

**ONTARIO LABOUR RELATIONS BOARD
INFORMATION BULLETIN NO. 9**

**Resolving Disputes in Certification and Termination Applications in
the Construction Industry**

This Information Bulletin describes how the Board deals with disputes of any sort, including “status disputes,” in the context of construction industry certification and termination applications.

“Status disputes” typically involve a disagreement as to whether certain individuals:

- were employed by the employer on the application date;
- performed work of the trade union for a majority of their time on the application date;
- exercised managerial functions; or
- were dependent or independent contractors.

Status disputes arise in two ways. The first way is when the union elects to have its certification application dealt with under section 128.1 of the Act (card-based certification) and the parties cannot agree on whether certain individuals should be on the “employee list.” The second way is where a vote is conducted in a certification application under section 8 of the Act (vote-based certification) or a termination application under section 63 or 132 of the Act and the parties cannot agree on the “voters list” or, in a certification application, where the employer gives notice to the Board under section 8.1 of the Act (employer’s disagreement with union’s estimate of members in proposed bargaining unit) and the parties cannot agree on whether certain individuals should be on the “section 8.1 list.”

Other disputes arise in a variety of ways and are set out in the response or subsequent correspondence of the parties. These can include the timeliness of the application, the proper identity of the employer, trade union status, bargaining unit appropriateness, conflict with a subsisting collective agreement, and other issues.

This Bulletin outlines the Board’s processes for resolving disputes in certification and termination applications in the construction industry. It does not describe the Board’s procedures with respect to disputes in certification or termination applications outside of the construction industry. Please refer to Information Bulletin No. 4 – Status Disputes in Certification Applications (Non-Construction) for information on those procedures.

I. IDENTIFICATION OF LEGAL AND FACTUAL ISSUES IN DISPUTE

Card-based certification: s. 128.1

Status Disputes

Where there is a dispute about the person listed (or not listed) on the employee list, the union will be directed by way of a Board decision to deliver to the employer and file with the Board, **no later than five (5) days from the date of the Board's decision**, a statement simply challenging any names on the Schedule A that normally accompanies the employer's Response. In the event the Union wishes to make additions to Schedule A, it may also do so but must include the reasons for such additions and all the basic facts upon which it relies (including, for example, *where* the individual sought to be added was working, *what* tasks the individual was performing and *how long* the individual was engaged in those tasks, particularly, but not only, where it may be arguable that tasks performed by the individual may fall outside of the craft bargaining unit being sought.) The Union must establish a *prima facie* case that that individual is properly included on the Schedule A. If the union does not do so, the Board may determine that a full hearing is not warranted to determine the employee status of the individual.

The Board's decision will direct the employer to deliver to the union and file with the Board a statement of its position in reply to each of the union's challenges (including any of the union's proposed additions) **within ten (10) days of that decision**. The Employer must include the reasons for such position and the basic facts upon which it relies (including for example *where* the individual sought to be added was working, *what* tasks the individual was performing and *how long* the individual performed each of these tasks, particularly, but not only, where it may be arguable that tasks performed by the individual may fall outside of the craft bargaining unit being sought). The employer must establish a *prima facie* case for each of its positions. If the employer does not do so, the Board may determine that a full hearing is not warranted to determine the employee status of any given individual. Together with this the employer is expected to produce copies of all relevant documents concerning the individuals in dispute (including payroll records, time sheets, invoices, cheques, etc.).

Within a further five (5) days (that is, **within fifteen (15) days of the Board's decision**), the Union must file its response to the Employer's position, with the reasons for such positions, including the facts upon which it relies (to the extent it has not already done so), together with any relevant

documents that the union relies on. Assertions that individuals were not at work should be accompanied with a detailed statement containing the basis of such assertion.

Parties are strongly encouraged to review the Board's jurisprudence (which can be accessed at www.canlii.org) for particular or specific applications of these pleading requirements.

