33. The parties exchanged correspondence trying to arrange a date. Notwithstanding different positions about when the best time to meet was, the parties ultimately met on April 11, 2014 following a day of hearing before the FST. At the outset of that meeting, the Union asked Navistar:

> "Will you agree to send the issue of who is entitled to severance pay under the ESA to arbitration?"

When Navistar responded "No", the Union representatives left the meeting without further discussion. The Union then filed this application with the Board.

The Relevant Law

34. Section 17 of the Act provides:

> **17.** The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

35. Section 99 of the ESA provides:

99. (1) If an employer is or has been bound by a collective agreement, this Act is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act that occurs,

(a) when the collective agreement is or was in force;

(b) when its operation is or was continued under subsection 58(2) of the *Labour Relations Act, 1995*; or

(c) during the period that the parties to the collective agreement are or were prohibited by subsection 86(1) of the *Labour Relations Act, 1995* from unilaterally changing the terms and conditions of employment.

(2) An employee who is represented by a trade union that is or was a party to a collective agreement may not file a complaint alleging a contravention of this Act that is enforceable under subsection (1) or have such a complaint investigated.

(3) An employee who is represented by a trade union that is or was a party to a collective agreement is bound by any decision of the trade union with respect to the enforcement of this Act under the collective agreement, including a decision not to seek that enforcement.

(4) Subsections (2) and (3) apply even if the employee is not a member of the trade union.

(5) Nothing in subsection (3) or (4) prevents an employee from filing a complaint with the Board alleging that a decision of the trade union with respect to the enforcement of this Act contravenes section 74 of the *Labour Relations Act, 1995*.

(6) Despite subsection (2), the Director may permit an employee to file a complaint and may direct an employment standards officer to investigate it if the Director considers it appropriate in the circumstances.

The Parties' Positions

(a) The Union

36. The Union asserts that in the circumstances, Navistar's conduct violates its obligation under section 17 of the Act, not so much the "bargain in good faith" component but on the latter and separate component of section 17 "to make every reasonable effort to make a collective agreement". The Union says that specifically, Navistar's refusal to agree to a process of arbitration to determine ESA severance entitlements in this plant closure situation was "objectively unreasonable".

37. The Union referred me to a number of cases that it said both set out the legal framework and clearly supported such a conclusion in the circumstances. It began with the Supreme Court decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 where the majority upheld a Canada Labour Relations Board determination that the employer had violated the statutory obligation to bargain in good faith and ordered the resumption of bargaining for 30 days on the four issues still outstanding failing which compulsory mediation was to be imposed. The Union specifically referred me to paragraphs 42 and 43 of the Supreme Court decision:

> " Section 50(a) of the *Canada Labour Code* has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.
>
> Section 50(a)(ii) requires the parties to "make every reasonable effort to enter into a collective agreement". It follows that, putting forward a proposal, or taking a rigid

> stance which it should be known the other party could never accept must necessarily constitute a breach of that requirement. Since the concept of "reasonable effort" must be assessed objectively, the Board must by reference to the industry determine whether other employers have refused to incorporate a standard grievance arbitration clause into a collective agreement. If it is common knowledge that the absence of such a clause would be unacceptable to any union, then a party such as the appellant, in our case, cannot be said to be bargaining in good faith. On this it is significant that the special mediators made the following observation in their second interim report:
>
> > . . . the employer must restrain itself from taking bargaining positions which it surely must know would be unacceptable to virtually any organization of workers. It is one thing to say that circumstances have changed such that the content of the tentative agreement is no longer good enough. It is another to construct unmanageable bargaining gaps."

Applying this objective assessment to whether Navistar had made "every reasonable effort to enter into [make] a collective agreement", the Union argued, it was clear that Navistar failed to do so with respect to Navistar's position on severance pay. The Board need not assess other collective agreements or what was prevalent in the industry because what was at stake here was ESA severance entitlements which were not only the law of the Province but specifically intended to be enforceable by arbitration under collective agreements pursuant to section 99 of the ESA. The Union pointed me to paragraph 45 of *Royal Oak* where the majority stated:

> "If a party proposes a clause in a collective agreement, or conversely, refuses even to discuss a basic or standard term, that is acceptable and included in other collective agreements in comparable industries throughout the country, it is appropriate for a labour board to find that the party is not making a "reasonable effort to enter into a collective agreement". If reasonable parties have agreed to the inclusion of a grievance arbitration clause in their collective agreement, then a refusal to negotiate such a clause cannot be reasonable. ..."

