

Prohibiting replacement workers in federally regulated industries – Discussion Paper

Unifors submission to Employment and Social Development Canada

January 2023



Prohibiting replacement workers in federally regulated industries

Thank you for the opportunity to provide feedback on the ESDC discussion paper, “Prohibiting replacement workers in federally regulated industries.”

Unifor is Canada’s largest union in the private sector representing 315,000 workers in every major area of the economy. The union advocates for all working people and their rights, fights for equality and social justice in Canada and abroad, and strives to create progressive change for a better Canada. The work to review and improve labour standards in the federally regulated private sector falls directly into this mandate.

Unifor is also Canada’s largest union in the federally regulated private sector, representing more than 66,000 workers in federally regulated sectors including transportation, media, telecommunications, and financial services.

In May 2021, Unifor released a discussion paper called [Fairness on the line: The case for anti-scab legislation in Canada](#). [FR: [Le bien-fondé d’une loi anti-briseurs de grève au Canada](#)] In that paper, we laid out the case that strong and fair anti-scab legislation that bans the use of scabs during both legal strikes and lockouts will help lead to shorter labour disputes, safer workplaces, and less acrimonious and conflict-ridden picket lines.

In June 2021, we released a supplement to *Fairness on the Line*, titled [It’s Time for a Real Federal Ban on Scabs](#). [FR: [Il est temps d’imposer une véritable interdiction fédérale sur l’utilisation des briseurs de grève](#)] In this supplement, we provide an assessment of the existing language at the federal level, found in Part I of the Canada Labour Code, and explore why it fails to offer any meaningful restrictions on the deployment of scabs in the federally regulated private sector (FRPS).

When we released *Fairness on the Line* in May 2021, Unifor also launched a public campaign in support of strong and fair anti-scab legislation – at the federal and provincial level – that bans the use of scabs during both legal strikes and lockouts. Since then, our Regional Councils have unanimously endorsed the campaign, and a Resolution in support of the anti-scab legislation campaign passed unanimously at our National Constitutional Convention in August 2022.

Unifor is grateful for the opportunity to participate in the ongoing consultation process regarding the proposed federal anti-scab legislation, and we respectfully offer the following feedback. As always, we remain available for comment and discussion, and look forward to continuing to connect with ESDC on this important issue.

What is the law now?

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

Unifor’s position on this question is laid out in detail in the supplement to *Fairness on the Line*, titled [It’s Time for a Real Federal Ban on Scabs](#). [FR: [Il est temps d’imposer une véritable interdiction fédérale sur l’utilisation des briseurs de grève](#)] It is worth looking at

the actual text of the section of the Code as it relates to replacement workers. Part 1 Section 94 (2.1) of Part I of the Canada Labour Code states the following:

“No employer or person acting on behalf of an employer shall use, **for the demonstrated purpose of undermining a trade union’s representational capacity rather than the pursuit of legitimate bargaining objectives**, the services of a 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 an employee in the bargaining unit on strike or locked out.” (emphasis added)

As we note in our research supplement, even a cursory reading reveals that this passage in the Code does not prohibit the deployment of scabs. In fact, it places the impossible task upon a union of proving that the employer is using scabs to undermine the union’s representational capacity. In effect, employers in federally regulated sectors are able to use scabs as long as they make hollow gestures to indicate that they believe in the bargaining process.

The fundamental problem with Part I of the Code’s approach to the use of scabs is that it mistakenly suggests replacement workers are only a problem when they are used by employers to undermine a union’s representational capacity. This is patently false and ignores the primary reason for resorting to the use of scabs, which is a strategy that erodes the legitimacy of the bargaining process itself: scabs are deployed to undermine a union’s bargaining power.

In other words, there is a contradiction at the heart of the Canada Labour Code’s provision on replacement workers. The passage in question allows employers to use scabs as long as they pursue legitimate bargaining objectives, but the very deployment of scabs delegitimizes the bargaining process and allows the employer to circumvent it entirely. Please refer to our research supplement, hyperlinked above, our full position on this question.

Use of replacement workers in the federal jurisdiction

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

Unifor’s position is that the deployment of scabs during strikes and lockouts, as well as the *threat* of the deployment of scabs, is a serious problem in all sectors, including in the FRPS. We discuss the negative impacts that occur when scabs are deployed during strikes and lockouts elsewhere in our submission, but we would like to use our answer to this question to specifically discuss the use of the *threat* of scabs by employers in the FRPS.

This past summer, nearly 6,000 Unifor members comprised of the Bell Clerical and Aliant groups across six provinces – Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador – were engaged in negotiations with the company. On July 21, 2022, Reno Vaillancourt, Senior Vice President, Labour

Relations at Bell, sent an email to unionized Bell clerical employees asking for people to declare their intentions to continue working during a potential strike.

