ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

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November 2007

Holiday Season Board Schedule

Please see the attached notice to the community.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in October of this year. These decisions will appear in the September/October 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.

Bar – Certification – Construction Industry – Voluntary Recognition – In an application for certification filed by CUPW, the intervenor, Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW claimed that at the time Local 183 entered into the VRA with the employer there were no employees in the VRA bargaining unit – The Board found that, for the purposes of s. 66, the creation of an employment relationship is critical and is not dependent upon whether work has been performed for the employer as of the date that the VRA was entered into – The Board found that an employment relationship will commence upon the acceptance of a non-conditional employment offer and after the completion of the necessary employment documentation – The Board held that Local 183 and the employer were not required to wait until after the employees had actually commenced work prior to entering into the VRA – There was no reason to set aside the agreement – Matter continues

DISTINCTION SERVICE PLUS INC. ; RE THE CANADIAN UNION OF POSTAL WORKERS (CUPW); RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1856-06-R; Dated October 25, 2007; Panel: Peter F. Chauvin (7 pages)

Employment Standards – Wilful Misconduct – The employer sought review of an ESO's decision that the employee was terminated for exercising his rights under the emergency leave provisions of the ESA – The employer had an Employee Handbook which included policies on absenteeism, lateness and discipline – The employee had three disciplinary infractions within 12 months for "blameworthy" absences – The employee was disciplined a fourth time for missing the first three hours of his shift – The Board found that the employee's fourth absence was because he had slept in and not because he was caring for his son – The Board held that the employee was not attempting to request or claim an emergency leave, or any other right under the ESA – The Board further held that the employee's fourth absence, while blameworthy, did not constitute wilful misconduct – Order for compensation was reduced to an order to pay termination and severance pay – Application allowed, in part

FAG AEROSPACE INC.; RE CHRIS NEAL AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3118-06-ES; Dated October 30, 2007; Panel: Patrick Kelly (7 pages)

Certification – Construction Industry – Remedies – Unfair Labour Practice – In this request for remedial certification the Board found:

First, that the second-in-command asking employees if they had signed cards was intimidatory – Second, that the owner's statements without consequences, actual or intended, do not become unlawful statements simply because an employee overhears them in circumstances where it was not reasonable to expect that employee to overhear them – However, the owner's attempt to conduct surveillance on a meeting being held after hours (and off employer or customer property) for the purposes of discovering who might be interested in the union was improper and was a violation of s. 70 – Third, that a lay-off due to a temporary downturn in work was not tainted by any anti-union animus – This conclusion was supported by the fact that the employee did not actively demonstrate support for the union, and he was not involved in trying to recruit others; further, the employer offered him his job back two weeks later – Fourth, that the lay-off of the union's key inside organizer was in fact a discharge in violation of s. 72 – The Board held that while the employer did contravene the Act, these violations and the termination of the inside organizer, were not so serious that the Board could conclude that section 11 was the only appropriate remedy – Therefore, the Board ordered compensation to the inside organizer and a posting – ULP Application allowed, in part; Certification dismissed

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 557; File Nos. 4264-05-R; 0069-06-U; Dated October 15, 2007; Panel: David A. McKee (10 pages)

Employment Standards – The employee claimed unpaid wages related to a "points" program introduced by the employer to encourage employees to sell certain products – Points could be redeemed by: (i) submitting medical claims to the employer for reimbursement on a dollar for dollar basis; (ii) using them to buy products from the store up to a maximum of $500 per time; or (iii) requesting a payout of points as wages, subject to statutory deductions – The employer took the position that the points did not constitute wages – The Board found that the point system had a specific monetary value that when taken as money was considered by the employer to be "wages" and subjected to statutory deductions – The Board rejected the argument that the employee's termination somehow negated her entitlement to redeem her earned points for money because: (i) the employee was never advised that termination of her employment would affect her entitlement to redeem her points for money, (ii) the employee's entitlement was defined and calculable as of the date of termination, and (iii) as the employer conceded, had the employee known that she was going to be terminated she could have cashed out her points one way or another prior to the date of her termination – Appeal Allowed; Order for wages issued