Once the union has filed its statement of challenges and additions, neither party will be permitted to add to, or delete from, the list without agreement of the parties or leave of the Board. A Case Management Hearing will be scheduled before a panel of the Board to begin the adjudication of the dispute. Particular attention is directed to Rules 39.1 and 41.3 of the Board's Rules of Procedure. There will be no Regional Certification Meeting.

Vote-based certification or termination: s. 8 or s. 63/s. 132

Status Disputes

Where there is a dispute about whether certain individuals should or should not be on the voters list and/or on a section 8.1 list, each party must identify in writing, no later than the conclusion of balloting on the day of the representation vote, those individuals whose inclusion on the list(s) it is challenging. Challenges to individual voters must be raised with the Labour Relations Officer conducting the vote before the individual casts his/her ballot. Challenges that are made after the conclusion of the balloting will not be considered except with leave of the Board. In addition, in the interests of fairness and finality, parties cannot raise issues about the list(s) to which they have earlier agreed.

Parties (including individual workers) are given **five (5) days after the vote** (that is, normally 7 days after the Board's decision directing the taking of the vote) in which to make submissions in writing about the vote. The reasons for challenges to any ballot that was cast and sealed, and the basic facts in support of the challenges, must be delivered to the other parties and filed with the Board within **the same five (5) day period** (normally 7 days after the Board's decision directing the taking of the vote).

Any party wishing to file a response to the challenges may do so within a further five (5) days (that is, 12 days after the Board's decision ordering the vote).

A Case Management Hearing will be scheduled before a panel of the Board to begin the adjudication of the dispute. There will be no Regional Certification Meeting.

Other Issues

If there are issues other than status disputes to be litigated in the application for certification, they must be fully pleaded **within fifteen (15) days of the initial date of the Board decision** (in the case of an application under section 128.1—card-based) or **fifteen (15) days of the date of the representation vote** (where one is held), in the case of an application under section 8 or section 63/132 (vote-based). In either case, the submissions must include substantial particulars of the facts on which the party raising the issue(s) relies and a statement of the legal issues that party wishes to argue.

A Case Management Hearing will be scheduled before a panel of the Board to begin the adjudication of the dispute(s). There will be no Regional Certification Meeting.

II. MANDATORY PROVISION OF PARTICULARS AND DISCLOSURE OF DOCUMENTS

In the event that either party is not satisfied with the particulars or production furnished by the other party with respect to the status disputes or any other issues, within five (5) days of the receipt of the other party's last submission, each party is required to advise the other of all the documents it seeks to have produced and all of the additional factual particulars that it wishes to have pleaded. The other party is required to respond as fully and completely as possible **within five (5) days of receiving the request** (that is, within 25 days after the Board's decision). If a party objects to producing documents it must set out its reasons in writing and provide them to the other parties and the Board within that 5-day time frame.

III. SETTLEMENT DISCUSSIONS

While the Board will no longer be conducting Regional Certification Meetings, mediation still remains a significant component of the Board's process and the parties are encouraged to avail themselves of that process whenever it appears that settlement of some or all of the issues is possible, by contacting the Manager of Field Services. A settlement meeting with a Labour Relations Officer may be scheduled where appropriate. If a party seeks the assistance of a Board Officer to pursue partial or complete settlement discussions, the Board will accommodate that request. The purpose of such a meeting is to attempt to resolve, or at least narrow, the issues in dispute between the

parties. Scheduling of settlement discussions will be undertaken independent of the scheduling of the Case Management Hearing, but the Case Management Hearing will not be delayed to make the settlement discussions/meetings possible.

Documents disclosed to a Labour Relations Officer prior to, or during, settlement discussions have not been filed with the Board and do not become evidence before the Board until formally entered into evidence at the Hearing.

