

*H*ighlights

Ontario Labour Relations Board

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January 2012

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of last year. These decisions will appear in the November/December 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.

Bargaining Unit – Delay – Duty of Fair Representation – Employee – Fellows had been working in the position of 'Project Manager' although he continued to 'work on the tools' – Ainsworth paid remittances on behalf of Fellows who paid dues as a member of the Union – Fellows was reassigned as a 'working foreman' and, as a result, he chose to end his employment with Ainsworth claiming he had been constructively dismissed – This consolidated application followed a ruling of the Superior Court which stayed the constructive dismissal action pending a determination of whether Fellows was covered by the collective agreement, an issue the court deemed was beyond its jurisdiction – In this application the Union sought a determination under s.114(2) of the Act to determine whether Fellows was an 'employee' within the meaning of the Act and Fellows sought a declaration that the Union had violated s.74 – Ainsworth sought to have both matters dismissed due to delay as both parties previously knew or ought to have known there was an issue regarding Fellows' bargaining unit status which ought to have been grieved – Ainsworth also argued

the Board lacked jurisdiction to determine whether Fellows was in the bargaining unit because that determination must be made by an arbitrator, not the Board – Respecting the delay issue the Board was of the view both parties acted promptly once the issue concerning status was crystallized by the ruling of the Superior Court – On the jurisdictional issue the Board noted a Union could only violate its duty of fair representation under s.74 to a member in the bargaining unit, that is, a complainant must be in the bargaining unit for the duty to be owed – The Board held it had the power and the obligation under s.114(1) to determine whether Fellows is an 'employee' under the Act and under s. 74 to determine whether Fellows was a member of the bargaining unit – Parties ordered to file statements of fact – Matter continues by way of consultation

AINSWORTH INC.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353 AND GARETH FELLOWS; File Nos. 1071-11-M; 1171-11-U; Dated December 2, 2011; Panel: Harry Freedman (13 Pages)

Abandonment – Bar – Bargaining Rights – Bargaining Unit – Certification – Collective Agreement – The International Alliance of Theatrical Stage Employees ("IATSE") brought an application for the certification of a bargaining unit comprised of stagehands working in a local theatre operated by the Town of Richmond Hill – CUPE intervened and, along with the employer, took the position that the application was barred because the stagehands at issue were already covered by a collective agreement between CUPE and the employer – IATSE argued that CUPE did not

hold bargaining rights for the stagehands because: stagehands are excluded from the collective agreement; if CUPE did hold bargaining rights, they were abandoned; and if bargaining rights existed they had expired because the bargaining rights flowed from a Letter Of Understanding which had not been renewed – The Board found the stagehands were covered by the collective agreement between CUPE and the employer which barred the current application – The Board also stated bargaining rights come from the collective agreement and the Letter of Understanding provided for how the stagehands would be covered by the agreement not whether they would be covered – Regarding the abandonment argument, the Board stated abandonment should be measured in years not months and any hiatus in representation relates to the quality of representation, not the right to representation – Application untimely, application dismissed

THE CORPORATION OF THE TOWN OF RICHMOND HILL; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA LOCAL 58; RE CUPE AND ITS LOCAL 905; File No. 0392-11-R; Dated December 8, 2011; Panel: James Hayes (7 Pages)

Alteration of Jurisdiction – Apprehension of Bias – Construction Industry – Interference in a Trade Union – Practice and Procedure – The IBEW ordered two Locals (894 & 1739) to merge with a third, much larger, Local (353) – The two Locals brought an application alleging that the IBEW did not have just cause to order the merger and accordingly had breached sections 147 & 149 – The Locals brought a motion that the Vice-Chair was biased and that a reasonable apprehension of bias existed, relying only upon previous decisions written by the Vice-Chair – The Vice-Chair refused to hear the motions as the previous decisions “speak for themselves” (and cannot be added to: see *Jacobs Catalytic*) and because the motion appeared to be a delay tactic – After an extensive review of the evidence, the Board found the IBEW had just cause under sections 147 and 149 to make significant and substantial structural changes to the Locals to address the concerns of the IBEW as a whole and that those structural changes may well have been a merger of the three Locals – The

challenges facing the Locals represented a clear danger to the future of the Locals themselves and the IBEW as a whole and the Locals could not or would not rise to the challenges before them, requiring the IBEW to act – The Board found however that the IBEW chose to act unilaterally and imposed changes without consulting the Locals involved – The Board noted that there were a number of problems with the merger and ordered the IBEW to meet with the three Locals to discuss a number of specific issues, including whether there are any alternatives to merger – Applications dismissed with directions

FIRST DISTRICT CANADA; IBEW; RE IBEW, LOCAL 1739; RE IBEW, LOCAL 353; File Nos. 3174-09-U; 3175-09-U; Dated December 19, 2011, Panel: David A. McKee (66 pages)

Construction Industry Grievance – In upholding a five-day suspension for threatening to kill his foreman, the Board stated that when an event that fits squarely within the definition of workplace violence occurs, an employer is not only permitted but required to act, both to deal with the unacceptable behaviour and to take steps to ensure that its policies are known and understood – In considering discipline in the context of workplace violence, the issue of general deterrence takes on a more prominent role than it might in some other circumstances and nothing will undermine all of the policies and information sessions for employees as quickly as tolerance for an actual incident of workplace violence – The Board found no reason to reduce the penalty: the statement was not said as a “joke” and it was repeated calmly the next day; there was no apology and the grievor believed he was justified in making his statement – Grievance dismissed