38. The Union says a refusal to agree to arbitration of ESA claims by Navistar cannot be objectively reasonable when the ESA itself directs that those disputes be determined by arbitration in the unionized sector.

39. The Union also pointed me to the Board decision in *Vale Inco Ltd.* (2012), 206 CLRBR (2d) 80, where the Board found an employer who refused to agree to any procedure (arbitration or otherwise) which could result in the possible reinstatement of nine employees who had been discharged for alleged strike-related misconduct, thereby prolonging a long and bitter strike, violated the "make every reasonable effort to make a collective agreement" obligation of section 17 of the Act. The decision in *Royal Oak* was considered by the Board in *Vale Inco* and the Board again recognized the two components of section 17:

> a) the duty to bargain in good faith;
>
> b) the duty to make every reasonable effort to conclude a collective agreement.

In assessing that second component, the Board stated at para. 95:

> "The significance of an issue to the other party is a factor which a party, acting reasonably, will include in assessing its own position on that issue. A contrary position with respect to an issue of fundamental significance may be maintained **only if the party maintaining that position has compelling grounds for doing so. The obligation to make every reasonable effort to make a collective agreement means, at least for issues of this sort, that those grounds must be more than mere beliefs: they must be capable of rational discussion; they must be based on an honest assessment of the negotiations and what would be reasonably required to make a collective agreement having regard to the significance of the issue.** If not, depending on the overall circumstances of the case, the Board may conclude that the party has adopted and is maintaining a patently unreasonable position and is not making every reasonable effort to make a collective agreement."
>
> [emphasis added]

40. The Union pointed out that there were employees who had not worked since 2009 and now, six years later, their statutory severance entitlements under the ESA had not been determined, let alone received. Although Navistar had acted within its strict legal rights and the Union had/could not complain about it, even the FSCO decision acknowledged that the lay-offs at the Chatham plant had been done in a careful and deliberate way to minimize the statutory notice payment requirements under the ESA.

41. But now we were dealing with the outstanding statutorily mandated severance payments under the ESA. The Union urged the Board to consider, and weigh heavily, the unique circumstances of this case. Not only was this not the renewal of a collective agreement but it was the negotiation of a closure agreement. Operations at the plant had long ago stopped, the strength of the Union was obviously limited – it could exercise no economic leverage since a strike would be, to put it kindly, ineffective in these circumstances and the employees were economically vulnerable. Navistar's resistance to arbitration in these circumstances could not be anything other than "objectively unreasonable".

42. The Union points out when it sought to bypass Navistar's intransigence on this point and commenced its unsuccessful class action, the Court essentially told the Union to come to the Board: *Baker and Lucier v. Navistar*, 2013 ONSC 2778:

> "**55** However, the Union retains its certification as the exclusive bargaining agent of the employees whether a collective agreement is in force or not. There is an ongoing duty on both parties to bargain in good faith, and so long as that obligation remains, the three-part relationship between union, employer and employee created by the LRA displaces common law concepts. In other words, the termination of a collective agreement has no effect on the parties' ongoing obligation to bargain in good faith. While Navistar acknowledges a continuing duty on both parties to bargain in good faith …"
>
> "**57** While the Board cannot impose a close-out agreement on the parties, if one party or the other (here, the Union) feels that negotiations for a close-out are not moving forward with dispatch, it can request the Board charge the other party with failing to bargain in good faith."

As noted before, the Union's appeal of this decision to the Court of Appeal was dismissed: *Baker v. Navistar Canada Inc.*, 2014 ONCA 115.

43. The Union says that the ESA entitlements are statutory and the employer cannot attempt to bargain out of them. The Union conceded that by going to arbitration, the arbitrator (at this point in time, depending on the outcome of pension benefit issues and those proceedings) would not necessarily be able to determine the quantum of individual claimants but at least the process could begin and establish who was entitled. Otherwise, the Union alleged that the employer was essentially holding the employees' ESA severance entitlement hostage, which it should not be permitted to do. Perhaps at some point, individual employees might have had an option to file individual ESA complaints with the Employment Standards Branch but they would be subject to a $10,000.00 cap and other possible limitations. Arbitration was the only viable and reasonable alternative and Navistar was refusing to consider it.

44. The Union alleges that it legally (let alone morally) could not agree to less than the ESA severance entitlements. There was really nothing to bargain about other than the process to determine those entitlements (and even then, employees may still have to wait to determine the quantum). Navistar's refusal to do this and refusal to enter into any closure agreement until the pension benefit determinations were concluded was objectively unreasonable. In these circumstances, the Union sought essentially an order that the employer be directed to submit this issue to arbitration.

