ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

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October 2004

Draft Rules for Comments

The Board has been engaged in an internal process to revise its Rules of Procedure and is now ready to consult with the labour relations community on its proposed changes. To review the new Rules, please go to the Board's website at: www.olrb.gov.on.ca

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. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Health and Safety – Work Refusal – Adjournment – In this appeal of an inspector's refusal to make an order following a work refusal, the employer requested that the matter be adjourned pending the outcome of an outstanding arbitration between the employer and the employee's bargaining agent – The employee claimed sensitivity to air-borne contaminants and engaged in a work refusal – The employee and the bargaining agent filed a variety of WSIB claims, grievances and human rights complaints relating to her alleged condition and circumstances – The Board considered whether it should defer or adjourn the matter because similar issues are pending in another forum, where it makes practical sense to do so, and where it would not be unfair or prejudicial to a party to do so – The Board held that arbitration is the most appropriate forum for this case because the arbitrator is able to determine the extent of disability and accommodation obligations, is able to apply the collective agreement and other employment legislation and has greater remedial authority than the Board – Motion granted and the appeal is adjourned *sine dine*

CORPORATION OF THE CITY OF TORONTO AND LEO TSE, INSPECTOR; RE MELODY SYLVESTRE, File No. 2623-03-HS; Dated September 7, 2004; Panel: Mary Anne McKellar (7 pages)

Jurisdictional Dispute – Construction Industry – The Cement Masons' union brought a preliminary motion to have this jurisdictional dispute dismissed because it said that the collective agreement required any dispute about a work assignment to be referred to a tribunal under "the Canadian Plan" – A tribunal constituted under the Canadian Plan had already rendered a decision following a hearing involving the Cement Masons and the parent union of the applicant – The applicant union claimed they were bound by a different collective agreement with EPSCA than the Cement Masons, and therefore are not required to resolve a jurisdictional dispute under the Canadian Plan – The Board found that the relevant sections of the two collective agreements were identical, that the parent union was able to bind the local when it signed the EPSCA agreement and participated in the arbitration under the Canadian Plan and that s. 99 of the *Labour Relations Act, 1995* gave the Board a broad discretion to inquire into a jurisdictional dispute when it considered it appropriate, even where it had been dealt with in another forum – The Board found that the applicant was bound by the decision made under the Canadian Plan, and it exercised its discretion to refuse to hear the dispute – Motion granted and application dismissed

ELLIS DON CONSTRUCTION LTD. AND JOHN HAYMAN & SONS CONSTRUCTION; OPCM, RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA AND ITS LOCAL 598; TURNER MURRAY CONTRACTORS INC.; RE LIUNA, LOCAL 1059; RE UBCJA; File No. 0167-04-JD; Dated September 27, 2004; Panel: Harry Freedman (8 pages)

Abandonment – Construction Industry Grievance – Strike – Unfair Labour Practice – The employer brought three applications before the Board, all of them challenging the trade union's right to abandon bargaining rights in the ICI sector of the construction industry – The employer alleged the union was attempting to coerce it into signing a voluntary agreement with a second company – The Board (differently constituted) had earlier declined to exercise its discretion to make a single employer declaration – The employer argued that the trade union's threat of abandonment breached the collective agreement, amounted to an illegal strike, and comprised an unfair labour practice – The Board recognized that the question of abandonment in the ICI sector has to be dealt with differently from other industries because of the statutorily mandated provincial bargaining scheme; nevertheless, there is nothing in the Act to prevent a trade union from abandoning bargaining rights in the ICI sector – The motive or intent underlying the union's conduct is not relevant to the question of whether bargaining rights have been abandoned – Further, the Board has no discretion to decline to make a finding – However, the Board held that the union's primary purpose for the abandonment (coercion) was an unfair labour practice and ordered that the abandonment be deferred for six months – Order accordingly

ENKA CONTRACTING LIMITED; RE CARPENTERS DISTRICT COUNCIL, UBCJA AND CARPENTERS AND ALLIED WORKERS, LOCAL 27, UBCJA AND FRANK O'REILLY AND UCAL POWELL AND CHARLES CALLIGAN; File Nos. 0176-04-U; 0186-04-G; 0187-04-U; Dated September 9, 2004; Panel: Kevin Whitaker, Glenn Pickell, Alan Haward (16 pages)

