
TALKING UNION IS A NEWSLETTER HIGHLIGHTING MATTERS OF
INTEREST TO THE LABOUR RELATIONS COMMUNITY

November 2006

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Arbitrator declines to direct "local area modification" of Provincial Agreement

In the first decision of its kind affecting the electrical trade, an arbitrator has dismissed an application for "local area modifications" to the Principal Agreement between the International Brotherhood of Electrical Workers and the IBEW – Construction Council of Ontario and the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario ("ETBA"). The application was brought by the ETBA under Section 20 of the Principal Agreement which sets out an alternative to sections 163.2 and 163.3 of the *Labour Relations Act*. (Readers will remember that these sections were introduced into the Act by Bill 69 in December 2000. Bill 69 set up quite a complicated process for local area modification of provincial agreements in the ICI sector of the construction industry.)

In his decision released on November 2, 2006, Arbitrator David McKee dismissed the application to amend the Principal Agreement in the geographic jurisdiction of Local 303 (essentially Niagara and a portion of Haldimand-Norfolk in the Dunville area) in respect of:

- all projects in the commercial sector of the construction industry other than casinos and casino hotels; and
- any project in any sector of the construction industry covered by the Principal Agreement where non-IBEW contractors are bidding on the project.

The ETBA sought significant changes to the Principal Agreement (including deep cuts in wages, vacation pay, pension contributions, shift premiums and overtime), but the first issue before the arbitrator was whether "there [was] a significant competitive disadvantage to the Contractors bound to the Principal Agreement with respect to the scope of work defined in the application having regard to current market conditions". It was on this threshold issue that the application stumbled. The Arbitrator ruled that the ETBA was required to demonstrate that any competitive disadvantage arose from the application of the Principal Agreement and not from some other market force. According to the arbitrator, if the competitive position of an employer changes because of exterior market factors that affect profitability or competitive position that are unrelated to the Principal Agreement, that is *not* a significant competitive disadvantage that arises from the Principal Agreement.

Mr. McKee accepted that the change in the nature of the ICI market in the Niagara area had had a detrimental effect on the work available to IBEW contractors. But that was simply because the industrial segment of the ICI sector had become a more limited source of work than it had been in the

past, and the commercial segment, though expanding, was just as difficult to bid successfully in as it ever was. The Arbitrator concluded that it was not the provisions of the Principal Agreement that created any significant competitive disadvantage. The advantages and disadvantages of the Principal Agreement, he held, “are what they always were”. Having failed to prove its case, the ETBA application was dismissed.

IBEW Local 303 was represented in the proceeding by Koskie Minsky partner, **Alan Minsky**.

IBEW documents rampant non-compliance and non-enforcement of TQAA

International Brotherhood of Electrical Workers Local 586 continues its campaign to secure compliance with – and enforcement of – the *Trades Qualification and Apprenticeship Act* (TQAA).

In a 20-page brief submitted last month to Chris Bentley, the Minister of Training, Colleges and Universities (“MTCU”), Local 586 documented a consistent pattern of failure by non-union contractors to abide by the provisions of the TQAA. At the same time, by its own admission, the MTCU has done virtually nothing to deal with this situation.

Last spring, following an earlier IBEW Local 586 initiative, Ministry of Labour inspectors (who are responsible for enforcing the “certification” provisions of the TQAA) were given the power to issue on-the-spot tickets to employers, supervisors and employees who violate the “certification” requirements of the TQAA. Fines range from \$195 to \$295. Over 200 such tickets have been issued in the Ottawa area alone since April 2006. There is good reason to think that these enforcement efforts are having a real effect on job sites.

But enforcement of the TQAA’s “ratio” provisions lies with the Ministry of Training, Colleges and Universities – *not* the Ministry of Labour. And the MTCU, unfortunately, continues to neglect its enforcement responsibilities.