45. The Union also referred to one of the earlier seminal cases on the duty to bargain: *Radio Shack*, [1979] OLRB Rep. December 1220 as summarized in *Vale Inco*, *supra*, at para. 101:

> 101. As applied to this case, *Radio Shack (1979)* provides support for the following propositions. First, the fact that the Act does not require an employer to agree to arbitration with respect to discharged strikers does not mean that refusing to agree to arbitration cannot constitute a breach of the duty to bargain: one must consider the circumstances of the case. Second, the fact that arbitration with respect to discharged strikers is an issue of particular sensitivity and importance to trade unions is one of which the Board is entitled both to take notice and to factor into its decision making. Third, the

> evidence of Vale's chief negotiator, Beresford, that his assessment was that an agreement could be reached without agreeing to arbitration and that he had in fact tabled a number of suggestions in this respect is of far less significance than the evidence of Pollesel, who made the decision on behalf of Vale, that Vale's position was firm and inflexible, that there was nothing which the USW could have proposed which would have resulted in a change in Vale's position and which contained no suggestion that Vale's position was in any way informed by what was going on at the bargaining table.

46. The Union says all of those propositions apply here. Firstly, Navistar's refusal to allow the severance issue to immediately proceed to arbitration is more than just something not being required by statute (as in *Radio Shack*) enabling a party to refuse to agree to it without justification. Here, the ESA actually does require the arbitration of severance pay disputes. Secondly, the issue of arbitration of severance pay is clearly an issue of such fundamental importance to the Union here. There are no alternatives – the Union has been unsuccessful in going to court and possible individual claims with the Employment Standards Branch have serious limitations. Thirdly, Navistar's intransigence and refusal to bend from this position equally suggested that Navistar's position "was [not] in any way informed by what was going on at the bargaining table". Navistar's intransigence was, like *Vale Inco*, objectively disregarding an issue of fundamental importance to the trade union and therefore was patently and objectively unreasonable – therefore violating its obligation to make reasonable efforts to make a collective agreement. That, in the Union's view, could only be remedied by directing the issue to go to arbitration.

47. Lastly, the Union also referred me to an older Board decision, *Canadian Industries Limited*, 76 CLLC ¶16,014 where the Board found the refusal by an employer to discuss monetary issues in excess of the Federal Anti-Inflation Guidelines to be a violation of the statute:

> 24. The full survival of the duty to bargain in good faith does not mean that the *Anti-Inflation Act* is not a factor to be taken into account during collective negotiations. Obviously the existence of this statute will influence the content of collective agreements. To refuse to discuss the impact of the anti-inflation guidelines at all would be a failure to bargain in good faith, since a factor of this significance should be the subject of full discussion during

> collective negotiations. A refusal to discuss the full implications of the guidelines by insisting on dealing with only one aspect of the restraints has the same effect, and is also a failure to bargain in good faith. It is in this latter respect that the respondent has failed to meet the duty to bargain in good faith. By adopting its own interpretation of the anti-inflation regulations and indicating its unwillingness to discuss any other interpretations, it has foreclosed the kind of full discussion required by law. A party cannot wrap itself in a cloak fashioned from its own interpretation of the guidelines in order to avoid the obligation to bargain in good faith.

48. Accordingly, the Union says there is no effective relief the Board can grant other than direct this issue go to arbitration. The Union, although not referring to them in argument, left me with copies of the following cases:

- *Re Brad Cole Underground Construction Ltd.*, [2013] O.L.R.D. No. 218;
- *WHL Management Limited Partnership*, [2013] O.L.R.D. No. 4409;
- *Direct Energy Essential Home Services*, [2014] O.L.R.D. No. 574;
- *Gemstar Canada Inc.*, [2010] O.L.R.D. No. 3437, 185 C.L.R.B.R. (2d) 204;
- *Circuit World Corp. (c.o.b. PC World)*, [1997] O.L.R.D. No. 2296, [1997] OLRB Rep. July/August 711;
- *Rolph – Clark – Stone Packaging*, [1980] OLRB Rep. June 1045;
- *Brinks Canada Ltd. and General Teamsters Local 979*, (2002) 84 C.L.R.B.R. (2d) 1;
- *Élévateurs de Sorel Limitée*, 61 di 18, 85 CLLC para. 16,032;
- *Fleet Industries, Magellan Aerospace Ltd.*, [2004] O.L.R.D. No. 1955;
- *Fleet Industries, Magellan Aerospace Ltd.*, [2006] 119 C.L.R.B. (2d) 121, [2006] OLRB Rep. January/February 45;
- *Boldrick Bus Services Ltd.*, [2010] O.L.R.D. No. 3479, 186 C.L.R.B.R. (2d) 139;
- *DeVilbiss (Canada) Limited* [1976], OLRB Rep. March 49;
- *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309;

- *Stolle v. Daishinpan (Canada) Inc.*, [1998] B.C.J. No. 1273.