Trusteeship – Construction Industry Grievance – The union sought a default award in a construction industry grievance after the employer failed to file a Request for Hearing or Notice of Intent to Defend – The employer filed an assignment in bankruptcy – Section 69.3 of the *Bankruptcy and Insolvency Act* requires the trustee to be discharged before the union can proceed with a claim provable in bankruptcy – Further, the provision protects the bankrupt debtor from participating in or defending against any proceeding – The union may prove its claim in bankruptcy with the trustee or seek consent from the trustee or the court to continue the referral of the grievance – Referral adjourned *sine dine*

EN-SAN CONTRACTORS LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1548-04-G; Dated September 1, 2004; Panel: Christopher J. Albertyn (2 pages)

Interim Relief – Unfair Labour Practice – In this latest skirmish between the International and Local 183, the International filed a s. 96 complaint alleging that Local 183 had improperly fired two business representatives – Local 183 brought its own complaint charging that the International was interfering in its autonomy by threatening to bring action and in fact taking steps against Local 183 for its handling of the terminations – The business representatives were reinstated to different positions – Local 183 sought interim relief, asking that the International's actions be lifted – The Board held that if it granted the interim relief sought, Local 183 would be returned its autonomy and it would then have the authority to re-fire the business reps (who were allegedly assisting the International in its investigation of the Local) – The Board ruled it would not grant an order permitting an employer to discharge employees who, it was asserted, were cooperating in an investigation of their employer, carried out by the parent of the employer – Interim relief denied – Unfair labour practice complaints adjourned pending the determination in Board file No. 2049-03-U

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; File Nos. 1441-04-U; 1598-04-M; 1599-04-U; Dated September 8, 2004; Panel: Mary Ellen Cummings, John Tomlinson, Alan Haward (2 pages)

Health and Safety – OPSEU sought the suspension of two orders issued by an inspector which provided that the employer was not required to call in a designated member of the joint health and safety committee to conduct a work refusal investigation – The Board ruled that the inspector's premise/project form was an order, not just an opinion, but that it was binding on only

the parties and in the circumstances of the instant proceeding – Suspension denied – Appeal referred to the Registrar for processing

MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES, AND R. ANTHONY, INSPECTOR; RE OPSEU; File Nos. 1720-04-HS; 1721-04-HS; 1749-04-HS; 1750-04-HS; Dated September 8, 2004; Panel: David A. McKee (2 pages)

Evidence – Certification – Witnesses – A number of evidentiary issues arose during the hearing of this application for certification – First, the employer sought to ask a union witness about his role in the application and discussions he had with other employees regarding the application – The union objected and stated that many of the questions would violate section 119(1) of the Act – The Board allowed the objection and ruled that the employer had not presented compelling reasons as to why the Board should exercise its discretion to allow this line of questioning – Second, the employer objected to the admissibility of a corporate profile obtained approximately one year after the application date – The union argued that it assisted in determining the status of individuals who may or may not be employees in the bargaining unit – The objection was overruled because the corporate profile could assist in determining whether or not an individual continued to occupy a management position in the company – Third, the employer objected to a person being called as a witness because an order excluding witnesses had been made, but the witness had been in the room when other testimony had been given – The objection was overruled because the Board found there was no risk of the witness tailoring his evidence as a result of the testimony he had heard – Fourth, the union attempted to file a copy of a provincial ICI agreement in an effort to adduce evidence about the treatment of dependent contractors under the provincial agreement – The Board did not allow the agreement to be filed because the specific issue was whether a person was entitled to vote in the certification application, not their status under a provincial agreement – Finally, the employer claimed that allowing the union to call a witness to contradict testimony provided by an employer witness would violate the evidentiary rule in *Browne v. Dunn* – The Board found that the union had sufficiently cross-examined the employer's witness on areas which it was now attempting to contradict, that the union's witness could be called and that the employer would be allowed to recall its witness if it wished to address any of the conflicting testimony – Orders accordingly

PRAIRIE PLUMBING LTD.; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 463; File No. 1551-02-R; Dated September 28, 2004; Panel: Harry Freedman (7 pages)

Employment Standards – The employer sought review of an order requiring it to pay, among other entitlements, termination pay to the employee for a period covering two distinct periods of employment – The employer argued that the hiatus between the terms exceeded 13 weeks, thus there was no entitlement – The Board agreed with the employer's view but also considered the sections of the employer's Employee Handbook in light of the greater right or benefit provisions of the Act – The Board held that entitlement to termination pay was not a vesting-related benefit – Order amended accordingly