In a follow-up memo, with the subject line, “Reminder: Choosing to work during potential strike,” Mr. Vaillancourt said, “If you decide to work during a strike, you will work exclusively from home and your pay and conditions will remain the same, with the exception that union dues would not be deducted.”

Unifor responded by filing an Unfair Labour Practice complaint with the Canada Industrial Relations Board (CIRB) and alerting the federal government to Bell’s repeated attempts to undermine workers’ bargaining power with requests for scab labour. In our letter to the Honourable Seamus O’Regan, Minister of Labour, we noted, “This email [from Vaillancourt] is nothing less than an open invitation for unionized Bell clerical workers to act as scabs during a potential strike, an invitation we see as an offensive and unacceptable form of union busting.”

It is Unifor’s position that when a major employer in the FRPS encourages scabbing from its unionized workforce – *even before an actual labour dispute is underway* – it is also pre-emptively notifying its employees that the company is considering deploying scabs to undermine the union’s position at the bargaining table. The Bell executive’s email and memo constitute a not-so-subtle threat, and we believe that Bell’s actions perfectly demonstrate the urgent need for strong anti-scab legislation at the federal level.

At this point it is worth noting Unifor’s concern around the word “use” in the context of the employers’ employment of scabs during labour disputes. In Unifor’s experience, the term “use” is insufficient for the purposes of the new legislation. The Supreme Court has a narrow interpretation of that exact word in the context of anti-scab legislation. If the employer is not making a positive act in using a replacement worker, the Supreme Court has found it is not in violation of existing anti-scab legislation.¹ This represents an enormous loophole that has been used countless times in Quebec to have sub-contractor or sub-sub-contractors do the job of union members.

It would be preferable to add a more inclusive definition in the new legislation, spelling out clearly that the prohibition covers “the services of or the product of the work of” replacement workers. See below for a discussion of the notion of “struck work” that will add more nuance to this point.

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

Unifor does not believe there are any benefits of using replacement workers in federally regulated sectors, though we acknowledge some employers in the FRPS may not agree with this position.

As we recommended in *Fairness on the Line*, Unifor believes that strong and fair anti-scab legislation for the FRPS should include exemptions that allow for the very limited use of temporary workers, only to undertake essential maintenance work to protect the integrity and safety of the workplace, but not to contribute to the ongoing, normal operation of the workplace. Essential services provisions already exist in the Code and

the prevention of serious danger to the safety or health of the public is already covered by those provisions.

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

In our experience, and based on the research conducted for our discussion paper, *Fairness on the Line*, the use of scabs during strikes and lockouts:

- Undermines the collective power of workers;
- Unnecessarily prolongs labour disputes;
- Removes the essential power that the withdrawal of labour is supposed to give workers to help end a dispute, that is, the ability to apply economic pressure;
- Contributes to higher-conflict picket lines;
- Jeopardizes workplace safety;
- De-stabilizes normalized labour relations between workers and their employers; and
- Removes the employer incentive to negotiate and settle fair contracts.

In *Fairness on the Line*, we analyzed our own internal data regarding Unifor labour disputes between 2013 and 2020, and we found that:

- Labour disputes occurred in approximately 2.1% of Unifor contract negotiations, a figure that tracks with other studies on the subject.
- The number of disputes where scabs are used is relatively low (less than 10% of labour disputes), but the impact of the use of scabs is high (in terms of the negative impacts listed above).
- The three longest labour disputes in Unifor's history involved the use of scabs.
- The average length of a dispute was six times longer when the employer used scabs, compared to when scabs were not involved.

5. How would a prohibition on replacement workers affect your sector?

Unifor represents workers in more than twenty sectors of the Canadian economy, including a half-dozen or more in the FRPS. Unifor believes that strong and fair anti-scab legislation would lead to shorter labour disputes, less conflict on the picket line, and safer workplaces. Most importantly, it is Unifor's position that a prohibition on replacement workers would create an incentive for employers and unions to settle labour disputes at the bargaining table

Replacement workers in other jurisdictions

6. 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?

Yes, workers, including managers, supervisors, excluded employees, employees from other locations and contractors, should 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. That said, we recognize that workers covered by a collective agreement that is in force are usually bound by a ‘No Strike’ clause of some sort, and we respect that reality.

Giving managers, supervisors and other excluded people the right to refuse to do the work of striking or locked out employees would help the work climate in a return to work scenario because the divide between managers and employees would be far less if managers didn’t do the work of employees. If one of the goals of creating strong anti-scab legislation in the FRPS is to promote normalized labour relations, giving managers, supervisors and other excluded people the right to refuse to do the work of striking or locked out employees would help de-escalate tension in a post-dispute workplace. However, we would like to note that strong and fair anti-scab legislation would render this question moot, since with that legislation in place, an employer in the FRPS would be prohibited from employing scabs to do the work of employees who are on strike or locked out.

