ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

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October 2003

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in September of this year. Some of these decisions will appear in the September/October issue of the OLRB Reports:

Construction Industry Grievance – Reconsideration – Remedies – Settlement – The employer sought a reconsideration of a remedy ordered on consent or, alternatively, the Board's permission to resile from the agreed-to settlement – The Employer alleged either a misrepresentation by the trade union or a misapprehension of the facts, namely when the employer agreed to reinstate the grievor, it had no idea he had a traffic conviction and was consequently uninsurable by the employer's carrier – For policy reasons which uphold the inviolability of settlement discussions, the Board declined to reconsider its remedy – Reconsideration denied

ALL CANADA CRANE RENTAL CORPORATION; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 1989-01-G; Dated September 11, 2003; Panel: Mary Ellen Cummings (4 pages)

Jurisdictional Dispute – Reconsideration – Settlement – The applicant filed a complaint relating to a work assignment, and the parties settled the dispute with a letter of understanding – As part of the settlement, the applicant withdrew the complaint – Subsequent to the withdrawal, the applicant returned to the Board claiming that counsel opposite made incorrect representations at the settlement meeting – The Board refused to reconsider the matter, as the contents of discussions during settlement meetings are privileged – Application dismissed

BLACK & MCDONALD LIMITED, LIUNA, LOCAL 527; RE INTERNATIONAL BROTHER-HOOD OF ELECTRICAL WORKERS, LOCAL 586; File No. 3773-02-JD; Dated September 11, 2003; Panel: Harry Freedman, John Tomlinson, George McMenemy (3 pages)

Bargaining Unit – Certification – Construction Industry – The Board ruled that once an applicant for certification accepts an employer's estimate of the number of employees in the proposed bargaining unit and concedes that it does not therefore represent 40% of the employees for a valid application, the employer cannot subsequently withdraw its s. 8.1 objection – A party cannot retreat from a position once the other side has agreed to that position (effectively negating any dispute) – Application dismissed

DAGMAR CONSTRUCTION INC. RE ONTARIO PROVINCIAL DISTRICT COUNCIL, LIUNA; File No. 1080-03-R; Dated September 23, 2003; Panel: Jack J. Slaughter, John Tomlinson, G. McMenemy (4 pages)

Duty of Fair Representation – *Public Service Labour Relations Transition Act, 1997* – Reconsideration – The applicants in two LRA files complained of unfair treatment with respect to their seniority at the hands of the successor bargaining agent, following a PSLRTA amalgamation – The Board necessarily re-opened the PSLRTA matter to address the duty of fair representation complaints – Based on an application of s. 74 alone, and given the predecessor collective agreements of the various bargaining units, the Board found no violation of

the Act – However, the Board sought to clarify its earlier ruling in the PSLRTA matter and the retrospective and prospective operation of seniority provisions – The parties and all affected employees were invited to make submissions on the Board's tentative conclusions

HAMILTON HEALTH SCIENCES; RE CUPE, LOCAL 4800; File Nos. 2956-01-U; 3000-01-U; 2089-01-PS; Dated September 29, 2003; Panel: Christopher J. Albertyn (9 pages)

Construction Industry Grievance – *Prima Facie* case – Unfair Labour Practice – Malfar, a mechanical subcontractor bound to an ICI collective agreement with the applicant, submitted a bid on a project to Atlas, the general contractor, who bid to the owner – Malfar advised Atlas the sheet metal work would be subcontracted to Con Air (a non-unionized employer) – Atlas and Con Air then entered into their own contract – The union filed a grievance against Malfar and an unfair labour practice complaint against all three employers, who moved to have the complaint dismissed for no *prima facie* case – The Board held that sections 70 and 72 of the Act do not oblige a general contractor to sort out the conflicting allegiances that a subcontractor may have with a trade union (which might appear to guarantee employment for the union's members) – The complaint against Atlas was dismissed – As different considerations obtain with respect to Malfar and Con Air, the complaints against them were allowed to proceed

MALFAR MECHANICAL INC., THE ATLAS CORPORATION, 1502543 ONTARIO LTD. C.O.B. AS CAN AIR INC.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 537; File Nos. 3144-02-G; 4011-02-U; Dated September 17, 2003; Panel: David A. McKee (11 pages)

Employment Standards – The employer sought review of an Order to Pay, where an Employment Standards Officer found the employer terminated an employee in response to being informed of the employee's pregnancy – On review, the Board found that the employer had refuted the presumption that an employer who terminates an employee who is pregnant and will be taking leave was motivated to terminate the employee due to the pregnancy – The Board found the employer had been attempting to replace the employee prior to the announcement of the pregnancy and had intended to terminate the employee once a suitable replacement had been found – The Board held the termination was not motivated by the employee's pregnancy – Application allowed

