
Canadian Union of Public Employees

Submission to **Employment and Social
Development Canada**

January 31, 2023

Introduction

This submission is in response to the Federal government’s call for input from stakeholders and the public on prohibiting replacement workers in federally regulated industries.

The Canadian Union of Public Employees (CUPE) is Canada’s largest union, representing 715,000 workers across the country in many sectors. We represent over 35,000 members in federally regulated sectors, including workers in airlines, communications, ports, public transit, ferries and rail, and various federal crown corporations, all of whom would benefit from federal anti-scab legislation.

CUPE welcomes the Government of Canada’s commitment to introduce legislation to prohibit the use of replacement workers when a unionized employer in a federally regulated industry has locked out employees or is in strike —a change that is long overdue. We hope that such legislation is introduced as early as possible since there is no reason to delay the enforcement of existing rights.

Our position is that while a ban on replacement workers already exists and is an essential part of fair collective bargaining, the current legislation renders it effectively unenforceable. We advocate a firmer replacement worker ban and regulatory regime. CUPE is broadly supportive of the language presented in Bill C-302, *An Act to amend the Canada Labour Code (replacement workers)*.¹ We detail our position through responses to the discussion questions below.

Discussion Questions & Responses

What are your views on the current, limited ban on replacement workers under Part I of the Code?

Competing interests and power imbalances lie fundamentally at the heart of employer-worker relationships and balancing these competing interests with an eye to redressing power imbalances has been the ethos of Canadian labour law and the collective bargaining system. The use of replacement workers, or “scabs”, undermines workers’ right to negotiate fairly by undermining the only leverage that workers have during

¹ <https://www.parl.ca/legisinfo/en/bill/44-1/c-302>

difficult disputes: the withdrawal of their labour and the disruption of normal business activities.

Allowing the use of replacement workers tilts the scale completely in favour of employers, removing any incentive for them to negotiate constructively since they can draw out disputes, be intransigent in their demands, and continue operations without interruption when workers try to pressure a negotiated agreement. The use of replacement workers, thus, undermines the right to strike by undermining the impact of a withdrawal of labour (Duffy & Johnson, 2009).

The current ban on replacement workers under Part I of the *Canada Labour Code* tacitly acknowledges that the use of replacement workers undermines the representational capacity of trade unions. The intent of a ban on replacement workers is to limit such use exclusively to situations in which unions' representational capacity is not damaged. However, the current language of the legislation is utterly ineffective in accomplishing that goal. The result is a ban that is widely seen as unenforceable (Dachis & Hebdon, 2010).

Section 95(2.1) of the *Code*² sets the onus on unions to establish a “demonstrated purpose of undermining a trade union’s representational capacity rather than the pursuit of legitimate bargaining objectives.” Breach of s.95(2.1) constitutes an unfair labour practice, and the remedy is set out in s.99(1)(b.3) as an order requiring:


“...the employer to stop using, for the duration of the dispute, the services of any person who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given and was hired or assigned after that date to perform all or part of the duties of employees in the bargaining unit on strike or locked out.”

The threshold for unions to prove that replacement workers are being used to undermine their bargaining power is so high that employers behave as if there were no ban whatsoever.

Since the 2015 ruling *Saskatchewan Federation of Labour v. Saskatchewan* (no. 35423)³, the Supreme Court has upheld the right to strike as constitutionally protected on the basis that prohibiting the right to strike “amounts to a substantial interference with the right to a meaningful process of collective bargaining.” The Committee of Experts on the Application of Conventions and Recommendations of the International

² <https://laws-lois.justice.gc.ca/eng/acts/l-2/page-11.html#h-340805>

³ <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do>



Labour Organization, described the use of replacement workers in the Canadian context as “an impediment to harmonious labour relations [that] may violate the workers right to strike.”⁴

New legislation should ensure a complete and effective ban with the objective of protecting workers’ bargaining power and rights within a fair collective bargaining system.

Do you believe that the use of replacement workers is a problem in federally regulated sectors?

CUPE’s position is that the deployment of replacement workers undermines the right to strike and that the use of replacement workers in federally regulated sectors is a recurrent problem. Employers regularly circumvent the existing ban leading to the breakdown of negotiations, extended strikes and lockouts, poor labour relations, and increased risks to health and safety.

Per ESDC’s estimates in the discussion paper, employers used scabs in about 42% of the work stoppages between January 2012 and July 2022. Andrew Sims, the Chair of the 1996 Task Force reviewing Part I of the Canada Labour Code, estimated that between 1991 and 1994 replacement workers were used in only 25% of work stoppages in the federal sector. This suggests a growing incidence of scabs in strikes and lockouts. This is an alarming trend that indicates the extent to which the use of replacement workers is widespread in federally regulated industries, even as industrial action has declined in the same period.