(b) Navistar

49. Navistar strongly disagrees with the Union's characterization of events – on the agreed facts there can be no violation of section 17. Even if there was a violation of section 17, the relief the Union seeks should not be granted. A section 17 complaint ought not to be used to have a difficult issue determined externally (by a third party), not only before the collective agreement is finalized, but before the parties have sufficiently and adequately addressed it and done the "heavy lifting" of bargaining, which the Agreed Statement of Fact clearly showed that Navistar was still prepared to do.

50. Navistar says the more accurate characterization of what has transpired is not that Navistar is refusing to bargain in good faith but rather, the Union is. It points to the characterization of the Union's conduct in the court decision dismissing the class action:

> "68 It appears to me to be contradictory and counterintuitive for the Union to publicly decry a lack of bargaining progress with Navistar and then, indirectly through these individual plaintiffs attempt to impose jurisdiction on the courts where clearly none exists.
>
> 69 The essential character of this dispute is the claim by the plaintiffs that Navistar is not bargaining in good faith for a closure agreement. This action, framed as a wrongful dismissal, appears to be a tactical decision by the Union to skirt around its obligation to continue negotiating as the certified bargaining agent of the Navistar employees."

51. Following the dismissal of the class action, the Union, in October 2013, once again gave Navistar its proposal for settlement. In the back and forth between the Union and Navistar about a meeting, the Union on March 11, 2014 set preconditions for the meeting:

> (a) that Navistar present a proposal for settlement in response to the Union's proposal in advance of the meeting to allow the Union to analyze it beforehand;

(b) that the discussion of pension benefit entitlement wind-up be without prejudice to the ongoing litigation, otherwise everything else was "on the record".

52. Navistar agreed to both conditions and presented its comprehensive proposal on March 24, 2014. After the jockeying for when the meeting would take place was concluded, and the meeting actually took place, on April 11, 2014, the Union simply opened the meeting by asking (without warning to Navistar ahead of time that this was a pre-condition to any bargaining) whether Navistar would agree to send the issue of entitlement to ESA severance pay to arbitration. Navistar, not surprisingly, refused, as had been its position in its last offer. The Union then walked out. Under no stretch of the imagination, Navistar says, can this amount to bargaining in bad faith.

53. Moreover, Navistar says that the Union was demanding it agree to arbitration before the closure agreement (or the collective agreement) had even been agreed to. Moreover, there was no dispute that the closure agreement would contain a provision making any disputes (over ESA severance entitlements or anything else for that matter) referable to arbitration. Navistar says this complaint is merely a tactical decision by the Union to escape its obligation to bargain (and perhaps have no choice but to agree to a resolution that it was not happy with) and attempt to seduce the Board under the guise of a section 17 complaint to intervene and adjudicate an outcome as opposed to a properly collectively bargained outcome.

54. Navistar notes (as the court decision did in paragraph 10) that both the Union and Navistar sought a partial wind-up of the pension plan from the Deputy Superintendent of Pensions at the FSCO. Having engaged the FSCO process, neither side, and particularly the Union, can now complain about the process taking too long or that the length of that process somehow justifies the finding that section 17 has been violated.

55. Navistar refers me to the long line of Board jurisprudence that section 17 of the Act is not intended to redress bargaining power – that the dominant theory of the Act and the duty to bargain is the theory of voluntarism – that a collective agreement is for the parties to determine and, if unable to agree, resort to economic sanction. For convenience, Navistar refers me to the summary of this jurisprudence in *Formula Plastics Inc.*, [1986] OLRB Rep. July 954, 1986 CanLII 1413 (ON LRB) where an employer's insistence that there be no "just cause for discharge" clause within the collective agreement did not amount

to a violation, *inter alia*, of what is now section 17 of the Act. At para. 8, the Board stated:

> 8. Section 15 [now section 17] of the *Labour Relations Act* reads as follows:
>
> > The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.
>
> 9. As the Board stated in *Governing Council of the University of Toronto (Royal Conservatory of Music),* [1985] OLRB Rep. Nov. 1652:
>
> > Scope of the Duty to Bargain
> >
> > 30. The scope of the duty to bargain imposed under section 15 of the Act is squarely raised on the instant facts and has not been dealt with quite so directly by the Board previously. It is useful to refer first to the classic exposition of the duty in *De Vilbiss (Canada) Limited, supra,* at paragraph 13:
> >
> > > The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective - that of entering into a collective agreement and [then] section 14 is intended to convey this obligation. **But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective**

