ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

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December 2005

New Rules of Procedure

The Board's new Rules of Procedure came into force on December 1, 2005. You may access a copy of the new Rules, updated Forms and Information Bulletins on the Board's website at <http://www.olrb.gov.on. ca>.

Holiday Season Board Schedule

Please see the attached notices to the community.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in November of this year. These decisions will appear in the November/December issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Certification – Construction Industry – Reconsideration – Status – The applicant sought reconsideration of a decision denying it the right to make submissions regarding the status of one employee – The Board denied the request for reconsideration, reasoning that (1) s. 128.1(3) precluded the possibility of providing additional information after the two-day response time had passed; (2) there would be prejudice to the trade union; and (3) one could conclude that the employer was attempting to gerrymander the list – Request for reconsideration denied

AVES & SHAW LIMITED; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1824; File Nos. 1318-05-R; 1319-05-U; Dated November 1, 2005; Panel: David A. McKee (4 pages)

Certification – Construction Industry – Membership Evidence – The responding party challenged the membership cards filed by the applicant that were more than six months old or that were less than six months old but were dated prior to June 13, 2005 (the date the provisions for card-based certification came into force) – The responding party sought rejection of the stale cards and argued that those individuals who signed cards prior to June 13, 2005 did so in anticipation of a representation vote (the status quo before the amendments to the Act) – The Board held that if the applicant could establish more than 55% support for its bargaining unit based in part on cards that were more than six months old the Board would subject to the parties' other arguments, order a representation vote to ascertain the employees' true contemporaneous wishes – As for the cards signed prior to June 13, 2005, the Board held the employees were enlisting the trade union to represent them in collective bargaining, no matter how that goal was achieved – Matter continues

FOUR SEASONS SITE DEVELOPMENT LTD.; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; File Nos. 1140-05-R; 1830-05-U; Dated November 10, 2005; Panel: Harry Freedman (10 pages)

Unfair Labour Practice – On the eve of an anticipated work stoppage, the employer initiated a process to elevate four positions and their incumbents from the bargaining unit to managerial status – The Society alleged this action violated sections 70 and 72 of the Act – The Board held that only employer conduct that more than incidentally affects a trade union constitutes improper interference contrary to s. 70 on either a non-motive approach or, in the absence of direct affirmative evidence of anti-union animus, a motive approach – The Board found that the employer had an existing plan to re-rate the positions and a *bona fide* belief for the necessity of doing so – Although the timing of the re-rating arguably improved the employer's ability to weather the work stoppage, there was no breach of the Act – Similarly, the promotions were not intended to remove the incumbents' collective agreement protections, so there was no violation of s. 72 – Application dismissed

HYDRO ONE INC.; RE THE SOCIETY OF ENERGY PROFESSIONALS; File No. 0181-05-U; Dated November 7, 2005; Panel: Ian Anderson (25 pages)

Construction Industry – Jurisdictional Dispute – The Board was asked to determine whether a jurisdictional dispute may be filed in circumstances where employees who are not represented by a trade union are performing work and a trade union representing other employees of a different employer (who is the party who let the contract to the contractor performing the work) files a grievance relating to the same work – The Board canvassed the history of jurisdictional disputes in Ontario and concluded that their root emanates from conflicting legal rights to claim certain work – In the instant case, the unrepresented employees had no identifiable legal right to the work they were performing (their interest, and their employer's, was purely commercial) – The Board exercised its discretion not to inquire into the dispute, since to do so would constitute an erosion or limitation of the trade union's rights under its collective agreement in the context of its own grievances – Application dismissed

KENAIDAN CONTRACTING LTD.; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA; RE CITY OF TORONTO; YAN KUTOVSKY, TIMOTHY SPENCER, JEFF MENEZES, LUKE WALSH, MIROSLAW LUBASZEWSKI, ANDREI BALACHOV, GASPAR DE SOUSA, MARCEL GAGNON, ED KOLLEE, GLEN MACNEIL, SILVIO MARINELLA, WAYNE MARTIN, JEROME PITAWANAKWAT, COLIN RIDEOUT, JAKUB SCHABOWSKI, ANDY THOMSON, TED USNARSKI AND JANUSZ ZIEBA; File No. 2130-05-JD; Dated November 15, 2005; Panel: David A. McKee (15 pages)