TESTON PIPELINES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; File No. 1811-10-G; Dated December 2, 2011; Panel: David A. McKee (10 pages)

Duty to Bargain in Good Faith – Health and Safety – Strike – Unfair Labour Practice – The Union alleged improper and unlawful surveillance of their occupational health and safety representative and filed applications under s. 50 of the OHSA and s. 96 of the LRA alleging violations of sections 70, 72 and 76 – The employer alleged the union unlawfully

disrupted operations by engaging in a public smearing campaign, by turning down overtime shifts, by engaging in illegal strike activity, and by unlawfully disclosing what transpired during negotiations of the collective agreement – The employer filed applications under s. 100 and 96 of the LRA alleging violations of sections 17, 71, 76, 81 and 83 – This decision dealt with preliminary motions brought by both parties to dismiss the other parties' complaints without a hearing – The employer argued that the union's application ought to be dismissed because of: undue delay; failure to make out a prima facie case; an abuse of process; a personal attack which amounted to bargaining in bad faith; and no sound labour relations purpose for the Board to inquire into the application – The Board was not prepared to dismiss the application based on the delay argument stating once the event was crystallized the delay only amounted to seven months and the employer did not suffer significant prejudice – The Board, relying on the factors in *Wal-Mart Canada*, determined there was no real labour relations purpose to be served by continuing to litigate the complaints – The alleged surveillance took place three years ago and had no discernible impact on either party and the underlying surveillance issue had been resolved in a collective agreement which was midway through its term – In these circumstances, on the consent of the employer, the Board also dismissed the employer's complaints – Applications dismissed

TORONTO HYDRO-ELECTRIC SYSTEM LTD.;
RE CUPE, LOCAL ONE AND JOHN CAMILLERI;
 File Nos. 4298-10-U; 4299-10-U; 3601-10-U;
 3602-10-U; Dated December 1, 2011; Panel:
 Bernard Fishbein, J.A. Rundle, D.A. Patterson
 (17 pages)

Interference with Trade Union – Right of Access – Strike – Unfair Labour Practice –

During a long and bitter strike nine employees were terminated and banned from Vale Inco's property – One of those terminated, Veinot, had been a union activist, although after running for President of the Local (from his position as Vice-President) and losing, he had no official position at the time of the strike – After the strike was over the President retired and Veinot was appointed Local Vice President, in accordance with the Steelworkers' constitution – Vale continued to ban Veinot from all company property and

refused to recognize him in those capacities where it asserted the collective agreement required him to be an employee – The Steelworkers filed this application alleging a violation of s. 70 of the Act – Veinot was a satisfactory employee, with a discipline free, or virtually discipline free record; no criminal record and no record of violent outbursts or conduct – He was found not guilty of criminal harassment resulting from an incident that occurred during the strike, the same incident that gave rise to his termination and banning from the company property – Using either "actual interference" (see: *International Wallcoverings*) or balancing of interests (see: *Maritime Employers Association*) test, the Board found that Vale had breached the Act – First, alternative solutions were not offered by Vale; second, an arbitration proceeding was delayed as a result of the Union's advisor (Veinot) not being able to "take a view" of Vale's property; third, the ban deprived the President and others from the assistance of Veinot whenever the issue involved Vale property; and finally, the "cold and hard" message from Vale was not subtle, but undermined both Veinot and the Local – In assessing the balance of interests the Board noted that there was nothing before it that connected Veinot in any way to the incident – He was acquitted of the charges and Vale declined to explain the manner, method or content of its own investigations into the incident – The Board found it was not credible on the evidence before it to conclude that Veinot presented such a "risk to the physical and mental well-being" of Vale Inco's employees – The Board found that between the legitimate company interests (protection of the physical and mental well-being of its employees) and reality, there must be more to "connect the dots" than a mere belief – That is, in balancing the competing interests, Vale Inco's mere belief does not outweigh the very real impact that banning Veinot from Company property has on the administration and representation of the Union – Application allowed with posting and cease and desist direction

VALE INCO LIMITED; UNITED
STEELWORKERS ON ITS OWN BEHALF AND
ON BEHALF OF ITS LOCAL 6500 AND ITS
 LOCAL 6200; File No. 2880-10-U; Dated
 December 22, 2011; Panel: Bernard Fishbein
 (20 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.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Aragon (Hockley) Development (Ontairo) Corporation Divisional Court No. 595/11	2781-09-R	Pending
C.W. Smith Crane Services v. IUOE Local 793 Divisional Court No. 513/11	3894-09-G	Pending
Erie St. Clair Community Care Divisional Court No. 504/11	0144-09-PS	Pending
Swift Railroad Contractors Divisional Court No. 400/11	0039-06-U 0139-06-R	Pending
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	April 17, 2012
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	Dismissed December 20, 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	Abandoned Dec. 19/11
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	March 7, 2012 (motion)
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	Granted Oct. 4/11, Leave to appeal to C.A. abandoned Dec. 22/11
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	Granted Oct. 7/11 Seeking leave to appeal to C.A.
John McKenney v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 Ottawa	2687-08-U	Pending
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10 Court of Appeal No. C53992	3322-03-R 2118-04-R	Feb. 14 & 15, 2012

Case name & Court File No.	Board File No.	Status
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 Court of Appeal No. C54427	1048-07-HS 0255-08-HS	Pending – 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	Nov. 9/11 – Reserved
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