MILKYWAY PHAN; RE JCD HOLDINGS INC. O/A ENVIROTRENDS AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2664-06-ES; Dated October 4, 2007; Panel: Ian Anderson (3 pages)

Construction Industry Grievance – Trade Union – In this referral of a grievance filed by OPG concerning the entitlement of former employees to severance payments, the Board addressed the preliminary question whether it had the jurisdiction to hear the grievance, given the Machinists' position that it was not a construction industry trade union – The Board, following *Ontario Hydro*, held that "a history of representing construction employees separate and apart from other employees" must be established for a union to be a construction industry union, and the various union practices relevant in establishing such a history were that a construction trade union usually operates: a hiring hall, an out-of-work list, health, welfare, pension or other benefit plans, either jointly with employers or alone, and a training or apprenticeship program – The Board considered it significant that the members at OPG had exactly the same status within the union as all of the other clearly non-construction members, and had never sought separate status, rights, or representation – There was also no evidence of the Machinists ever having bargained their agreements with OPG or Ontario Hydro together with any building trade unions or as part of a council of such unions, but rather there was direct evidence that the Machinists had always bargained their agreements alone – Although the Machinists/OPG collective agreement did contain certain provisions which were far more common within construction as opposed to non-construction collective agreements, the actual practices of the Machinists were far more in keeping with those of a non-construction union – Ultimately the Board stated that the trade union definition in s. 126, and specifically the words 'pertains to,' should be given a restrictive interpretation in order to accomplish the separation in the Act between construction and non-construction – The Board held that the Machinists were not a construction trade union, and therefore the Board had no jurisdiction to determine this grievance – Grievance dismissed

ONTARIO POWER GENERATION INC.; RE INTERNATIONAL ASSOCIATION OF

MACHINISTS AND AEROSPACE WORKERS; File No. 1456-06-G; Dated October 4, 2007; Panel: Mark J. Lewis (15 pages)

Construction Industry – Jurisdictional Dispute – The applicants alleged an improper assignment by Strabag of certain work at the Niagara Tunnel Project to members of the Labourers – The applicants asserted that tunneling work did not come within the exclusive purview of the Labourers and submitted that there were a number of other trades actively involved in tunneling work – The Board held that it was imperative to consider the context within which the work was undertaken – The Board was not persuaded that the assignment of the work in dispute by Strabag to members of the Labourers was wrong – Assigning the work associated with the construction of the tunnel to members of the Labourers was consistent with both the area practice and the practice of the electrical power systems sector and accorded with the recognized work jurisdiction of the Labourers – In particular, the existence of the "tunnel exception" in the EPSCA agreements and the incorporation of the tunnel schedule from the Heavy Engineering Association of Toronto collective agreement demonstrated that recognition – Applications dismissed

STRABAG INC.; ONTARIO POWER GENERATION; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; LIUNA LOCAL 837; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL UNION 736; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO, CJA AND ITS LOCAL 1007; ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; File Nos. 0631-06-JD; 0632-06-JD; 1782-06-JD; 2014-06-JD; 2368-06-JD; Dated October 16, 2007; Panel: Harry Freedman (11 pages)

Employment Standards – Wilful Misconduct – The employee sought review of an ESO's refusal to issue an Order to Pay – The employer had a written policy which included health and safety requirements – A progressive disciplinary model was used to address an employee's failure to comply with the policy – Upon the employee's third disciplinary notice, he was advised that future violations of the policy could lead to termination – The employee violated the policy a fourth time by altering the scene of, and failing to report, an accident – Video surveillance evidence was considered – The Board assessed the employee's failure to comply with company policy and found his acts amounted to wilful misconduct – Application dismissed

SUPPLY CHAIN MANAGEMENT INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUSTAFA DAGINAWALA; File No. 4015-06-ES; Dated October 2, 2007; Panel: Patrick Kelly (8 pages)