At the time of writing, 81 of our members at the Port de Quebec have been locked out by their employer for more than four months⁵ and are being replaced with subcontractors and managers from other ports doing the work normally assigned to their bargaining unit. Using subcontractors and managers effectively as replacement workers has allowed the employer to avoid true bargaining and has resulted in at least two workplace accidents as untrained replacement workers perform bargaining unit

⁴ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:4057885

⁵ <https://www.journaldequebec.com/2022/09/15/port-de-quebec-lock-out-decrete-a-la-societe-des-arrimeurs-de-quebec>

work⁶ The capacity for employers to use replacement workers during a lock-out creates a fundamental imbalance that completely undermines the bargaining process.

Recently, the Canada Industrial Relations Board (CIRB) finally issued a ruling which resolved a three-year strike between IBEW technicians and LTS Solutions in British Columbia.⁷ 240 workers were left out on strike for 3 years; 5 years after unionizing, these workers still had no first collective agreement. The employer's ability to use scab labour played an important role in prolonging this conflict.

In *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 CSC 2⁸ the employer was effectively able to circumvent restrictions on the use of replacement workers by providing its clients a list of contractors who would be able to provide services normally provided by the workers of Stage Local 56 for the duration of the strike. The union brought proceedings against the employer for infringement of s. 109.1(b) of Quebec's Labour Code, which prohibits employers from using the services of a person employed by another employer to perform the duties of an employee who is a member of a bargaining unit that is on strike. The Supreme Court of Canada considered that the language in the Quebec Labour Code did not prohibit this tactic from the employer. The upcoming federal legislation should ensure that this kind of loophole cannot be exploited by employers to nullify the effectiveness of a prohibition on the use of scabs.

Replacement workers have also been used in other lockouts by federally regulated employers, including Gateway Casinos in British Columbia, and Videotron in Quebec where 2,200 employees were locked out for more than 13 months.⁹ Those same workers feared another lockout in 2021 because the employer had increased its recourse to subcontractors abroad. At the same time, 900 cash conveyors at Sécur in Québec were on strike. The bargaining process was undermined by the use of replacement workers by Desjardins (owner of Sécur). During the strike, the company declared that its operational situation was almost normal, showing the extent to which workers were stripped of any bargaining power during the negotiations.¹⁰ The imbalance of power created by the hiring of replacement workers was such that the employer decided to lower its initial offer to punish workers.

⁶ <https://www.journaldequebec.com/2022/10/21/un-deuxieme-accident-au-port-de-quebec-en-marge-du-lock-out>

⁷ <https://www.cbc.ca/news/canada/british-columbia/ibew-213-labour-dispute-lts-ledcor-group-collective-agreement-1.6657994>

⁸ <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2113/index.do>

⁹ <https://www.lapresse.ca/affaires/entreprises/2021-04-29/videotron/les-employes-craignent-un-lock-out.php>

¹⁰ <https://www.ledevoir.com/economie/7490/la-greve-chez-secur-n-a-pas-cree-la-penurie-d-argent>

What are the benefits of using replacement workers in federally regulated sectors?

CUPE does not see any benefit to the use of replacement workers. Their use lengthens strikes and lockouts, causes labour relations to deteriorate and poses risks to health and safety – as detailed below.


What are the downsides of using replacement workers in federally regulated sectors?

When Quebec first enacted its ban on replacement workers in 1977, lawyer Pierre-Marc Johnson, Minister of Labour at the time, remarked that “Where there are scabs there is violence.”¹¹ This observation has remained true and is one of the strongest cases for a ban on replacement workers in federally regulated sectors. One leading study from the United States shows that the use of replacement workers not only increased the length of strikes but was associated with a higher incidence of violence. Replacement workers were present in 46% of strikes that involved major violence, far above their deployment as a percentage of overall strikes (14%) during the period from 1981-1998 (Cramton & Tracy, 1998). In the view of Andrew Sims, Chair of the 1996 Task Force reviewing Part I of the *Canada Labour Code*, “Experience shows that violence most often occurs when replacement workers and strikers come into contact with each other in a heated labour dispute.” In the 21st century, three members of the Canadian Autoworkers Union (CAW), for example, were hospitalized when a scab employed by a professional strikebreaking company intentionally drove his van through the picket (Unifor, 2021).

