

*H*ighlights

Ontario Labour Relations Board

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October 2011

Mark J. Lewis

Vice-Chair Mark Lewis will be leaving the Board in early October to return to private practice. Mr. Lewis was appointed to the Board in September 2006.

Holiday Schedule Season Board

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 September 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.

Construction Industry Grievance – Evidence – Reconsideration – During opening statements, the Applicant gave notice for the first time that it intended to call evidence of past practice and collective bargaining negotiations to support its interpretation of a premium pay provision in the collective agreement, and to support an estoppel argument – The Board ruled that the applicant could not call such evidence – On reconsideration, the Board reiterated its reasons for disallowing the evidence – The Board distinguished itself from privately constituted, and funded, boards of arbitration whose mandate is to

interpret grievances liberally to deal with them on their merits – The Board is a public administrative tribunal with limited resources, established forms, processes and Rules of Procedure – The Board held that the applicant failed to raise the material facts on which it sought to rely in its grievance referral, effectively ambushing the responding parties on the first day of hearing – As the responding parties in this proceeding did not sit at the bargaining table, they were in no position to be able to respond to allegations surrounding negotiations – Further, the passage of time (from the referral to the first day of hearing, and from opening statements to when the evidence might be heard) could seriously prejudice the responding parties – Reconsideration denied

EPSCA; BRUCE POWER LP; AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; BLACK & MCDONALD LIMITED; COMSTOCK CANADA LTD.; E.S. FOX LIMITED; RE IBEW ELECTRICAL POWER COUNCIL OF ONTARIO; RE CANADIAN UNION OF SKILLED WORKERS; File No. 2878-10-G; Dated September 28, 2011; Panel: Diane L. Gee, J.W. Schel, R. Baxter (7 pages)

Construction Industry Grievance – The union grieved after the employer ordered six employees not to report for work on a day the employer scheduled a foremen meeting – The union asserted the employees were suspended without cause rather than laid-off because a lay-off required there to be a shortage of work – In the alternative, if there was a lay-off, the union argued the employer breached the lay-off provisions of the collective agreement because employees with less seniority than the grievors were permitted to report to work on the relevant day – In response,

the employer relied on the standoff provisions of the collective agreement which allowed it to standoff part or all of a crew if the crew was unable to proceed with work – The employer asserted the grievors were unable to work because there were no foremen available to supervise them – The Board held the employer acted properly within its rights under the standoff provisions of the agreement – The Board reasoned a standoff is a type of short duration lay-off but the parties clearly differentiated between the two in the collective agreement – Specifically, the collective agreement did not stipulate a standoff could only occur due to a shortage of work or provide seniority-based bumping rights in such circumstances – The Board further reasoned the employer made a *bona fide* operational decision and was not obligated under the agreement to pursue or implement alternative scheduling options such as overstaffing other crews or hiring additional foremen – Grievance dismissed

HYDRO ONE INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA LOCAL 1059; File No. 3564-10-G; Dated September 19, 2011; Panel: John D. Lewis (15 pages)

Discharge – Health and Safety – Practice and Procedure – Reconsideration – Reprisal – The Applicant sought reconsideration of the Board's acceptance of the late-filed delivery of the response to his reprisal complaint – The Board had earlier ruled that the delivery was arguably three days late, but exercised its discretion to extend the time for delivery so the merits of the complaint could be determined – The Board ruled that the time of delivery was not worth a dispute and affirmed on reconsideration that the ruling was correct – On the merits of the application, the Board considered whether being discharged for making a harassment complaint was a violation of s. 50 of the *Occupations Health And Safety Act* – The Board's authority to deal with a matter under s. 50 arises when the worker has acted in compliance with the Act, has given evidence in a proceeding, or has sought the enforcement of the Act or regulations – The Act requires an employer to create a policy with respect to workplace harassment, to develop and implement the policy, and to provide workers with information regarding the policy – The Applicant has not alleged that the employer has not fulfilled these obligations – The Act provides no specific rights to a worker with respect to workplace harassment (as opposed to violence); similarly, it does not obligate an

employer to maintain a harassment-free workplace – It appears the Board does not have the authority to adjudicate upon the practical application of a harassment policy that otherwise complies with the Act – The Legislature chose not to extend the Board's jurisdiction to preside over such complaints – On the facts of this case, the Board found that the two emails sent to the Applicant did not amount to a "course of vexatious comment or conduct" to constitute harassment – Rather, the Applicant's own communications with his superiors were "less than professional, specifically belligerent and derogatory in nature" – The employer properly concluded that the Applicant was unwilling to communicate in a more appropriate manner and discharged him – Application dismissed