> **agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.**

31. **Given that "voluntarism" is the touchstone, it is implicit that the Board's role pursuant to section 15 of the Act is one of monitoring the *process* of bargaining and not the *content* of the proposals tabled.** This role stands in sharp contrast with the American approach embodied in the "mandatory-directory" classification of proposals and the different consequences for bargaining of classification as a "mandatory" or "directory" item. The mandatory-directory approach has been rejected in this jurisdiction as not consonant with the legislative scheme: see *Consolidated Bathurst, supra; Pulp and Paper Industries, supra; Westinghouse Canada Limited, supra.*

32. This does not mean that the Board is totally distanced from the *content* of the parties' proposals or that there are no limits whatsoever on the scope of bargaining. The

> Board may have regard to the *content* of items tabled in order to determine whether either party does not intend to enter into a collective agreement (e.g., is engaging in surface bargaining) or whether the employer, for example, is seeking to undermine the union as exclusive bargaining agent by tabling an offer "tailor-made for rejection": see *Radio Shack,* [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Ltd., supra; Irwin Toy Ltd.* [1983] OLRB Rep. July 1064. Further the Board may review the content of proposals to assess whether any items are "illegal". For example, a strike for recognition or to resolve a jurisdictional dispute is contrary to the legislative scheme …
>
> 33. However, subject to the comments outlined in paragraph 32 above, the Board will not evaluate or censure the content of proposals tabled by the parties. Again, apart from those comments, if the parties are free to agree that any matter may become part of their collective agreement, it is implicit that each party must be free to table that matter for discussion. While this is perhaps the bluntest enunciation of this principle, the proposition is not novel: see *Westinghouse, supra; Sunnycrest Nursing Homes, supra; Consolidated Bathurst, supra; Canadian Industries Limited, supra.*

10. The applicant has conceded that the respondent has not in any way been engaging in surface bargaining, nor has been seeking to undermine the union as exclusive bargaining agent of the employees. Similarly, the applicant concedes that the respondent employer is not in any part motivated by anti-union animus. In effect, the applicant has conceded that insofar as the "process" of collective bargaining is concerned, the respondent employer has not violated section 15. The applicant is really suggesting that the "content" of the proposed clause is *per se* illegal and therefore a violation of section 15.

11. We agree with and adopt the approach taken by the Board in the *Royal Conservatory of Music Case,* as noted above. **It is not for this Board, in a complaint alleging**

> **bargaining in bad faith, to assess the wisdom or merits of a particular bargaining position or bargaining proposal tabled by either party at the negotiating table. Our concern must be to ensure that the "process" of collective bargaining proceeds properly, and unless it can be said that the contents of a particular proposal impede that process, or violate some other section of the *Labour Relations Act,* it is not for the Board to intrude itself within the collective bargaining process, nor for this Board to redress any economic imbalance between the parties.** Although we recognize that a "just cause for discharge" clause is the foundation of most negotiated collective agreements, there is nothing in the statute which requires a particular employer to provide such protection, nor to agree to include it in a collective agreement. It would take clear language in the statute to support the applicant's contention that the respondent's insistence on such a clause is *per se* a violation of section 15. The parties must remain free to negotiate and agree to the substantive provisions contained within a collective agreement, and such substantive provisions may very well include the right of an employer to discharge an employee with or without "just cause".
>
> [emphasis added]

56. Simply put, Navistar says there is nothing improper in any of Navistar's positions or its last offer. It has always taken the position that it will comply with the ESA. It has agreed that disputes over the implementation of the closure agreement (including ESA severance payments) will be subject to an arbitration provision contained in the closure agreement. It cannot be improper for Navistar to then say that it will not agree to the arbitration of those disputes (and in particular ESA severance) prior to the conclusion of the closure agreement (and while the pension benefit issues – which even the Union concedes could have an impact on ESA entitlement – were still being litigated). Navistar referred me to the *Radio Shack* decision [1985] OLRB Rep. December 1789, at paragraph 31:

> "… The Board has an obligation to ensure compliance with the law, but litigation should not be regarded as a substitute for bargaining or bargaining power; nor should the Board's process be viewed as the means of salvaging an untenable bargaining position, or securing an otherwise unobtainable bargaining objective."