RE/MAX EXCELLENCE REALTY INC.; RE ELENA ST. AMAND AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2067-02-ES; Dated September 18, 2003; Panel: Laura Trachuk (5 pages)

Bargaining Unit – Certification – After receiving a response, including a s. 8.1 challenge, to its application for certification, the applicant advised the Board it was accepting the employer's estimate of the number of employees in the proposed bargaining unit and asked the Board to dismiss the application pursuant to paragraph 7 of section 8.1(5) – The employer sought to characterize the applicant's letter as a withdrawal and asked the Board to impose a one-year bar – The Board rejected the employer's submission – Once the Board determines that an applicant lacks the requisite 40% support for its application, paragraph 7 of section 8.1(5) requires that the Board dismiss the application – Employer's motion dismissed – Application dismissed

SCM SUPPLY CHAIN MANAGEMENT INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA); File No. 1809-03-R; Dated September 22, 2003; Panel: Patrick Kelly, J. Ronson, R.R. Montague (2 pages)

Certification – Construction Industry – Practice and Procedure – When the applicant failed to respond to directions from the Board regarding the presence at the workplace of four employees on the application date, failed to provide particulars about its unfair labour practice allegations, and failed to file a sale of business/related employer application, the Board accepted the employer's assertions about the presence of the employees, directed that the unanswered particulars be struck from the pleadings, and ruled that the union would be precluded from filing a sale of business/related employer application in aid of the present applications for certification

SUNDIAL HOMES (BRONTE) LIMITED; RE LIUNA, LOCAL 837; File Nos. 0846-03-R; 0959-03-R; 1046-03-U; Dated September 24, 2003;

Panel: Mary Ellen Cummings, John Tomlinson, G. McMenemy (3 pages)

Certification – Construction Industry – Representation Vote – An application for certification was filed with the Board just prior to the August 14, 2003 power outage, consequently the employer's response was not received by the Board until its offices re-opened some ten days later – Once its operations had resumed, the Board issued a decision ordering a vote at the employer's worksite – The employer subsequently advised the Board that its work at the original site had ended and its employees were either moved to a new site or laid off – The employer then advised the employees that the vote would take place at the employer's new work site – The Board held the vote at the original worksite, in accordance with its decision and Notice of Vote – A number of employees wrote to the Board after the vote complaining that they had no notice of the vote and no opportunity to cast their ballots – The employer also sought a second vote – The Board held that a second vote was necessary because the employees had no notice of the original vote, and because the employer had incorrectly advised its employees that the location of the vote would be changed, absent any indication of such a change from the Board – Second vote ordered

TERRY PAUL CRESSMAN LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; File No. 1527-03-R; Dated September 9, 2003; Panel: David A. McKee (8 pages)

Court Proceedings

Duty of Fair Representation – Judicial Review – *Prima Facie* case – The applicants alleged the union had violated s. 74 of the Act when it entered into an agreement with the employer following the acquisition and consolidation of warehouse operations – The Board dismissed the complaint on a *prima facie* basis as the remedies sought by the applicants were beyond the Board's jurisdiction – On judicial review, the applicants argued the Board's decision was patently unreasonable and that the Board had breached the principles of natural justice by failing to give the applicants procedural advice and by dismissing the application without a hearing – The application for judicial review was dismissed on all counts

MARC A. CROCKFORD, DAN BOISVERT, CYRILLE BLAIS, GEORGE VILLENEUVE, PAUL KONAREK AND GAETAN PAQUETTE; RE THE OLRB, WAREHOUSEMEN, TRANSPORTATION AND GENERAL WORKERS UNION LOCAL 715 OF THE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION DISTRICT COUNSEL OF THE UFCW, PROVIGO INC./LOEB INC., LOBLAW CO. LTD./NATIONAL GROCERS CO. LTD.; File Nos. 1350-99-U; 2809-99-U (Court File No. DV-543-02); Dated September 30, 2003; Panel: Blair, Then, Desotti, JJ. (4 pages)

Constitutional Law – Judicial Review – Stay – Unfair Labour Practice – The union, duly certified, filed an unfair labour practice when the employer refused to bargain – The intervenor First Nation Band challenged the Board's jurisdiction to hear the complaint, and related matters, on the basis that it had passed its own Labour Code – The Board framed a constitutional question and directed the parties to file pleadings – The intervenor applied for judicial review of the Board's decision and sought a stay of the Board's proceedings – In motions court, the presiding judge ordered the parties to secure a date for a full hearing of the stay application and granted an interim stay pending the full argument