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

Yes, bargaining unit members should be prohibited from working for the employer if their bargaining unit is on strike or locked out, an approach that would remove any chance of picket line crossing and the associated antagonism and potential violence that comes with it. As we explore in *Fairness on the Line*, beyond our own anecdotal experience, at least one study has shown that the use of scabs is associated with a higher incidence of violence on the picket line.

However, like Question 6 above, this question would be moot with strong and fair anti-scab legislation in place. It would not be necessary to prohibit unionized employees from working for the employer if their bargaining unit is on strike or locked out if *employers were prohibited from employing scabs in the first place*.

The framing of the question makes it sound like the onus for the employment of scabs is on individual employees, when in fact, it is the employers who seek out, encourage, invite, hire and employ replacement workers (see the Bell incident above as an example).

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

Unifor’s position is that, in principle, the focus of the revised legislation should be on the work itself and not the person or entity doing it. This focus represents a shift in the

philosophical approach to the question of the definition of a replacement worker, with an emphasis on the notion of “struck work.” If the legislation focuses too much on the “who” rather than the “what,” i.e. the work itself, it will open up loopholes with regard to contractors, sub-contractors, volunteers, etc. that could be ripe for exploitation by employers.

That said, in *Fairness on the Line* note’s that certain international studies on scabs, “distinguish between so-called ‘internal’ scabs – i.e. those who are existing employees of the employer at the time negotiations commence – and ‘external’ scabs – those hired specifically to replace striking or locked out bargaining unit members.”ⁱⁱ

With the caveat noted above – that the legislation should focus on what kinds of work should not continue to take place, rather than “who” could be prohibited from doing that work – Unifor’s position is that a prohibition on replacement workers should apply to both **external scabs** (those hired specifically to replace striking or locked out bargaining unit members), as well as **internal scabs** (those hired after notice to bargain is served, members of the bargaining unit who might otherwise cross the picket line, or any other employees at any of the employer’s other establishments, including supervisors and managers). The inclusion of supervisors and managers on this list of prohibited workers is critical: this loophole has proven deeply problematic in the two provincial jurisdictions with anti-scab laws on the books, Quebec and British Columbia.

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

10. 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)?

These two questions speak to the same concerns, so they will be answered together. Unifor’s position is that strong and fair anti-scab legislation for the FRPS could include exemptions that allow for the very limited use of temporary workers, only to undertake essential maintenance work to protect the integrity and safety of the workplace or prevent serious environmental damage, but not to contribute to the ongoing, normal operation of the workplace.

We recognize the exemption as proposed represents a potential loophole that could be exploited by employers, and there will be a need to tightly define and regulate what constitutes “essential maintenance” and related terms and concepts.

11. 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?

Unifor’s position is that the most effective way to make sure that employers respect a ban on replacement workers is to include significant financial penalties for employers who defy the anti-scab legislation. The CIRB should be empowered to impose significant financial penalties when employers are found to have disobeyed the anti-scab provisions of the Code.

In addition, the revised legislation should establish an investigator role whose powers mimic those of the Head in the health and safety provisions of the Code. (a. 140 – 145). As it stands now, the process of going to the Board to have a determination on a violation takes far too long to be useful. In fact, we often see decisions rendered *after* the end of a conflict. The investigator’s report should be seen as prima facie evidence in front of the Board and admissible as proof, and they must have the powers of the Head in a. 145 and, more specifically, in immediately ending a contravention.

Debate

12. What do you think the impact of a prohibition on replacement workers would be:

- on work stoppages?
- on labour relations?
- on the economy?

Fairness on the Line observes that, “[w]ithin the field of labour studies, few studies examine the impact of replacement workers - or anti-scab legislation - on the frequency and duration of strikes and lockouts, with most of the examples drawing on experiences in the United States and Canada.”

A 2009 study by Duffy and Johnson found that the *incidence* of work stoppages increased in the first two years after anti-scab legislation was introduced, but in contrast to earlier studies, there was a significant and substantial reduction in the *duration* of the work stoppages.ⁱⁱⁱ As we observe in our discussion paper,

This is a key finding. It suggests that once workers’ bargaining power is restored through anti-scab legislation, there may be a slight uptick in the incidence of work stoppages (particularly in the first two years after legislation is introduced) but the length of the average labour dispute shortens significantly so that there is no overall increase in the number of days lost.

