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Ontario Labour Relations Board HIGHLIGHTS

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. Some of these decisions will appear in the May/June 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.

Collective Agreement – Construction Industry Grievance – The issue was whether shift differential was owed in addition to overtime rates for overtime hours worked on the afternoon shift, pursuant to the EPSCA/Power Council of Unions collective agreement – The Board noted the conflict between the Modified Provisions and the Appendices, and found that the specific language of the Modified Provisions governed over the general language of the LIUNA Appendix – Having found that the term "scheduled hours worked on that shift" in the Modified Provisions was applicable, the Board concluded that the phrase includes those hours that the employee was scheduled to work overtime at the end of the afternoon shift – The Board also found that while the shift differential was to be paid in addition to overtime, the overtime premiums did not apply to the shift differential – Labourers were to be paid at a rate of double time plus shift differential for all overtime hours worked on afternoon shifts on a two shift operation – Further hearing dates scheduled

BRUCE POWER LP; RE LIUNA, LOCAL 1059; RE ELECTRICAL POWER SYSTEMS CONSTRUC-TION ASSOCIATION; File No. 2008-03-G; Dated June 16, 2004; Panel: Jack J. Slaughter (20 pages)

Construction Industry – Discharge – Duty of Fair Referral – Duty of Fair Representation – Natural Justice – Trade Union – The applicant was fined as a result of an internal union trial; did not pay the fines; filed an appeal, which was dismissed as he had not paid the fines; he was expelled from membership for not paying the fines and as a result, the union caused his employer to discharge him pursuant to the mandatory membership provision in the collective agreement – The applicant alleged breaches of sections 74, 75 and 51(2) on two different grounds: first, that the entire process was motivated by bad faith, and second that the process was defective in that he was not provided with proper notice of the trial – The Board found that it had the jurisdiction to consider what the union did and why, including the rationale and motivation for the Union's actions; however it did not have the jurisdiction to deal with internal union processes (e.g., whether the union Constitution was followed), as that was the role of the Superior Court of Justice – The Board found that the union's actions were not motivated by bad faith or discrimination – Although the Board found that once the Trial Committee was advised that the applicant did not have notice of the meeting, its response was clearly wrong, since this was not motivated by bad faith or ill-will, it was a matter that the Superior Court of Justice had jurisdiction over, not the Board – Application dismissed

BUTTAZZONI, DANILO; RE BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2; File No. 0544-02-U; Dated June 7, 2004; Panel: David A. McKee (20 pages)

***Occupational Health and Safety Act* – Suspension –** The City applied to the Board to suspend an order of the Inspector requiring that a

climbing line used by an arborist not be used and that all productive work stop until the stop work order is withdrawn – The Ministry opposed the request and the Union did not file a response – The Board found that the order was vague and factually flawed: it was not clear whether it was limited only to a particular life line or all similar ones; it referred to the line being altered and damaged, when it was neither altered nor damaged; and it was not clear whether the workplace where productive work was to stop was limited to a backyard or all of the City's operations – The Board found the applicant met the criteria which favoured granting a suspension of the Order – Order suspended pending appeal

CITY OF TORONTO; RE WAYNE BEATON, TORONTO CIVIC EMPLOYEES UNION, LOCAL 416, JOE ZAHER, INSPECTOR; File Nos. 0858-04-HS; 0718-04-HS; Dated June 25, 2004; Panel: Jack J. Slaughter (5 pages)

Bargaining unit – Certification – *Fire Protection and Prevention Act, 1997* – The applicant applied for a bargaining unit comprised of volunteer firefighters operating out of one of Norfolk County's eleven fire stations – The County argued that the only appropriate bargaining unit was one that included all eleven stations – The Board noted there was no dispute that the group applied for encompassed a group of employees with a sufficiently coherent community of interest and went on to consider whether the unit would cause serious labour relations problems for the County – First, the Board addressed the issue of fragmentation and found that most of the concerns underlying the issue of fragmentation were not present: the fire stations were largely independent; there were essentially no transfers or promotions from one station to another; no intermingling except for rare instances; and no real competition for work – Second, the County had essentially lived with a separate station for three years with few if any labour relations problems – Finally, the Board was not persuaded that there was any "industry practice" which was applicable – The Board found the unit sought by the applicant to be appropriate