MISSISSAUGA OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY, OLRB; File Nos. 1271-03-U; 1336-03-M; 1414-03-M (Court File No. 585/03); Dated September 24, 2003; Panel: Jennings J. (1 page)

Certification – Judicial Review – Representation Vote – Stay – The union applied for certification for employees working at a mushroom processing facility – The employer responded that its operation and employees were covered under the *Agricultural Employees Protection Act, 2002* and therefore the *Labour Relations Act, 1995* did not apply – The Board held a representation vote – The union then sought to adjourn the proceeding to commence a court application and the employer requested that the ballot box remain sealed – The adjournment was denied and the Board, as is its usual course prior to making substantive decisions, ordered the ballots counted – The employer applied for a stay of the Board's proceeding – The Court took

jurisdiction over the matter on the ground of urgency pursuant to s. 6(2) of the *Judicial Review Procedure Act* – The Court ruled that the Board's jurisdiction and any *Charter* arguments were not before it, that the only matter to be decided was whether the order to count should be stayed or quashed – The order to count ballots was not patently unreasonable – Application for judicial review dismissed

ROL-LAND MUSHROOM FARMS LTD., RE UFCW, THE OLRB; File No.1025-03-R (Court File No. 33013/03); Dated September 18, 2003; Panel: Jenkins J. (2 pages)

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Some of 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 Library, now located on the 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Electrical Power Systems Construction Association and **Comstock Canada Ltd.** v. Sheet Metal Workers' International Association, Local 30 and OLRB Court File No. 679/03	1894-02-G	pending
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	pending
Slavtcho Petrov Detchev v. OLRB, Ministry of Labour, **Canadian Feed Screws Mfg. Ltd**. Court File No. 618/03	2701-00-ES	pending
Mississauga of Scugog Island First Nation v. CAW-Canada & its Local 444, Great Blue Heron Gaming Co. Court File No. 585/03	1271-03-U; 1336-03-M; 1414-03-M	Interim stay granted Sept. 24/03 Motion for stay dismissed Oct.9/03
Rol-Land Farms Ltd. v. UFCW Court File No. 33013/03 – LONDON	1025-03-R	Dismissed Sept. 18/03
Director of Employment Standards v. William Brown**, North York Chevrolet Oldsmobile Ltd**.	2235-02-ES	Pending – Mar/Apr. 2004
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of Elevator Constructors Divisional Court File No. 410/03	2087-01-U	Pending
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 Divisional Court File No. 368/03	3060-02-G	Pending
Teamsters, Chemical, Energy and Allied Workers, Local Union 1880 v. **Dominion Colour Corp**. Divisional Court File No. 391/03	0425-02-U	Pending – Feb. 27, 2004
CAW-Canada v. **National Grocers Co. Ltd**. and UFCW, Locals 1000A, and 175/633 Divisional Court File No. 382/03	0137-02-R; 0139-02-R; 0179-02-R; 0450-02-U	Pending – Mar/Apr. 2004
Greater Essex County District School Board Divisional Court File No. 276/03	3398-00-R	Pending
Windsor-Essex Catholic District School Board Divisional Court File No. 277/03	3426-00-R	Pending
OPSEU v. **Ontario Hospital Association** Divisional Court File No. 83/03	3631-02-U	Pending
Canadian Health Care Workers v. CAW-Canada, **Central Park Lodges** et al Divisional Court No. 646/02	1951-01-R; 2179-01-R; et al	Pending
CAW-Canada & its Local 385 v. **Coca-Cola** et al Divisional Court No. 751/02	0179-01-R; et al	Dismissed October 10/03; applic. for leave to appeal Oct

Case name & Court File No.	Board File No.	Status
		15/03
Marc A. Crockford et al v. UFCW et al Divisional Court No. DV-543/02	1350-99-U; 2809-99-U	Dismissed Sept.30/03
Ottawa-Carleton Public Employees Union Local 503 – CUPE v. **Ottawa Transition Board**, et al Divisional Court No. 02-DV-723	2353-00-PS	Pending – Nov. 27/03
Rosalina Papa v. HERE Local 75, et al Divisional Court No. 283/01	0426-00-U	Pending
Rocco Tassone v ATU Local 113, et al Divisional Court No. 84/02	3527-96-U	Pending – Nov. 18/03
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Heard Dec. 12/02; reserved
Dundas Realities Ltd. v. MOL, et al Divisional Court No. 01-5359	3256-99-ES	Abandoned Sept. 23/03
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Adjourned