In its submission to the MTCU, IBEW Local 586 compared information provided by 39 electrical contractors to the Ontario Labour Relations Board regarding the individuals whom they certified were performing electrical work, on the one hand, with the information that the MTCU had collected for those same employers. The data revealed the following:

- First, employers exceeded the TQAA “ratio” requirements more than 90 % of the time. **These violations were revealed in material prepared and certified by employers themselves.**
- Second, employers are so indifferent to the “ratio” requirements under the TQAA and so confident of the MTCU’s non-enforcement of the “ratio” provisions that employers routinely and unhesitatingly verify their non-compliance in certified filings with the Ontario Labour Relations Board.
- Third, there is a tremendous gap between the information that is collected and retained by the MTCU, on the one hand, and the actual employment practices of Ontario’s electrical employers, on the other.

IBEW Local 586 proposed **both** short-term and long term solutions in its brief. In the short term, the Ministry of Training, Colleges and Universities was urged to use the powers that it already has to:

- **independently verify information** regarding the number of journeymen and apprentices employed by an employer and ensure that such information is collected and verified regularly – not only when new apprentices are registered;
- **conduct both targeted and random field inspections** to enforce the ratio provisions of the TQAA and be prepared to perform such inspections during "off hours" (nights and week-ends);
- **conduct both targeted and random audits** of employers' payroll and tax records to verify compliance with the TQAA ratio provisions;
- **implement a system to receive and act upon** information from MOL inspectors when they discover violations of the certification provisions of the TQAA so as to check those same employers for compliance with the TQAA's "ratio" provisions;
- **give MTCU training consultants the power to issue "tickets"** under the *Provincial Offences Act* for violations of the TQAA and **direct** training consultants to exercise that power;
- **actually prosecute violations of the TQAA**, and seek substantial fines for violations of the TQAA – especially for chronic violators and those violators who exploit young workers; and
- **abandon its policy** of routinely giving "credit" in respect of unlawful employment when registering apprentices.

In the longer term, IBEW Local 586 also proposed:

- **amending** the regulation under the TQAA so that the ratio provisions are applied *at each job site*;
- **transferring** responsibility for enforcing the TQAA to the Electrical Safety Authority or, alternatively, consolidating all TQAA enforcement under the MOL.; and
- **amending** the TQAA to harmonize fines with those of OHSAA with regard to ratio enforcement.

"The time for action is ripe," says Local 586 Business Manager James Barry. "This Government must act without delay to protect both young workers and the public," he added.

Ontario government appoints "expert commission" on pensions

On November 9, 2006, the Ontario Government announced the appointment of an "expert commission" to seek input about ways to ensure that Ontarians can rely on their pensions, and keep the province's pension system sustainable. The review will focus on:

- the importance of maintaining and encouraging the system of defined benefit pension plans in Ontario;
- the importance of maintaining the affordability of defined benefit pension plans for both members and sponsors;
- the importance of pension plans in supporting a competitive economy;

- the need to safeguard the security of pension benefits;
- the need to balance the rights and obligations of employers, plan members and pensioners; and
- the impact of demographics and the changing nature of the workforce on the provision of employment pensions.

The Commission Chair is noted academic and labour law expert Harry Arthurs. He will be assisted by four pension experts, including **Murray Gold** of **Koskie Minsky**. The panel will hold consultations throughout the province, and is expected to report back in the summer of 2008.

There are more than 7,500 pension plans registered in Ontario, and more than 2 million Ontario pension plan members. Fifty-one percent of the plans are defined benefit pension plans, with 83 per cent of the members. The *Pension Benefits Act* has not been substantially updated since 1986 and, of course, much has changed in pensions since then.

For more information, visit the Commission's web site at www.pensionreview.on.ca.

Employer challenges *Air Kool* line of cases in Divisional Court

In a case called *Air Kool*, decided in August 2005, the Ontario Labour Relations Board decided that the 2-day time limit within which an employer must reply to a card-based certification application is mandatory. This means that the Board has no discretion to relieve against an employer's failure to meet the statutory time limit contained in s. 128.1 of the Act – no matter its excuse for that failure. As a consequence, the Board has in the last 15 months issued dozens of certificates under s. 128.1 where the employer has filed a late response (or no response at all).