CORPORATION OF NORFOLK COUNTY; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; File No. 2368-03-R; Dated June 9, 2004; Panel: Brian McLean (11 pages)

Damages – Employment Standards – Remedies – The issues remaining were the amount of wage loss owing and whether any other remedies were appropriate given the employer's breach of section 53 – At the hearing sufficient time had passed to establish that the applicant took 29 weeks to find comparable employment, without failing to mitigate – The Board found she should be reimbursed for the full 29 weeks wage loss, even though her companion appeal had requested only 19.5 weeks (the amount originally calculated by the ESO as reasonable) – Additionally, given that the applicant had found arguably better employment, the Board made no further remedial award (e.g., for the loss of reasonable expectation of continued employment) in lieu of reinstatement – Direction to pay

KINGSTON INDEPENDENT NYLON WORKERS UNION; RE PATRICIA PAGE AND DIRECTOR, EMPLOYMENT STANDARDS; File Nos. 1363-02-ES; 1483-02-ES; Dated June 9, 2004; Panel: Mary Ellen Cummings (4 pages)

Construction Industry – Jurisdictional Dispute – The work in dispute involved the installation of heavy vibrators at the Nanticoke Generating Station which were lifted into place along side a hopper and bolted on to the channel iron that had been welded there before – The work was performed by the UA and the Millwrights claimed it – The Board assessed its typical factors and found that all factors were neutral except economy and efficiency which strongly favoured the UA – The Board also found that the work did not fall exclusively within the Millwrights' jurisdiction, nor was it at the core of their jurisdiction – The UA was assigned the installation of the pneumatic system, which took about 1800 hours, and after the installation of the vibrators at issue the UA would have to hook up the air hoses to the vibrator – The Board found that introducing a different trade merely to move and bolt the vibrator onto the channel would not be efficient, especially since the sequence would have to be repeated 30 times – The Board confirmed the assignment made by the employer to the UA

KVAERNER CONSTRUCTORS LTD., UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 67; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AND MILLWRIGHTS UNION LOCAL 1007; File No. 3110-03-JD; Dated

June 8, 2004; Panel: Mary Ellen Cummings (8 pages)

Conflict of Interest – Construction Industry – Interference in Trade Unions – Interim Relief – Reconsideration – Stay – In the main application in this matter (2049-03-U) Local 183 complained that its parent union (LIUNA) was interfering with its autonomy, contrary to the Act – The Board imposed a stay on LIUNA's Special Hearings Panel in order to ensure an appropriate foundation for the hearing of the main application until it was concluded or such earlier time as the Board ordered – In this application LIUNA requested that the Board lift the stay – The Board noted that Local 183 was no longer involved in triennial bargaining and that LIUNA had altered the composition, mandate, remedial authority and scheduling of the Special Hearings Panel and had undertaken to maintain these changes – These factors shifted the balance of harm and accordingly, the Board lifted the stay – The Board also found it could decide this issue, even though it had not yet addressed the conflict of interest issue with respect to counsel representing LIUNA – Stay lifted

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; RE MASONRY CONTRACTORS' ASSOCIATION OF TORONTO INC. TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU; METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION; ONTARIO CONCRETE & DRAIN CONTRACTORS' ASSOCIATION; THE RESIDENTIAL LOW-RISE FORMING CONTRACTORS' ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY; THE ONTARIO FORMWORK ASSOCIATION; PIPE-LINE CONTRACTORS ASSOCIATION; THE UTILITY CONTRACTORS' ASSOCIATION OF ONTARIO; METROPOLITAN TORONTO ROAD BUILDERS' ASSOCIATION; THE HEAVY CONSTRUCTION ASSOCIATION OF TORONTO; GREATER TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION; RESIDENTIAL FRAMING CONTRACTORS' ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY INC.; LIUNA, ONTARIO PRO-VINCIAL DISTRICT COUNCIL; LIUNA, LOCALS 506, 527 AND 837; File Nos. 2320-03-M; 0681-04-M; Dated June 23, 2004; Panel: Mary Ellen Cummings, John Tomlinson, Alan Haward (6 pages)

