Talking Union is a bi-monthly newsletter highlighting matters of interest to the labour relations community. We welcome your questions and comments.

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March 1999

VOTES AFTER ULP COMPLAINTS: THE TAXI-TAXI DECISION

Since the enactment of Bill 31, there has been speculation about how the Ontario Labour Relations Board would decide certification proceedings where the applicant union does not have the 40% membership evidence required for a vote but relies on ss. 11(1) of the Labour Relations Act, 1995, empowering the Board to order "another" representation vote. The Board considered this situation in 526093 Ontario Inc. c.o.b. as Taxi-Taxi (unreported, November 13, 1998), a decision followed in Alto Restoration Renovations Ltd. (unreported, January 19,1999). In both decisions, the unions had applied for certification prior to Bill 31, although the Board did not consider their applications under ss. 11(1) until the amendments had become effective.

In Taxi-Taxi, the Steelworkers applied for certification and filed an unfair labour practice complaint. The union did not enjoy 40% membership support and, accordingly, the Board did not order a representation vote. At the hearing, the employer moved for dismissal of the union's application for certification under section 11 and for imposition of a one year bar on further applications. The employer argued that under the amended section the Board may order "another" representation vote pursuant to section 11 only if an initial representation vote had been conducted and the Board subsequently concluded that the results of that "prior representation vote did not likely reflect the true wishes of the employees in the bargaining unit".

The union argued that it was because of the employer's illegal conduct that it could not obtain 40% support at the time of its application and that the employer's argument unduly restricted the Board's remedial authority.

While agreeing with the union that the Act should be interpreted in a manner which preserves a broad remedial authority for the Board in order to achieve the purposes and freedoms of the Act, Vice Chair Whitaker ruled that the union was not entitled to a representation vote under s. 11, as amended, in the absence of an initial vote. Accordingly, the Board dismissed the certification application, although it declined to impose a bar on future application since the

wishes of the employees had not been tested in a vote.

In this decision the Vice Chair suggests that if the union's allegations of unfair practices were successful in the complaint which accompanied its certification application, the Board could fashion a remedy in that proceeding which would fully redress the employer's conduct and would safeguard the rights and freedoms contemplated by sections 2 and 5 of the Act.

The union's proceedings under section 96 of the Act have concluded, although no decision has been released. Since the union did not seek a representation vote in the complaint, the decision is unlikely to address the remedies raised in the Vice Chair's comments.

In Alto Restoration Renovations Ltd., the applicant union, the Labourers, argued that Taxi-Taxi was wrongly decided. The Board disagreed, although it declined to dismiss the union's application for certification altogether as requested by the employer. The Board concluded that the certification proceeding should be kept alive in order to allow the union to request remedies in its unfair labour practice complaint, such as holding a vote and then processing the certification in the normal course under s.10.

Taxi-Taxi makes its clear that a first vote must have occurred prior to obtaining the remedy of "another" representation vote under ss. 11 (1). In the face of unfair labour practices, an applicant union wishing to preserve the remedy of a future vote should seek to have a vote held (although perhaps sealing the ballot box) and should file a complaint under s. 96. The complaint should seek remedies which include a representation vote and the processing of the certification application in the normal course, since ss. 96(8) specifically precludes the Board from certifying a union as a remedy for unfair labour practices. Given the plain language interpretation of the amended ss. 11(1) in Taxi-Taxi, that section has become a much less effective remedy for unions facing unfair labour practices during organizing campaigns.

DIV. COURT NARROWS APPLICATION OF PILON

Since 1996, arbitrators have been confused about their jurisdiction to hear grievances based on benefits and entitlements not found within the plain language of the collective agreement, primarily in grievances claiming benefits under disability insurance plans.

Prior to 1996, arbitrators found that in order to have a valid grievance seeking entitlement to disability benefits, the collective agreement must expressly incorporate the terms of the insurance plan or must otherwise make the employer answerable for a denial of disability benefits. Where the collective agreement only required the employer to provide an insurance plan, arbitrators uniformly held that actual entitlement to the benefits was a matter between the employee and the insurer, enforceable through the courts, not by grievance. In 1996, the Ontario Court of Appeal issued a decision which undermined the traditional approach, Pilon v. International Mineral and Chemical Corporation (1996), 31 O.R. (3d) 210). In

Pilon, the OCA held that, since the entitlement to disability benefits arose under the collective agreement, the employee must grieve to obtain the benefits and therefore the employee's civil suit against the insurer was dismissed.

Subsequently, arbitrators have grappled with the application of Pilon. Some arbitrators have concluded that it implies a "but for" test in unionized workplaces: if the entitlement to the benefit would not exist but for the collective agreement, then it was grievable, regardless of the language in the agreement. Others used it to join insurance companies as a party to the grievance arbitration, an unusual approach since third parties are not normally bound to a contract between two others, such as a union and an employer. Still other arbitrators have expanded Pilon, and other related decisions, to include other issues, such as assuming jurisdiction to hear claims for mental distress damages or to remedy tortious conduct in the workplace.

The Divisional Court has now released decisions reviewing two such arbitral awards. These decisions narrow the application of Pilon and support the traditional approach to the jurisdiction of an arbitrator. In Dubreuil Forest Products Limited (unreported, Bendel), the arbitrator, relying on Pilon, assumed jurisdiction to arbitrate the grievor's entitlement to benefits, even though the language of the collective agreement would not normally support such jurisdiction. In Honeywell Limited (1997), 65 L.A.C. (4th) 37, arbitrator Mitchnik used Pilon to name the insurer as a party to the grievance proceeding. On review, the Div. Ct. held that the traditional approach to grievances for disability insurance, which requires the arbitrator to find jurisdiction within the four corners of the collective agreement, continues to be the applicable law. Further, it held that arbitrators, whose own jurisdiction is limited to interpreting the collective agreements under which they are appointed, lack jurisdiction to add a third party, such as the insurer, to that dispute.

(See Sun Life Assurance Company of Canada and CAW, Honeywell Ltd./Aerospace Division and Morton G. Mitchnick, Court File No. 886/97 and London Life Insurance Company and Dubreuil Brothers Employees Association, A Division of IWA Canada, Local 2693, 98 CLLC, 220-075. The practical implication of these decisions is that the specific language of the particular agreement must still be carefully assessed before answering the question "To grieve or not to grieve".)

WHAT'S NEW?

- At Koskie Minsky: Two new partners – Arleen Huggins and Jeffrey Long, formerly litigation associates.

  One new Lawyer - Ari Kaplan, in our Pension Department.
- At the OLRB:
  New location – 505 University Avenue, Toronto.
  New Associate Chair – Mary Ellen Cummings.

- In Legislation: Bill C19 passed effective January 1, 1999, totally

revamping the Canada Labour Code and creating the Canada Industrial Relations Board. To be reviewed in the next Talking Union. Appointments are now finalized for CIRB Vice Chairs and Nominees.