During many strikes and lockouts, police officers, special constables, and even troops are deployed to facilitate the movement of scabs across picket lines, further inflaming tensions and raising the spectre of violence. Historically, inciting violence in this way has been used to the benefit of employers to provoke authorities to intervene against the union, sour public opinion about an ongoing strike, and reinforce media tropes about unions being violent (Zwelling, 1972).

CUPE’s own experience of the Air Ontario strike of 1997 shows that the use of replacement workers is actively detrimental to harmonious negotiations and to workplace safety. When 146 members of CUPE’s Airline Division were replaced by 85 replacement workers with limited training and experience, this led to a hostile and potentially unsafe work environment that put workers and passengers at serious risk.

¹¹ <https://www.nytimes.com/1977/07/31/archives/quebec-government-is-proposing-a-ban-on-use-of-strikebreakers.html>



Airline pilots were reluctant to work with replacement workers which also led to delays and a tense work environment (Unifor, 2021; Singh et al., 2005).

We also reiterate the two accidents at the ongoing Port de Quebec lockout as a result of untrained replacement workers operating the port, one of them having badly damaged a gantry crane as well as the ship's navigation and telecommunications instruments¹².

How would a prohibition on replacement workers affect your sector?

A ban on replacement workers would rebalance the playing field for workers, making them able to exercise their rights more effectively.

Some argue that prohibiting replacement workers results in too strong of a bent towards workers, increasing the frequency of strikes and lockouts in the provinces where such bans exist (Gunderson, 2008; Landeo and Nikitin, 2005; C.D. Howe Institute, 2010; Tu, 2011). However, the relatively limited experience with bans on replacement workers mean that these studies have limited data on which to base this claim. When Budd (1996), for example, controlled for province-specific effects, he found no statistically significant impact of replacement worker bans on strike incidence and duration.

Policymakers should consider that the frequency and scale of strikes and lockouts in Canada have been in general decline since the 1970s across all sectors, including federally regulated sectors. The number of strikes and lockouts each year in the federal sector is a fraction of the numbers reached even in the 1980s. Across Canada, there are approximately 150 strikes and lockouts each year, and the level of work absences due to strikes and lockouts is at historically low levels. There has been no statistically significant impact of replacement worker bans on this trend.

One study, using a large data set from 1978 to 2003 to examine the impact of anti-scab legislation in Quebec, B.C. and Ontario found that there was little to no evidence that there was any effect on days lost to work stoppages once anti-scab legislation was introduced, both in the first two years following its implementation and after it had been in effect for more than two years (Unifor, 2021; Duffy & Johnson, 2009). This suggests that once workers' bargaining power is restored through a replacement worker ban, there may be a slight uptick in the incidence of work stoppages (particularly in the first two years after the legislation is introduced) but the length of the average labour dispute

¹² <https://www.tvanouvelles.ca/2022/10/21/lock-out-au-port-de-quebec--des-accidents-denonces/>

shortens significantly so that there is no overall increase in the number of days lost (Duffy & Johnson, 2009).

In the federal jurisdiction, the vast majority (95%) of collective bargaining rounds to renew collective agreements are completed successfully without any work stoppage. This fact has been stable for years, and there is no indication that the introduction of a replacement worker ban would dramatically alter this tendency.

Should people have the right to refuse to do the work of employees who are on strike or locked out, even if the ban on replacement workers does not apply to them?

The prohibition on the use of replacement workers should apply to all workers. Workers of the same employer in a different unit should be included to dissuade employers from using any coercion to make workers accept bargaining unit work. If some groups of workers are not covered by a ban, employers will be tempted to use threats and punish workers (especially those who are non-unionized). In such a case, it is important that the legislation at the very least ensure the right of those workers to refuse to perform the work of bargaining unit.

No-cross clauses are a common component of many collective agreements, and the right to refuse unsafe work – which replacement work often is – is a well-established right. Amendments to the Code around replacement workers should add clarity around this by explicitly granting workers the right to refuse to replace employees who are on strike or locked out as a supplemental protection.

Amendments to the Code should protect workers from pressure to act as replacement workers, and similar to the BC *Labour Code*,¹³ explicitly prohibit an employer from:

- a) refusing to employ or continue to employ a person,
- b) threatening to dismiss a person or otherwise threaten a person,
- c) discriminating against a person in regard to employment or a term or condition of employment, or;
- d) intimidating, coercing, or imposing a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or locked out. Doing so should be considered an unfair labour practice.

¹³ https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96244_01#section68

Should unionized employees be prohibited from working for the employer if their bargaining unit is on strike or locked out?

Yes, and employers should be prohibited from pressuring workers from crossing a picket line with similar language as above.