Court Proceedings

Judicial Review – Lock-out – Natural Justice – Practice and Procedure – Reconsideration – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier – Lock-out application dismissed; reconsideration of strike application denied – On the judicial review, the union took the position that the Board exceeded its jurisdiction by conducting an "expedited hearing", without authority and that natural justice was breached by proceeding without the union in the first hearing and by

unfairly limiting the union's presentation time in the second hearing – The court noted that context is often the balancing ingredient when weighing the undeniable tension as among the tribunal's ability to control its process, the duty of fairness and the degree of deference courts should afford the exercise of the tribunal's discretion – The court found that the Board was not proceeding pursuant to its authority under section 110(18) and Rule 41, but rather pursuant to the abridgement provisions in its general Rules – In derogating from the norm through abridgement, the Board may only vary times, not eliminate them; it must give notice of a hearing, although it may vary the manner of doing so; it must conduct a hearing, although it may allow it to proceed electronically; it must allow the parties full opportunity to present evidence and make submissions, although it may direct how this is to be done, including orally or in writing, whether by evidence admissible in court of law or not – The court reviewed the factors to be applied in assessing the Board's duty of procedural fairness as set out in *Baker*, concluding that the Board merits a high degree of deference with respect to the fairness of its procedural decisions – The court found that the circumstances, in this case, were extreme and warranted quick intervention and that the Board's abridgement of times and procedures, and its finding of proper service and notice were appropriate in the context of the situation and did not operate as a breach of fairness – The court found nothing wrong with limiting the time for presentations in the second hearing and that the union had sufficient and fair opportunity to present its evidence and make its position clear – Finally, the court found that if there was a deficiency of fairness in the initial hearing, it was cured by the reconsideration hearing – Application for judicial review dismissed

AMALGAMATED TRANSIT UNION, LOCAL 113; RE TORONTO TRANSIT COMMISSION AND OLRB; File Nos. 0618-06-U; 0620-06-U (Court File No. 261/06) Dated October 1, 2007; Panel: Ferrier, Whalen, Cumming JJ. (42 pages)

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
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. 423/07	1386-06-R	Pending
Limen Masonry et al v. Brick and Allied Craft et al Divisional Court No. 413/07	3862-05-R; 3864-05-R	Pending
Dev Misir v. Muluneshi F. Agago et al Divisional Court No. 281/07	0769-06-ES	Pending
Eastern Eavestroughing v. Sheet Metal Workers', et al Divisional Court No. 359/07	3394-06-R; 3399-06-R; 3418-06-R; 3528-06-R; 3545-06-R; 3641-06-R; 3797-06-R; 4039-06-R	Pending
Dr. Oliver Bajor v. OLRB Divisional Court No. 258/07	0353-06-ES	Pending
1257707 Ont. Ltd. o/a Oakville Honda v. Creyos Batchelor & OLRB Divisional Court No. 152/07	0784-06-ES	December 3, 2007
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07	3737-05-U	January 10, 2008
Dana Horochowski v. OECTA; York Catholic DSB Divisional Court No. 93/07	1115-04-U	Pending
Hurley Corporation v. OLRB; SEIU L. 2.on Divisional Court No. 23/07	2915-06-R	Pending
Comstock Canada et al v. United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 Divisional Court No. 522/06	2558-03-JD	November 22, 2007
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Johnson Controls Ltd. v. Brookfield Lepage Divisional Court No. 406/06	1634-04-R	Adjourned – sine die
TTC v. Amalgamated Transit Union Divisional Court No. 261/06	0618-06-U; 0620-06-U	Dismissed – Oct. 1/07
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04-ES, 2224-04-ES	Dismissed – August 13/07 Seeking leave to C.A.
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Pending
Guild Electric Limited et al v. IBEW, Local 1739 Divisional Court No. 202/06	4179-05-U; 4307-05-M	Dismissed – June 22/07; seeking leave to C.A.
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	March 10, 2008
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04 Court of Appeal No. C-46210	1271-03-U; 1336-03-M; 1414-03-M	October 9, 10, 11, 2007
Maystar General Contractors Inc. v. IUPAT, Local 1819 Divisional Court No. 481/06 Court of Appeal No. C47489	0812-06-R	Court of Appeal March 25, 2008

Case name & Court File No.	Board File No.	Status
Greater Essex County District School Board v. IBEW Local 773 Divisional Court No. 126/06 Motion for Leave No. M34720 S.C.C. No. 32171	1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R	Seeking leave to S.C.C.