Duty of Fair Representation – Practice and Procedure – Remedies – The Applicant was terminated and the respondent union grieved one day later – After proceeding through the grievance procedure with the employer, but prior to arbitration, the union withdrew the grievance – The employer confirmed the withdrawal with the union by letter dated April 2001, however the letter confirming this fact was not brought to the attention of the applicant, his counsel or the Board until the hearing – The person responsible for making the decision not to proceed to arbitration was not called as a witness (he had retired), and the Board did not think the reasons set out in the correspondence were persuasive – The first reason was that the union relied on the supervisor's credibility as a reason for not proceeding to arbitration, but attacked the supervisor's credibility during the grievance procedure – The second reason supporting withdrawal was the grievor's disciplinary record, however the Board found the union relied upon stale discipline – Finally, in light of the Board's two orders for production of documents, the Board found it simply incredible that the union failed to provide a copy of the letter confirming the grievance had been withdrawn – The Board ordered that the grievance proceed to arbitration, waiving any time limits, and that the applicant be represented at arbitration by counsel of his choice with costs borne by the union – Application granted

LENAHAN, CLARE; RE CANADIAN AUTO WORKERS LOCAL 222, OSHAWA; RE GENERAL MOTORS OF CANADA LIMITED; File No. 0765-03-U; Dated June 14, 2004; Panel: Stephen Raymond (4 pages)

Certification – Fraud – Practice and Procedure – Trade Union – The Progressive Workers Union made application to displace the intervenor, UFCW, as the bargaining agent for the employees of Maple Leaf – The UFCW asked for production of documents in light of its assertion that the applicant was not a trade union because it was not created in an appropriate way, and because it did not have as one of its purposes the regulation of employee/employer relations – The UFCW's assertions were premised on the fact that the applicant's assumed intentions were simply to merge with another union, as had been done in two previous applications, a result which was prohibited since both unions are members of the CLC, which prohibits raiding – The issue to be determined was whether the requirement in the Act that an organization of employees have as one of its purposes the regulation of relations

between employees and employers was satisfied by the applicant's (assumed) intention to merge with the Teamsters – A majority of the Board found that the organization has the legal capacity, as demonstrated by its constitution, to fulfill its obligations; that even if the Board should have regard to motivation (which it doubted), in this case the ultimate motivations of the individuals to merge met the definition of regulating employee/employer relations; that the term "regulation of relations" includes an intention to merge with a trade union; that the above view was supported by Board jurisprudence (see *The Great Atlantic & Pacific Company of Canada*); that the viability of an organization is determined through organization, not financial analysis; that the assumed intention to merge does not mean it is not a viable organization; that there was no fraud on the Board, since it is ultimately the employees who will decide what will happen; and finally that these "two step" processes occur in other circumstances – A majority of the Board declined to order production of the documents

MAPLE LEAF MEATS INC.; RE THE PROGRESSIVE WORKERS UNION; RE UFCW, LOCALS 175 & 633; File No. 2831-03- R; Dated June 2, 2004; Panel: Brian McLean, J.A. Rundle, D.A. Patterson (Dissenting) (10 pages)

Certification – Construction Industry – Intervenor – Practice and Procedure – Six certification applications were made in relation to construction work carried on by Ontario Power Generation Inc., Bruce Power LP, Hydro One Inc., and Crossby-Dewar Projects Inc., two by the Canadian Union of Skilled Workers ("CUSW") and four by the LIUNA, Ontario Provincial District Council ("OPDC") – The International Brotherhood of Electrical Workers Construction Council of Ontario ("IBEW"), the Electrical Power Systems Construction Association ("EPSCA") as well as several other unions, sought to intervene – The applicant unions objected to the intervenors participating in the proceedings on the grounds they had no legal interest in the applications and, in any event, there was no good reason to grant them intervenor status as a matter of discretion – The Board considered whether the parties seeking to intervene had the right to do so and if not, whether the Board, as a matter of discretion, should permit them to do so – The Board dismissed the requests by all of the intervenors, except PWU, to be given status to intervene in the two CUSW applications – The requests by EPSCA, the Carpenters and the IUOE to intervene in the OPDC applications were granted, along with LIUNA's request which was not opposed – The requests by all of the other construction trade union intervenors to be given status to intervene were dismissed – Motions granted, in part; denied, in part