Workers in a union never take strike action without the agreement of an overwhelming majority. This is because strikes require significant cohesion and resilience. Yet, as with all democratic decisions, a minority of workers may disagree. Allowing that minority to ignore the decision of the majority and cross the line undermines the nature of the democratic process. Even worse, if workers are not clearly prohibited from crossing the line, employers may try to force them to do so with unfair incentives and even threats.

There is no universal definition of a replacement worker. Which types of workers do you think a prohibition on replacement workers should apply to?

A replacement worker should be understood as anyone, or any entity, who performs all or part of the duties of an employee in the bargaining unit on strike or lockout i.e., work that, but for the strike or lockout, would have been performed by a bargaining unit member who is striking or locked out.

This definition should include, for example:

- a) Any person hired or contractor engaged after the “trigger date” of when notice to bargain is given or when deemed notice is in effect (where notice to bargain is not given, notice to bargain should be considered 90 days before expiry), up until the day on which a collective agreement or arbitral award comes into force
- b) A contractor or a person employed by another employer who performs the duties of an employee on strike or lockout, and;
- c) another employee of the employer who ordinarily works at another place of operations, in a different classification, or is outside of the bargaining unit on strike or lockout.

These restrictions should extend to teleworking and any technological means to replace workers during a strike or lockout. Evidence shows that teleworking or remote working is becoming increasingly popular among both employers and employees,¹⁴ and about four in ten (38.9%) jobs in Canada can be plausibly carried out from home.¹⁵

¹⁴ <https://www150.statcan.gc.ca/n1/pub/45-28-0001/2021001/article/00012-eng.htm>

¹⁵ <https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00026-eng.htm>

Unfortunately, this also creates new opportunities for employers to circumnavigate bans on replacement workers.

Evidence from Quebec shows that regulations which only restrict replacement workers at the employers' "establishment" or place of operations allow employers to use remote replacement workers instead, thus violating the ban (QCCA [2011] no. 1638).¹⁶ The *Journal de Quebec* was able to lock out its workers for almost sixteen months¹⁷ and continue to operate by exploiting a loophole in the language of Quebec's replacement worker ban and employing replacement workers remotely.¹⁸ A subsequent parliamentary review of Quebec's replacement worker legislation highlighted this as a key loophole that needed to be closed in the legislation.¹⁹

What types of workers should be allowed to do the work of striking or locked out employees, if any?

No one should perform the work of bargaining unit employees who are on strike or lockout. Any work that is required for critical maintenance or the provision of essential services should be carried out by workers in the relevant bargaining unit according to the terms of pre-existing, freely negotiated *maintenance of activities agreements*. This is already well regulated under federal legislation. Our position is detailed further in the next response.

Do you think there should be any exceptions to a prohibition on replacement workers? Should an employer be allowed to use replacement workers in very specific situations (for example, to prevent destruction or damage to property)?


The current maintenance of activities language contained in the *Canada Labour Code* – the duty to continue the supply of services, operation of facilities, or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public, already cover any situations where continuous work might be required during a work stoppage. Thus, CUPE's position is that the current maintenance of activities process should be preserved or improved based on our recommendations to the maintenance of activities consultation. Freely negotiated agreements of this type

¹⁶ <https://www.canlii.org/fr/qc/qccs/doc/2009/2009qccs4168/2009qccs4168.html>

¹⁷ <https://scfp.qc.ca/lock-out-au-journal-de-quebec-dixieme-anniversaire-de-la-parution-de-mediain-quebec/>

¹⁸ <https://www.ledevoir.com/culture/medias/546226/il-y-a-10-ans-le-lockout-au-journal-de-montreal-etait-decrete>

¹⁹ (Commission de l'économie et du travail, 2011).



should be the only mechanism by which work which would otherwise be struck should be performed during a strike or lockout.

What do you think is the most effective way to make sure that employers respect a ban on replacement workers? How should it be enforced?

Unlawful use of replacement workers, which in our interpretation should include every instance of replacement workers should be considered an offence and significant financial penalties for each day or part of a day during which replacement workers are deployed unlawfully should be added to Part 4 of the *Code*.

The use of replacement workers should be included in the list of unfair labour practices for which the CIRB may issue orders and interim orders.

Enforcement mechanisms should also include investigations with the express authority to enter the workplace.

Conclusion

The government's commitment to banning replacement workers in federally regulated sectors is a welcome move by CUPE for all the reasons above. An effective ban on replacement workers will safeguard the bargaining power of workers in the federal sector, promote more effective and good-faith bargaining, and protect the health and safety of workers and the public. We hope that these consultations and the government's implementation of a replacement worker ban prioritize the promotion and protection of workers' right to free and fair collective bargaining.

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