According to Navistar, it was the Union's position, not its own, that was untenable.

57. As well, Navistar pointed to Board jurisprudence where the Board has refused the very relief that the Union seeks, namely a direction to arbitration by a third party of the issue in dispute. In *Forintek Canada Corp.* [1986] OLRB Rep. April 453, 1986 CanLII 1578, the Board stated at para. 56:

> … This Board has on many occasions dealt with the proposition that it should respond to particularly serious violations of section 15 by deciding the terms of a collective agreement and imposing it on the parties. The Board has consistently held that this is not a remedy which it ought to, or indeed, can provide: *DeVilbiss (Canada) Limited, supra, The Journal Publishing Company of Ottawa Limited,* [1977] OLRB Rep. June 309; *The Daily Times,* [1978] OLRB Rep. July 604; and *Radio Shack, supra.* **The reasoning in those cases applies with equal force to an order which obliges the parties to abide by the terms of a collective agreement imposed by the some third party other than the Board.** …
>
> [emphasis added]

58. Most importantly, Navistar says that any final determination of individual ESA entitlement is dependent on the determination of the pension benefit questions – even the Union concedes that to some extent. It pointed to the lengthy arbitration award in *Kitchener Frame Ltd.*, 2009 CanLII 32696 (ON LA), ironically involving the predecessor of the Union, where issues similar to those issues now being litigated in the courts following FSCO proceedings, impacted the interpretation of paragraph 9(1)3 of O. Reg. 288/01 and whether the exception to severance pay entitlement applied because an employee had received "an actuarially unreduced pension benefit". In that arbitration, the arbitrator ultimately dismissed the union's grievances.

59. Navistar pointed out, to the extent that arbitrators have jurisdiction to interpret the severance pay entitlement, it was under section 99 of the ESA, not under an arbitration imposed pursuant to section 17 of the Act prior to the resolution of the closure (or collective) agreement. Moreover, the Union's demand for "transition payments" (that is, payments akin to severance payments for those not otherwise entitled under the ESA) had not been withdrawn and

was still "in play". To the extent that the Board would compel an outcome of the ESA severance entitlement question to be determined prior to the resolution of the Union's demand for "transition payments" was for the Board to intrude into the collective bargaining and determine an outcome in complete disregard of any theory of voluntarism – or to address inequality of bargaining power through section 17 of the Act which the Board has repeatedly said it would not do.

60. Ultimately, Navistar asserted that it could not be said that its position was either illegal or "objectively unreasonable", as found either in the *Royal Oak* or *Vale Inco* cases upon which the Union relied. Those cases were confined to their facts – very extreme employer positions which could not be in any way analogized to Navistar's position here – that it would comply with the ESA and it would agree that any disputes about ESA entitlement would go to arbitration but after the closure agreement had been concluded. More importantly, Navistar was still willing to meet and discuss this with the Union even at the last meeting of the parties on April 11, 2014. It was the Union that unilaterally left the bargaining table when Navistar refused to accede to its position about arbitration. Contrary to what occurred in either *Royal Oak* or *Vale Inco*, it was not Navistar (the employer) insisting no collective agreement could be reached unless there was union capitulation to one of the employer positions, rather it was the Union that was doing that. It was the Union that broke off negotiations and had pushed its position to impasse. Bottom line, there was nothing illegal or unreasonable about Navistar's last bargaining position. The Union could provide no authority where the Board had in fact imposed arbitration of one particular issue by a party (let alone before the negotiations had concluded). In the circumstances, Navistar strongly urged that the application be dismissed. Navistar, although not referring to them in argument, left me with copies of the following cases:

- *International Union of Operating Engineers Local 865 v. Thunder Bay Packaging Inc.*, 2004 CanLII 24641 (ON LRB);
- *Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery workers v. Formula Plastics Inc.*, 1986 CanLII 1413 (ON LRB); and
- *Ottawa Newspaper Guild, Local 205 v. Journal Publishing Company of Ottawa*, 1977 CanLII 481 (ON LRB).

Decision

61. It is not disputed by any of the parties that section 17 of the Act applies equally to the negotiation of a closure agreement as it does to the negotiation of a collective agreement.

62. Equally, I have no difficulty with accepting the Union's framework for analysis, namely, that the duty imposed by section 17 of the Act consists of two components:

(a) the duty of bargaining in good faith

(b) the duty to make every reasonable effort to make a collective agreement

as elaborated both in *Royal Oak* and *Vale Inco*.