ONTARIO POWER GENERATION INC.; RE CANADIAN UNION OF SKILLED WORKERS; RE IBEW AND IBEW CONSTRUCTION COUNCIL OF ONTARIO; RE UBCJA; RE LIUNA; RE BBF; RE UA; RE IUOE; RE OPCM; RE HFIA; RE EPSCA; File Nos. 3443-03-R; 3448-04-R; 3449 -03-R; 3450-03-R; 3457-03-R; 3502-03-R; Dated June 10, 2004; Panel: Harry Freedman (11 PAGES)

Certification – *Hospital Labour Disputes Arbitration Act* – Practice and Procedure – Timeliness – The Board considered three issues that remained in dispute in this displacement application for certification – First, the Board found that the Hospital's 8.1 notice was untimely (received eight days after the application date) pursuant to s 8.1(3) and that even if the Board could exercise a discretion to accept the notice, there were no extraordinary circumstances is this case that would cause it to do so – Second, the Board addressed the question of when an arbitration board "gives its decision" thereby creating the effective date of the document that constitutes the collective agreement – The Board found this case stood between two lines of cases: one standing for the principle that when a board of arbitration settles all matters between the parties, but remains seized to deal with outstanding issues of clarification, the award constitutes a decision; and the other line describing those cases where one or more issues remain in dispute (and the board of arbitration remains seized to deal with them), where the award does not constitute a decision – The Board found that substantial issues remained in dispute, which the board of arbitration remained seized of, even though the parties believed (correctly) that they could ultimately resolve them, and that given the importance of clarity and certainty to employees and third parties, the Board found that the "decision" was not given until the January award – Finally the Board interpreted the word "from" to determine whether it was inclusive or exclusive – The Board found it should be read to exclude the day of the decision, because it was more consistent with the legislative intent to provide 90 full days, it provided more clarity and certainty where there was not necessarily public knowledge of the date, and it was more in harmony with the *Labour Relations Act, 1995* – Application was timely – Ballots ordered counted

OTTAWA HOSPITAL, THE; RE THE PROFESSIONAL INSTITUTE OF TH PUBLIC SERVICE OF CANADA; RE OPSEU; File No. 0372-04-R; Dated June 29, 2004; Panel: Brian McLean (14 pages)

Construction Industry – Jurisdictional Dispute – The employer assigned the work of installing pre-fabricated supports that carry pipe installed by the UA and electrical cable installed by the IBEW to the UA and IBEW – The Ironworkers and Millwrights claimed this work as theirs – The Board assessed the typical list of factors in a jurisdictional dispute and found that no trade agreements were relevant; safety, skill and training favoured the Ironworkers; area practice strongly favoured the Ironworkers with an acceptance by the UA and IBEW that the Ironworkers properly claim multi-purpose supports; and the employer practice favoured the UA and IBEW – The Board found that the area practice so strongly favoured the Ironworkers that the matter could be determined on that factor alone – Board declared that the work should have been assigned to the Ironworkers

ROBERTS GROUP INC., THE; UA, LOCAL 593, AND IBEW, LOCAL 120; RE BSOIW; RE MILLWRIGHTS & MACHINE ERECTORS, LOCAL 1592; File No. 0523-03-JD; Dated June 4, 2004; Panel: Mary Ellen Cummings (8 pages)

Court Proceedings

Employment Standards – Judicial Review – The Board's decision that the worker had quit his employment was upheld on a standard of reasonableness – The Court found the Board's decision was supported by the evidence and that nothing in the evidence pointed to a finding of a fundamental or substantial change in the applicant's terms of employment – Application for judicial review dismissed

CANADIAN FEED SCREWS MFG. LTD., OLRB; THE MINISTRY OF LABOUR; RE SLAVTCHO PETROV DETCHEV; File NO. 2701-00-ES

Board decision not reported.