In terms of labour relations impacts, Unifor believes a full ban on the deployment of scabs at the federal level will lead to improved labour relations in the FRPS. It is the union’s position that labour disputes should be resolved at the bargaining table, and it is always preferable to reach a fair deal during negotiations. When employers make use of replacement workers, they lose the incentive to reach a settlement at the bargaining table, dragging out the duration of the dispute.

As noted above, the three longest disputes in Unifor’s history involved the use of scabs, a fact that speaks for itself when considering what effect scabs can have on the duration of labour disputes, and on the overall state of labour relations between workers and their employers.

Unifor would like to reiterate that between 2013 and 2020, approximately 2% of the union’s contract negotiations for *all sectors* ended in a labour dispute, a figure that tracks with other studies on the subject. Further, of those negotiations that led to active labour disputes, Unifor employers employed scab labour 9.2% of the time. However, this

rate of incidence doesn't tell the whole story: while the incidence rate is low, the level of impact is high, in terms of the duration of the dispute, and the general impact on labour relations.

13. Are there any other impacts not discussed in this paper that should be examined?

The ESDC discussion paper does not make mention of the issue of health and safety during labour disputes, a key concern for Unifor and other unions in Canada. Unifor believes that the employment of scabs during strikes and lockouts jeopardizes workplace safety, as well as the safety of the general public, and contributes to higher-conflict picket lines.

Fairness on the Line discusses the long-term physical and mental effects scab use has on workers, which can include, "a decline in morale, fractured workplace relationships, mental and physical exhaustion and breakdown (particularly when scabs enable drawn-out lockouts or strikes), or outright violence that injures and even kills workers."

In terms of potential health and safety risks for the general public, one US example took place in the mid-1990s, when the production of defective Bridgestone/Firestone tires coincided with a labour dispute involving USW workers at a plant in Decatur, IL, in which a high number of scabs were deployed by the employer.^{iv} As noted in a 2002 study, "More than one of every 2,000 tires produced in the Decatur, IL plant in 1994 suffered a tread separation by 2000. Firestone tires have been linked to 271 fatalities and more than 800 injuries according to NHTSA data."

Based on Unifor's internal research and extensive interviews with Unifor members, Unifor believes that the presence of scabs vastly increases the level of conflict on picket lines, and we would be interested for the ESDC and other stakeholders to weigh in on this subject.

At the same time, Unifor has deep concerns over the deployment of scabs in our workplaces during labour disputes. Unifor members work in facilities that involve high levels of workplace risk in terms health and safety, including mines, airports, oil refineries and manufacturing facilities. They work with machinery and equipment, and handle and produce chemicals and other dangerous substances. We have no way of knowing what skills, training, experience and qualifications replacement workers might have (or lack), and the return to work process following the resolution of a labour dispute can often reveal serious workplace health and safety issues.

In addition, beyond the fractured workplace dynamics mentioned above, there are sometimes community-based consequences arising from the deployment of scabs. In smaller communities, long labour disputes involving scabs have led to lasting acrimonious relationships and community unrest. In 1949, 5,000 miners in Asbestos and Thetford, QC began a wildcat strike against their US-based employer, in a fight for better wages and working conditions. It is said that generations after the dispute, some families of striking workers and scabs still don't speak to each other.

Conclusion

Strong and fair anti-scab legislation that bans the use of scabs during both legal strikes and lockouts will help lead to shorter labour disputes, safer workplaces, and less acrimonious and conflict-ridden picket lines. Labour disputes should be resolved at the bargaining table, but when employers make use of replacement workers, they lose the incentive to reach a negotiated settlement, dragging out the duration of the dispute.

This much-needed update to the Canada Labour Code will help promote normalized labour relations between employers and workers in federally-regulated sectors. Unifor looks forward to continuing to work with ESDC as the consultation process moves forward, informing the development of urgently-needed legislation.

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ⁱ I.A.T.S.E., *Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2 (CanLII), [2004] 1 SCR 43

ⁱⁱ See for example López, Sergio L. (2015). *La Problemática de la Sustitución de Trabajadores Huelguistas*. Retrieved from https://ddd.uab.cat/pub/tfg/2015/133241/TFG_sleallopez.pdf

ⁱⁱⁱ Duffy, P., and Johnson, S. (2009). 'The Impact of Anti-Temporary Replacement Legislation on Work Stoppages: Empirical Evidence from Canada.' *Canadian Public Policy*, 35(1): 99–120

^{iv} Alan B. Krueger & Alexandre Mas, 2004. "Strikes, Scabs, and Tread Separations: Labor Strife and the Production of Defective Bridgestone/Firestone Tires," *Journal of Political Economy*, University of Chicago Press, vol. 112(2), pages 253-289, April.