63. Equally, I have no difficulty accepting, as the Union argued, that the latter component of the duty and on which the Union has based this application, is assessed on an objective basis as found in *Royal Oak* and *Vale Inco*. I do not believe Navistar has seriously questioned any of that.

64. To whatever extent this analysis somehow overrules or limits much of the earlier Board jurisprudence about the theory of voluntarism and that section 17 of the Act is not about redressing inequality of bargaining power, I need not address here, nor was it really addressed by the parties. I am prepared to deal with this case on the basis of the Union's framework for analysis. Even applying that analysis, I conclude that the application must be dismissed because the Union has failed to persuade me that the position of Navistar is objectively unreasonable.

65. I say this with much empathy for the plight of those employees of Navistar who are still waiting for the payment of the severance pay to which they are entitled under the ESA more than six years since they last worked at the Chatham facility (although less if measured from when the decision to permanently close the Chatham facility was announced). However, it has never been the position of Navistar that it will not pay ESA entitlements (nor has anyone suggested that there is some danger that Navistar will be unable to pay ESA-required severance pay in the future) nor has it ever been the position of Navistar that ultimately, any disputes about the ESA

entitlement would not be decided by arbitration, albeit after the closure agreement was concluded. Nor was it Navistar that, in the end, refused to continue to discuss the issue.

66. It is common ground between the parties that the determination of the pension issues still being litigated by the parties will ultimately have some impact on ESA severance pay entitlement. Even a cursory examination of the issues that have been litigated through FSCO and the FST and now await a hearing before the Divisional Court, discloses they involve determination of such questions of who actually constitutes an "on roll" employee as of the partial wind-up date of the plan, the entitlement to a special early retirement benefit (SER), questions of entitlement to a 0.9 bank pensionable service credit under the plan, and others. No party attempted to take me through the complexities of these issues and how they necessarily interrelate with paragraph 9(1)3 of O. Reg. 288/01 and the exemption from severance pay entitlements for employees who "retire[s] and receive[s] an actually unreduced pensionable benefit". However, the Union did concede that those questions would have an impact on ESA severance pay entitlement whether that impact was restricted only to the quantum of that ESA entitlement or actually impacted the actual entitlement of some individuals to ESA severance pay entitlements. What is clear is that, even if an arbitration was directed yesterday, no final determination of what every employee was entitled to in terms of ESA severance entitlement could be reached until the end of the FSCO litigation.

67. What eventually the Union urged on me was that directing this to arbitration now would be a more sensible, prudent and effective way of resolving those questions. In other words, if there were disputes about individual ESA entitlement that would have to ultimately go to arbitration (under a concluded closure agreement which would provide for arbitration), it would just make "more sense" to start that process now, particularly when employees have been awaiting payment of their statutory entitlements for over five years. Although I certainly may be of the view that may be a more practical and efficient method of proceeding, that is not the test for bargaining in bad faith nor necessarily the test for "objectively reasonable", under section 17. The fact that the Union points me to its limited influence in negotiating a closure agreement in respect of an already-closed plant without an operating collective agreement merely highlights its limited bargaining power in these circumstances. That is not a surprise but it is not something that section 17 is intended to address. Rather, that

is an assessment the Union needs to make (and is responsible for) in assessing what are attainable bargaining objectives in a situation of its drastically-reduced bargaining power. What I cannot say is that Navistar's insistence that the arbitration process (which it has agreed to) for ESA entitlements (which it does not dispute it will pay) not commence until after the closure agreement is concluded is objectively unreasonable.

68. More importantly, there is no dispute that the "transition payments" are still in play. In other words, the Union has not taken off the table (as it is entitled to do) its request for payments to former employees who are not entitled to ESA severance pay. Navistar's position has always been and remains that it will pay what it is required to pay under the ESA – but it will not pay more than that. In other words, the Union seeks to continue to negotiate for such "transition payments" (which is neither statutorily required of nor has Navistar agreed to) but wishes to begin the process for an adjudication (which, at this point, may not be an ultimately final adjudication) of what has been agreed to (or cannot be disagreed with), i.e., ESA severance pay. The Union itself has described this as a "cost" issue. Can I say that Navistar's use of the timing of ESA payments (when their quantification is still in issue) is not a legitimate bargaining chip in negotiating whether it should agree to pay transition payments? Can I say that that is not objectively reasonable? I do not think so. Rather, the inability of the Union to get Navistar to agree to immediately begin arbitrating (even when such arbitration may not yet be ultimately determinative) ESA entitlement, while continuing to claim payments for non ESA-entitled employees, appears to be a reflection of the lack of bargaining power that the Union holds in these circumstances. That is not what section 17 is intended to address. Perhaps if the issue of "transition payments" was off the table or no longer in play, Navistar's position would no longer be reasonably objective. However, that is not the situation here and that is the Union's choice.