INVESTIA FINANCIAL SERVICES INC. AND INDUSTRIAL ALLIANCE INSURANCE AND FINANCIAL SERVICES INC., RE SHLOMO CONFORTI; File No. 3990-10-OH; Dated September 23, 2011; Panel: Brian McLean (11 pages)

Certification – Construction Industry – Evidence – Practice and Procedure – Witness – In an application for certification in which the union sought certification under s. 11, the union requested the Board's consent to call the evidence of its key witness by way of video conference – The witness was in Colombia and the parties agreed it was effectively impossible for him to return to Canada to testify – The union argued Rule 38.5 of the Board's Rules gave it jurisdiction to hold an electronic hearing and the weighing of various factors indicated the Board should use its discretion to allow the union's request – Specifically, the union pointed to the seriousness of the issues at stake, the impossibility of the witness testifying in person, the severe prejudice the union would face if its key witness could not testify, and the lack of significant prejudice to the employer – In response, the employer argued Rule 38.5 required that the balancing of such factors only be undertaken as a secondary step after the Board has determined the employer would not face significant prejudice – The employer asserted it would suffer significant prejudice in this case because the witness's credibility could not be properly assessed and the employer would be deprived of the opportunity to physically face and cross-examine the witness in "open court" – In the alternative, the employer asserted the balancing of various factors also indicated the Board should deny the union's request – The employer relied on

the inextricable link between the serious issues and the witness's credibility, the fact that the witness's inability to testify in person was caused by his own actions, and its assertion the witness no longer had an interest in or allegiance to Canadian laws or institutions – The Board agreed that Rule 38.5 requires a two-step analysis and a balancing of competing factors is only undertaken after the Board has inquired into whether the employer would face significant prejudice – However, after reviewing jurisprudence from the Board and the civil and human rights contexts, the Board granted the union's request to allow its witness to testify via video conferencing – The Board accepted the employer may be faced with some prejudice but could not conclude the employer would suffer *significant* prejudice – The Board also analogized video conferencing to the use of language interpreters and reasoned that while neither was preferred, it could not be automatically assumed they result in significant prejudice – The Board went on to the second stage of the analysis and considered various competing factors described above, as well as the comparatively greater harm to the union if the witness could not testify, and the lack of associated costs (the union agreed to pay all related costs) – The Board specifically rejected the employer's argument that it should consider the witness's lack of interest in or allegiance to Canadian law and reasoned it could instead be dealt with in overall conclusions concerning credibility – The Board ordered the union to communicate with the employer regarding arrangements for the video conference and to either retain counsel in Colombia or arrange for a member of its law firm to be present when the witness testified – Motion allowed

ISLINGTON NURSERIES LIMITED; RE UNIVESAL WORKERS UNION, LIUNA, LOCAL 183; File Nos. 2567-09-U; 2771-09-R; Dated September 23, 2011; Panel: Mark J. Lewis (21 pages)

collective agreement under which the grievance was filed – On the facts of this case, the Board held that the union had not named the right employer in its request to the Minister – The Board explicitly rejected the argument that the employer's identity is an issue of arbitrability that ought to be dealt with by the arbitrator

WORKERS UNITED CANADA COUNCIL; RE WORKERS UNITED AND CANADIAN OFFICE & PROFESSIONAL EMPLOYEES UNION, LOCAL 343; File No. 0929-11-M; Dated September 21, 2011; Panel: Harry Freedman (11 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.