Since the *Air Kool* case was decided, the Board's approach has been challenged on several occasions. But the Board has rejected each of the reconsideration requests received. One of these cases is called *Maystar General Contractors Inc.* Maystar was certified last June after it failed to file its response to a certification application due to what it called "administrative error". For the reasons given in the *Air Kool* case, the Board ruled that it was unable to forgive the employer's failure.

Maystar is now asking the Divisional Court to review and quash the Board's decision. Maystar says that the labour board's interpretation of the Act denied its "fundamental right to participate in the certification process". It says that the Board has committed "a palpable and overriding error" that the Court should correct. The International Union of Painters and Allied Trades, which is defending the Board's decision in Court, says that the Board's established approach to interpreting s. 128.1 is faithful to the language and policy of the statute and is far from "patently unreasonable" or "absurd".

A three-judge panel of the Divisional Court will hear Maystar's application for judicial review on December 6, 2006.

Federal Labour Standards Review releases Final Report

On October 30, 2006, the Federal Government released Commissioner Harry Arthurs' comprehensive review of Part III of the *Canada Labour Code* titled "Fairness at Work: Federal Labour Standards for the 21st Century".

Part III of the Code establishes labour standards for workers employed in federally regulated enterprises. First enacted in 1965, it currently regulates hours of work, minimum wages, statutory holidays and annual vacations, statutory leaves (maternity, parental, compassionate care, bereavement and sick leave) and the termination of contracts of employment. It lays down procedures for workers to challenge their unjust dismissal and to recover unpaid wages, and also deals, to a limited extent, with human rights in the workplace (pay equity, sexual harassment).

The Commission's 324-page report comprises 11 chapters and makes dozens of important recommendations, including the following:

- Employers should provide all workers, including autonomous workers and independent contractors, with a written notice of their status, and should provide employees with notice of the terms of their employment contract, as well as their rights under Part III
- the government should proclaim into force Bill C-55, which protects workers' wages and benefits in the event their employer becomes insolvent
- Psychological harassment (bullying) should be dealt with as part of a broader program of violence prevention under Part II of the *Canada Labour Code*, which deals with health and safety in the workplace
- Provisions in Part III governing maternity, parental and compassionate care leave should be made more flexible
- Workers should have a limited right to refuse overtime in order to meet family obligations and attend scheduled educational programs
- Workers should be able to request individual accommodations concerning their hours and location of work
- Severance pay should be improved for long-service employees
- Workers claiming to have been unjustly dismissed should have access to speedier and more user-friendly procedures and complaints of unjust dismissal should be screened to ensure that employers are not subjected to frivolous and vexatious claims
- Part-time and temporary workers should receive equal pay if they perform the same work as full-time and permanent workers
- The federal government should investigate the feasibility of establishing a public or private sector "benefits bank," which would assist vulnerable workers and small businesspersons to secure coverage for benefits (such as drug, dental or disability insurance and pensions)

- The government should resume responsibility for ensuring that a proper minimum wage covers the small number of vulnerable employees in the federal domain who are in need of protection against exploitation or abuse. Rather than adopt a specific dollar figure, which would likely become the subject of debate from time to time, **the government should accept the principle that no Canadian worker should work full-time for a year and still live in poverty.** This principle should be translated into practice over a phase-in period of several years, during which the federal minimum wage should be raised until it meets the low-income cut-off (LICO) index. Thereafter, it should be adjusted at fixed intervals according to an agreed formula. This is an issue of fundamental decency that no modern, prosperous country like Canada can ignore.

While it is unlikely that the current Conservative federal government will act soon on any of these recommendations, it is hoped that the Report will influence several provincial governments to take action in their own jurisdictions. For more information on this very important report, visit the website of the Federal Labour Standards Review at www.fl-s-ntf.gc.ca.