69. That is clearly demonstrated by the fact that the Union is the party that broke off bargaining and sought to invoke section 17 of the Act. That is not to suggest in any way that in the face of violations of the Act, a party cannot seek redress before the Board but is compelled to continue bargaining when one party violates the Act. However, as long as the issue of whether Navistar should make payments in excess of the ESA requirements remains in play, at the insistence of the Union, and which Navistar, neither surprisingly nor uncommonly, has

refused, I cannot say that Navistar's position not to agree to arbitration of the ESA claims before the resolution of the pension benefit questions or before the closure agreement is reached, is objectively unreasonable.

70. The Union did not attempt to persuade me that Navistar's position was objectively unreasonable by pointing me to any "comparable standards and practises within the particular industry" or that this was a "standard" clause in an agreement as suggested in *Royal Oak*. In fact, as pointed out by Navistar, it cited to me no case where the relief it sought here was granted. Rather, the Union said that was unnecessary because the ESA itself provided for arbitration. However, a cursory review of the ESA clearly discloses that is only when the collective agreement is actually operative – obviously not the situation here. The Union equally said that there were no alternatives to arbitration available to the employees seeking their ESA severance entitlement. That may be a fair comment with respect to the Union's ill-fated court action, but is not so clear with respect to any individual claim under section 99 of the ESA (is arbitration pursuant to a collective agreement required when the collective agreement is no longer in force?). Even if section 99 does apply (and even section 99(6) permits an employee to file a complaint that will be subject to an investigation and possible order by an Employment Standards Officer when the Director of Employment Standards "considers it appropriate in the circumstances"), the Union says it has severe limitations reducing its effectiveness – e.g. a $10,000 cap – and these are particularly vulnerable employees. Leaving aside why Navistar's employees are more vulnerable than any employee seeking severance pay in the face of a plant closure (in particular, for instance, a closure as a result of a bankruptcy, etc.), it is not clear that is the case (see section 100(4) of the ESA) or would be the case in light of recent ESA amendments now in force – nor did the Union necessarily take any position on that. In any event, the vulnerability of the employees is a question for the Union to assess in determining its bargaining objectives, its bargaining strategy and its bargaining strength to attain such objectives in the circumstances.

71. Therefore, I do not think this is an appropriate case for the relief the Union seeks. I am not necessarily determining that in an appropriate set of circumstances where there is a violation of section 17 that ordering an issue to be arbitrated is beyond the jurisdiction of the Board. I need not comment on that here. Moreover, since Navistar has expressly, both at the Board and in its

last position to the Union, stated that it is prepared to continue to meet with the Union and negotiate, there is no need for any relief whatsoever. Accordingly, this application is dismissed. It is dismissed, however, without prejudice to the Union's ability to file another application, should the circumstances change and in particular, whether it can be said then that Navistar has not made every reasonable effort to make a collective agreement.

"Bernard Fishbein"
for the Board

APPENDIX A

Unifor
205 Placer Court
Legal Department
Toronto ON M2H 3H9
Attention: Lewis Gottheil, Counsel
Tel: 416-495-3750
Fax: 416-495-3786
Email: lewis.gottheil@unifor.org, wendy.white@unifor.org

Unifor Local 127
280 Merritt Avenue
Chatham ON N7M 3G1
Tel: 519-354-3450
Fax: 519-354-7460

Unifor Local 35
P.O. Box 1139
Chatham ON N7M 5L8
Fax: 519-380-9170

Gowlings Lafleur Henderson LLP
50 Queen Street N
Suite 1020
Kitchener ON N2H 6M2
Attention: John P. Illingworth
Tel: 519-575-7507
Fax: 519-571-5007
Email: john.illingworth@gowlings.com; angela.antoniades@gowlings.com

Gowlings Lafleur Henderson LLP
50 Queen Street N
Suite 1020
Kitchener ON N2H 6M2
Attention: Mr. Robert E. Salisbury
Tel: 519-575-7520
Fax: 519-571-5020
Email: rob.salisbury@gowlings.com; angela.antoniades@gowlings.com

Navistar Canada inc.
5500 North Service Road
Burlington ON L7L 6W6
Attention: Henry Van Vroenhoven, Labour Relations Manager
Tel: 905-332-2968
Fax: 905-332-2975
Email: henry.vanvroenhoven@navistar.com