IV. CASE MANAGEMENT HEARING

A Case Management Hearing will be held in Toronto. Notice of the time and date of the Case Management Hearing will be sent with the Confirmation of Filing. **A Case Management Hearing is not a pre-hearing conference.** It will generally be conducted by a panel of the Board **on the Wednesday of the fifth week after the date of the Board's initial decision.** The purpose of the Case Management Hearing is either to resolve as many issues in dispute as possible or to direct how they will be litigated before the Board in an appropriate and expeditious manner. Parties are expected to attend the Case Management Hearing with and ready to produce all relevant documents (if they have not already done so). Any further production issues should have already been raised and will be determined by the panel at the Case Management Hearing.

It is expected that in most cases the Case Management Hearing will be conducted in less than two hours, with the same panel conducting several hearings during the course of one day. However, lengthier Case Management Hearings may be scheduled by the Board where the circumstances warrant.

After hearing from the parties, the panel will determine the scheduling of the hearing on the merits, which may include the manner in which the hearing will be conducted, in what portions or segments, the number of days, the grouping and number of witnesses (if oral evidence is required) and any other procedural issues so that the scheduled hearing dates can be fully and efficiently utilized to determine the merits of the disputes.

The panel conducting the Case Management Hearing will also deal with as many substantive issues as it is able (including status disputes) when in the opinion of the Board no further evidence is necessary.

Following the Case Management Hearing, the panel will issue a decision outlining the determinations made and/or referring the matter to a hearing on the merits. **PARTIES AND THEIR COUNSEL WILL BE EXPECTED TO**

BRING THEIR CALENDARS AND COMMIT TO HEARING DATES AT THE CASE MANAGEMENT HEARING.

In the unlikely event that any other procedural or production issues remain outstanding, the Case Management Hearing panel/decision shall direct each party to outline those issues in writing **within five (5) days of the Board's decision**. If the Board considers it necessary, it will schedule a further Case Management Hearing with the parties, most likely by telephone conference. The telephone conference (or, in rare circumstances, a further Case Management Hearing) will likely be conducted early in the morning or late in the afternoon. The Board shall issue a decision with respect to those issues prior to the scheduled hearing on the merits. No further preliminary or production issues may be raised without leave of the Board.

Parties are reminded that the Case Management Hearing is not a pre-hearing conference: Parties should attend prepared to deal with both procedural and substantive issues. The Board may determine both kinds of issues at the Case Management Hearing.

V. HEARING

When the Board has determined that a hearing on the merits, including unresolved status disputes and oral evidence is required, the hearing will proceed on the dates fixed by the Board generally at the Case Management Hearing. That hearing will normally be scheduled to take place in Toronto.

The party that asserts that an individual should be on the list or in the bargaining unit has the responsibility for ensuring that individual's attendance at the hearing, unless the Board orders otherwise.

The party that has the responsibility for ensuring an individual's attendance at the hearing will be responsible for calling that individual as a witness. There may be circumstances in which a party calling a witness is allowed to cross-examine that individual. The Board may itself question a witness.

The hearing of the merits will not necessarily be conducted by the same panel that conducted the Case Management Hearing.

Hearings are open to the public unless the Board decides that matters involving public scrutiny may be disclosed or that disclosure of financial or personal matters would be damaging to any of the parties or witnesses. Hearings are not recorded and no transcripts are produced.

The Board issued written decisions, which may include the name and personal information about persons appearing before it. Decisions are available to the public from a variety of sources including the Ontario Labour Relations Board Reports, the Ontario Workplace Tribunals Library, and over the internet at www.canlii.org, a free legal information database. Some summaries and decisions may be found on the Board's website and Recent Decisions of Interest at www.olrb.gov.on.ca.

IMPORTANT NOTE

IN ACCORDANCE WITH THE *ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT, 2005*, THE BOARD MAKES EVERY EFFORT TO ENSURE THAT ITS SERVICES ARE PROVIDED IN A MANNER THAT RESPECTS THE DIGNITY AND INDEPENDENCE OF PERSONS WITH DISABILITIES. PLEASE TELL THE BOARD IF YOU REQUIRE ANY ACCOMMODATION TO MEET YOUR INDIVIDUAL NEEDS.