Certification – Construction Industry – Practice and Procedure – The applicant purported to serve the responding party with this application for certification by having a courier affix a delivery notice to the responding party's door and leave the application materials with the representative of another company located at a different (next-door) municipal address – The Board held that "delivery" of the application was effected only when the responding party actually received the applicant's material; the responding party's response time could only be calculated after actual delivery – Matter continues

KOOL FAB MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; File No. 2611-05-R; Dated November 16, 2005; Panel: Susan Serena (3 pages)

Discharge – Interim Relief – Practice and Procedure – Unfair Labour Practice – The Board was asked to reinstate an employee who had allegedly been discharged for union organizing activity (pending the ultimate resolution of the unfair labour practice) – The Board described its consultation process in interim relief applications, then applied the provisions of subsections 98(2) and (3) to the facts of the instant case – The Board found that the discharged employee had advanced systematically in the workplace; whatever discipline was meted out to him was minor (written), and no corrective measures were taken – The Board was unable to conclude there was no relation between the termination and the employee's support of the union's campaign – Application granted, reinstatement ordered

METRICAN STAMPING CO. INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION ("UNITED STEELWORKERS"); File No. 2714-05-M; Dated November 23, 2005; Panel: Peter F. Chauvin (11 pages)

Construction Industry Grievance – Discharge – The union grieved the termination of two employees for time theft – The Board had to determine the employer's right to engage in video surveillance of the employees (and the admissibility of such evidence) and, if they were guilty of time theft, the appropriateness of the penalty imposed – The Board made an assumption that the exercise of management rights under the collective agreement was subject to an obligation to be reasonable: there must be a legitimate business reason for the surveillance and the taping must not unduly intrude on the employee's private life – The evidence presented showed a pattern of less than stellar diligence in the employees' performance of their duties – Given the importance of elevator mechanics' jobs for public safety, discharge was the appropriate penalty notwithstanding each employee's long, unblemished record – Grievances dismissed

OTIS CANADA INC.; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50; File No. 2170-04-G; Dated November 16, 2005; Panel: Mary Ellen Cummings (5 pages)

Certification – Construction Industry – Practice and Procedure – The applicant applied for card-based certification under s. 128.1 of the Act (and provided membership evidence), then subsequently sought to convert the application to one filed under s. 8 "out of an abundance of caution" – The Board refused to allow the conversion for two reasons: first, the unfair labour practices on which the applicant was relying occurred *after* the date of application, and could not have had any effect on the membership evidence when the application was filed; secondly, the applicant failed to demonstrate a need for the conversion based on the relative merits of sections 8 and 128.1, nor any unfairness to the applicant if leave were not granted - Card-based certification continues to be processed

SARNIA PAVING STONE LIMITED; LIUNA, LOCAL 1089; File No. 1572-05-R; Dated November 28, 2005; Panel: Corinne F. Murray (5 pages)

Employment Standards – The employer applied for review of an employment standards officer's order to pay – In remitting the required payment to perfect the appeal, the applicant calculated the net amount potentially owing to the employee, and unilaterally reduced the administration fee to reflect a percentage of the new figure – The Board held that the administration fee is a statutory requirement and the employer is precluded from reducing it when making payment to the Director of Employment Standards in trust – Board directs the employer to remit the missing funds

SEARS CANADA INC.; JOSEE POIRIER AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2077-05-ES; Dated November 14, 2005; Panel: Kelly Waddingham (1 page)

Health and Safety – Timeliness – Reconsideration – In this reconsideration of a dismissal for delay of a s. 61 appeal, the Board considered its customary practice of treating the date of issuance of the inspector's order as the date of the "making of the order" to calculate the timeliness of the appeal – The applicant, in its request for reconsideration, asserted that he could not appeal the order until he learned of it since he had been terminated the day before the order was issued, and did not receive notice of it until two months later – The Board suggested that this case may be an exception to its general rule that issuance constitutes the making of the order – Matter set down for hearing on timeliness of appeal and on merits – Reconsideration granted, Board's original decision rescinded