Divisional Court Decision reported at [2004] OLRB Rep. Mar./Apr. 456

Leave to appeal to Court of Appeal dismissed. (Court of Appeal File No. M31185); Dated June 25, 2005; Panel: Armstrong, Blair, Uriansz JJ.A. (1 page)

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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
Joseph S. Rooke v. Stelco Hamilton, OLRB & Ministry of the Attorney General for Ontario Divisional Court No. 404/04	1584-02-OH; 2647-02-OH	Pending
Dr. Nicholas Hawrylyshyn, et al, o/a **Square One Dental Ctre.** v. Queen in Right of MOL, et al Divisional Court No. 343/04	1721-02-ES	Pending
OPSEU v. PIPS, **The Ottawa Hospital**, OLRB Divisional Court No. 378/04	0372-04-R For Aug Highlights	Pending Motion to stay dismissed July 9/04
UBCJA, Local 494 v. **Build Force Construction Ltd.**, 1404406 Ontario Ltd., Unicor Construction Inc. (Stated Case) Divisional Court No. 368/04	1190-03-R; 1189-03-G	Pending
Alistair McEachran v. The Society of Energy Professionals and **Ontario Power Generation Inc.** Divisional Court No. 298/04	0179-03-U	Pending
Atyourservice Corp. **Pape Rehabilitation & Wellness Ctre**. v. Victoria Blentzas, et al Divisional Court No. DC-04-002687-00	2801-02-ES	Abandoned June 23, 2004 **For Aug. Highlights**
Sheet Metal Workers' Int'l Assoc. Local 30 v. **Crossby-Dewar Projects Inc**., Int'l Assoc. Heat & Frost Local 95 Divisional Court No. 144/04	1643-03-JD	Pending
Vincent Borg v. OPSEU, The Crown in Right of Ontario et al Divisional Court No. 83/04	1208-02-U	Pending
Grantley Howell v. OLRB Divisional Court No. 04/178	0933-01-U; 1273-01-U; 3552-00-U	Pending
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending
Labourers' International Union of North America v. **Universal Workers Union**, et al Divisional Court Nos. 71/04 & 22/04	2320-03-M 2049-03-U	Pending
James Andrew Gerrie v. Ms. Charlotte Budd and Vice-Chair Timothy Sargeant Divisional Court No. 2/04	2290-00-U	Pending – Nov. 16/04
Great Blue Heron v. Mississaugas of Scugog Island First Nation et al Divisional Court No. 7/04	1271-03-U; 1336-03-M; 1414-03-M	Pending Motion for stay denied – Jan. 22/04
Mississaugas Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Pending Motion for stay denied – Jan. 22/04

Case name & Court File No.	Board File No.	Status
Elementary School Teachers' Federation v. OSSTF, Dist. 14 Kawartha Pine Ridge DSB et al Divisional Court No. 17/04	0797-01-JD	Pending – Nov. 8 & 9/04
Canadian Pacific Railway Co. v. Milk & Bread Drivers, Dairy Employees, Caterers, Local 647 Divisional Court No. 9/04	2864-03-R	Pending
City of Hamilton v. OPSEU Divisional Court No. 03-156-DV – HAMILTON	0185-03-U	Pending
Cecilia Collier v. TTC Divisional Court No. 706/03	0632-02-U	Pending – Dec. 17/04
Electrical Power Systems Construction Association and **Comstock Canada Ltd.** v. Sheet Metal Workers' International Association, Local 30 Divisional Court No. 679/03	1894-02-G	Pending – Oct. 7/04
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**. Divisional Court No. 618/03	2701-00-ES	Dismissed – Mar. 30, 2004. Leave to appeal dismissed June 25/04
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of Elevator Constructors Divisional Court No. 410/03	2087-01-U	Dismissed – June 24/04
Greater Essex County District School Board Divisional Court No. 276/03	3398-00-R	Pending
Windsor-Essex Catholic District School Board Divisional Court No. 277/03	3426-00-R	Pending
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Application allowed Nov. 6/03; leave to appeal granted Mar. 26/04 Pending – Oct. 15/04