ROSS SYSTEMS INC.; RE CHRISTOPHER NORMAN AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1538-03-ES; Dated September 23, 2004; Panel: Christopher J. Albertyn (8 pages)

Membership Evidence – *Prima Facie* Motion – Unfair Labour Practice – The applicants claimed that the responding parties violated sections 73, 76 and 119 of the Act when they allegedly disclosed a document that purportedly indicated that one individual had been a member of the responding party union at an earlier time – The responding parties brought a motion to have the application dismissed for not pleading a *prima facie* case – The Board found the application did not disclose a violation of any of the enumerated provisions – In dealing with the alleged violation of s. 119, the Board stated that the provision allowed it to act on documentary evidence of union membership in a Board proceeding when that membership evidence was relevant to a determination in the proceeding, without permitting any party to the proceeding to examine that evidence – Once membership evidence has been returned to a party, there is no logical or rational basis for interpreting the Act to create a prohibition against disclosure that distinguishes between membership documents that were at one time produced in a Board proceeding and membership evidence never produced in a

proceeding – Motion granted – Application dismissed

UNIVERSAL WORKERS' UNION, LIUNA LOCAL 183 AND DANNY BEVILACQUA; RE UA, LOCAL UNION 46; JOE FERRO AND TONY BISCEGLIA; File No. 0144-04-U; Dated September 7, 2004; Panel: Harry Freedman (5 pages)

Construction Industry – Sector Determination – This case involved a determination of whether the construction of a condominium-hotel complex is within the industrial, commercial and institutional sector or the residential sector of the construction industry – The employer asserted that the project is identical to apartment condominium building projects because it involves self contained units, coverage under the *Ontario New Home Warranties Plan Act* and mechanical and electrical work characteristics common to the residential sector – The Board noted that unit owners are required to execute a "Rental Pool Management Agreement" limiting the amount of personal use of the unit and that owners are unable to change furnishings or personalize the unit – The Board distinguished all comparable projects and found that there was no relevant collective bargaining pattern – The end use of project indicated industrial, commercial and institutional sector work – The Board concluded by declaring that the construction work comes within the industrial, commercial and institutional sector of the construction industry

YUKON CONSTRUCTION INC.; RE LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1081; RE IUOE, LOCAL 793; RE INTRAWEST CORPORATION; File No. 0512-04-M; Dated September 2, 2004; Panel: Harry Freedman (12 pages)

Court Proceedings

Judicial Review – Settlement – In settling a number of amalgamation-related cases involving the City of Hamilton and its workers, the parties signed Minutes which set out various salary grids and adjustments – OPSEU applied to the Board alleging that the City had breached the settlement when it did not pay its paramedics pursuant to those Minutes – The Board interpreted the Minutes in the union's favour – The City sought judicial review – Application dismissed

CITY OF HAMILTON; RE OPSEU; OLRB; File No. 0185-03-U (Court File No. 03-156-DV); Dated September 23, 2004; Panel: Matlow, Lock, Heeney JJ. (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
Assurant Group v. Ignacia Menor Fillion, et al Divisional Court No. 528/04	2999-03-ES	Pending
Maurice Leblanc v. TTC, and ATU, Local 113 Divisional Court No. 468/04	2326-00-U	Pending
Autoland Chrysler (1981) Ltd., Michael Leahey v. Teamsters Union, Local 879 Divisional Court No. 463/04	1151-03-R	Pending
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 – Divisional Court No. 368/03 Motion for Leave to Appeal No. M31292	3060-02-G	Dismissed March 11, 2004 Pending
Enka Contracting Ltd. v. UBCJA Divisional Court No. 448/04	0176-04-U; 0186-04-G; 0187-04-U	Withdrawn Sept. 1, 2004
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 Centre.** 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	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 - Jan. 19/05
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

Case name & Court File No.	Board File No.	Status
Labourers' International Union of North America v. **Universal Workers Union**, et al Divisional Court Nos. 22/04	2320-03-M 2049-03-U	Pending – Feb. 7/05
James Andrew Gerrie v. CAW Local 385; Coca-Cola Bottling Ltd. 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 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	Pending Motion for stay denied – Jan. 22/04
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	Dismissed Sept. 23/04
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
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	Pending – Feb.14/05
William McNaught v. TTC, et al Divisional Court No. 254/02 Court of Appeal No. C41584	3616-99-U; 3297-99-OH	Application allowed Nov. 6/03; leave to appeal granted Mar. 26/04 Pending – Oct. 15/04