WAL-MART AND CHRISTOPHER BOCCINFUSO, INSPECTOR; RE PETER L. PETRAN; File No. 1806-05-HS; Dated November 10, 2005; Panel: Jack L. Slaughter (2 pages)

Court Proceedings

Employment Standards – Judicial Review – The applicant sought review of two decisions of the Board upholding rulings by employment standards officers who rejected his claims for overtime and other relief against two different employers – The Court held the Board's decisions were amply reasonable in all the circumstances – Application dismissed

KABALA, CHRISTOPHER; RE THE ATTORNEY GENERAL OF ONTARIO, CLARE LEWIS, Q.C., THE OMBUDSMAN ONTARIO, KEITH C. NORTON, Q.C., CHIEF COMMISSIONER, ONTARIO HUMAN RIGHTS COMMISSION, ROSE DE STAFANO, INVESTIGATOR ONTARIO HUMAN RIGHTS COMMISSION, THE ONTARIO HUMAN RIGHTS COMMISSION, THE OLRB AND THE MOL; File No. 0458-00-ES (Court File No. 575/04) Dated November 2, 2005; Panel: Epstein, Lax, Swinton, JJ. (5 pages)

Certification – Construction Industry – Contempt – Stated Case – The Board stated a case to the Divisional Court when one of the responding parties failed to comply with a production order – The Court found the party in contempt, levied a fine (and substantial indemnity costs) and gave the offending party a period of time to purge its contempt – [*Editor's note*: The responding party subsequently complied with the Court's order and the matter was concluded without need of a further Court date.]

SUNDIAL HOMES (BRONTE) LIMITED; RE R.E.S. REAL ESTATE SERVICES LIMITED, 1565265 ONTARIO INC. C.O.B. AS PRODUZZI CONTRACTING, LIUNA, LOCAL 837; File Nos. 0846-03-R, 0959-03-R and 1046-03-U (Court File No. 50/05) Dated October 14, 2005; Panel: Cunningham, Then, Lax, JJ. (2 pages)

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The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Gus Nedelkopoulos v. OLRB Divisional Court No. 77287/05 WHITBY	3704-04-U	Pending
Leonard Gott v. Director of Employment Standards, et al Divisional Court No. SC-05-24523-00 (Civil Suit)	0444-02-ES; 1537-03-ES	Pending - Dec. 20/05
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending
BA International v. UA Local 412 et la Divisional Court No. 05-DV-001103	1363-04-U	Heard – Nov. 29/05 - Reserved
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	Pending
Wellington De Oliveira v. L.U.I.N.A 183 Divisional Court No. 51/05	0430-04-R	Pending
Sundial Homes (Bronte) Limited v. R.E.S Real Estate Services Limited., et al (Stated Case) Divisional Court No. 50/05	0846-03-R, 0959-03-R, 1046-03-U	Granted Oct. 14/05
Benjamin Blasdell v. UFCW Local A.F.L.-C.I.O.-C.L.C. Local 1000A; Loblaws Supermarkets Ltd. Divisional Court No. 74010/04 NEWMARKET	1431-03-M; 1341-03-U	Pending - Dec. 12/05
Gerald Thomas v. SEIU Local 1.ON; Toronto East General & Orthopaedic Hospital Inc. Divisional Court No. 638/04	0281-04-U	Pending
Christopher Kabala v. Attorney General of Canada, Ombudsman Ontario, et al Divisional Court No. 575/04	0458-00-ES	Dismissed Nov. 2, 2005
Assurant Group v. Ignacia Menor Fillion, et al Divisional Court No. 528/04	2999-03-ES	Pending – Jan. 16-17/06
Grantley Howell v. OLRB Divisional Court No. 04/178 HAMILTON	0933-01-U; 1273-01-U; 3552-00-U	Pending - Jan. 27, 2006
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Heard – Feb. 23,24,25,28/05 - Reserved