Employer – Reference – The Minister referred two questions to the Board: (1) does the Minister need to know the correct name of the employer to appoint an arbitrator under section 49 of the Act when the union seeking to have the Minister appoint an arbitrator named an employer who objected to the appointment on the grounds it was not the employer party to the collective agreement under which the grievance was filed? And (2) if so, did the union in this case name the employer who was the party to the collective agreement? The Board determined the Minister needed to know the identity of the employer party to the

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Vale Inco Limited v. United Steelworkers Divisional Court No. 451/11	3033-09-U	October 7, 2011
René Gagné v. Algoma University College Faculty Divisional Court No. 11-1764 Ottawa	0460-10-U	Pending
Greater Essex County District S.B. Divisional Court No. 403/11	1004-08-M	Pending
Sanford Pensler, A Director of Korex Don Valley ULC et al v. CEP L. 132 et al Divisional Court No. 328/11	0598-10-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11	1155-10-U	Pending
Classic POS Inc. Divisional Court No. 301/11	4059-10-ES	Pending
Ineke Sutherland o/a Designworks Divisional Court No. 238/11	4061-10-ES	Pending
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 213/11	0816-10-U 0817-10-U	Pending
Humber River Regional Hospital v. SEIU Divisional Court No. 101/11	1092-09-R 1132-09-R 1133-09-R	December 20, 2011
SNC-Lavalin Divisional Court No. 78/11	1405-03-R	October 25, 2011
Promark-Telecon Inc. v. Universal Workers Union, L. 183 Divisional Court No. 600/10	0745-09-R 0754-00-R 0765-09-R 0782-09-R	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	Pending
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	Pending
Pharma Plus Drugmarts Divisional Court No. 551/10	0579-08-R 0580-08-R 1662-09-R	June 30, 2011; Reserved
SNC-Lavalin Divisional Court No. 482/10	2442-07-R 2936-07-R	October 14, 2011
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	Pending
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	June 2, & 3, 2011; Reserved
Rainbow Concrete (Mark Corner) Divisional Court No. 437/10	2904-09-U 2905-09-FC 3292-09-M	Sept. 12 & 13, 2011; Reserved
John McKenney v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 Ottawa	2687-08-U	Pending
Rainbow Concrete Divisional Court No. 856-10	3292-09-M	Sept. 12 & 13, 2011; Reserved
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
Rainbow Concrete Divisional Court No. 850-10	2904-09-U 2905-09-FC	Sept. 12 & 13, 2011; Reserved

Case name & Court File No.	Board File No.	Status
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10	3322-03-R 2118-04-R	Granted – Feb. 18, 2011 Pending - CA
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
Blue Mountain Resorts v. MOL Divisional Court No. 373/09	1048-07-HS 0255-08-HS	Dismissed May 18, 2011 Seeking leave to appeal to C.A.
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999-07-ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Divisional Court No. 212/09	1776-04-R et al	November 9, 2011
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending
Comfort Hospitality Inc. o/a Days Inn v. Director Employment Standards et al Divisional Court No. 344/08	2573-07-ES	Pending
L.I.U.N.A. v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending

Oct. 5th, 2011

NOTICE TO THE COMMUNITY

Please be advised that the Ontario Labour Relations Board will neither schedule nor hold hearings between **December 22, 2011 and January 3, 2012** inclusive. Matters of an urgent nature, however, may be scheduled on an expedited basis as determined by the Board, during this period. Applications will be processed in the usual manner on the dates that the Board is open for business, including: December 22, 23, 28, 29 and 30 2011.

Please note the hearing schedule for s. 133 grievance referrals over the holiday season.

Thank you for your attention to the above. Please have a safe and very happy Holiday Season.

DATE REFERRAL FILED	HEARING DATE
December 8 , 2011	January 4, 2012
December 9	January 4
December 12	January 5
December 13	January 5
December 14	January 6
December 15	January 6
December 16	January 9
December 19	January 9
December 20	January 10
December 21	January 11
December 22	January 12
December 23	January 13
December 28	January 13
December 29	January 16
December 30	January 16
January 3, 2012	January 17