



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

Editors

Elizabeth Mitchell

Telephone:

416-977-8353

Ursula Boylan

TeleFax:

416-977-3316

May 1999

DRUG TESTING

The Operating Engineers, Local 793 has won a grievance under its ICI collective agreement and had an employer's drug testing policy declared void in Sarnia Cranes Limited, (unreported OLRB decision, May 4, 1999, L. Shouldice). The policy, which was imposed by Sarnia Crane at the request of its major customer Imperial Oil Limited, required testing in four situations:

- (i) pre-employment;
- (ii) reasonable cause;
- (iii) post incident; and
- (iv) monitoring, including random testing.

The test was a urinalysis to determine the presence of drugs or alcohol in the employee's bodily fluids. If the level exceeded specified thresholds, or if the employee refused to be tested, the employee was banned from working for Imperial Oil. The Union grieved that Sarnia Crane violated the management's rights clause by unilaterally imposing a policy which was arbitrary, unreasonable, and offended human rights legislation.

At arbitration, no one disputed that operating a crane is a safety-sensitive job and that all parties have an interest in maintaining a safe workplace. In its decision, the Board first concluded that the evidence did not establish any history or culture of drug abuse at Sarnia Crane or within the industry. It noted that other conditions not covered by the policy, such as fatigue and stress, can be equally impairing and dangerous. The Board then reviewed substantial expert testimony. That evidence established, first, that a urinalysis can not determine that an employee is impaired at the time of testing and, secondly, that there are less intrusive ways to manage substance abuse. The Board concluded that, while the employer had a duty to guarantee a safe workplace and to ensure its employees are not impaired on the job, it could do so more effectively through less intrusive means such as employee assistance and health promotion programmes, trained supervision, and proper identification and management of problematic behaviour. The imposition of this ineffective testing programme was arbitrary and unreasonable and, therefore, violated the collective agreement.

In its careful, 84 page decision, the Board reviews decisions of the Ontario Human Rights Commission and various levels of courts, including decisions which have struck down Imperial Oil's attempt to impose testing on its own employees. These decisions have all upheld employee privacy interests over policies which experts have concluded do not help in controlling substance abuse in workplaces nor measure individual impairment from performing work duties at the time of the test. The decisions conclude that, in most workplaces, properly trained supervision and programmes supportive of troubled employees can effectively address the safety goals which arbitrary testing can not.

ENFORCEMENT OF NEGOTIATED PENALTIES

Collective agreements frequently impose monetary consequences on employers for breaches of their terms. Historically, the OLRB, when sitting as an arbitration board in construction industry grievances, has refused to enforce these clauses unless it first decided that they were a legitimate pre-estimate of damages flowing from the violation, rather than a "penalty". Three recent decisions, however, signal a change in policy. It appears that the OLRB, when acting as an arbitration board, will now enforce the agreement's negotiated terms, including penalties.

In *Kennedy Masonry Company Limited*, [1998] OLRB Rep. July/August 622, in comments not essential to the decision, Chair MacDowell analyzed, and rejected, the Board's reluctance to enforce agreed consequences for non-compliance. Subsequently, in *Provincial International Cranes Inc.*, [1998] OLRB Rep. Nov./Dec. 1004, the Board adopted and applied the Chair's reasoning. Here, the IBEW was successful in enforcing a penalty of 2 hours' wages for each day the employer was late in delivering a final paycheque to departing employees; the Board ordered Provincial Crane to pay a penalty for 94 days' delay for one grievor and 102 days for the other, commenting these were significant penalties compared to the nature of the offence, not previously enforceable. Finally, in *Asbestos Workers, Local 95 and Sentinel Systems Inc.*, (unreported, April 27, 1999, M.E. Cummings), the Board ordered the employer to pay a \$25,000.00 penalty, in addition to other damages, a penalty provided in the agreement where the evidence established that the employer knowingly employed non-union employees.

In these decisions, the Board has reiterated that collective agreements are different from other contracts and different rules apply. They are part of a broad, ongoing relationship and have significant, institutional purposes. Further, when sitting as an arbitrator, the OLRB's jurisdiction, like other arbitration boards, is limited to the collective agreement pursuant to which it has been appointed; such boards have no discretion to refuse to enforce a penalty clause freely negotiated by the parties. The new decisions will be helpful in enforcing penalties at arbitration, but, more importantly, may encourage employers to comply with their contractual obligations in order to avoid such penalties.

CHANGES TO THE CANADA LABOUR CODE

Legislation affecting labour relations in the federal sector changed substantially in January 1999 with the passage of Bill C19. Bill C19 re-vamped the Canada Labour Code, Part 1. Highlights of the changes follow.

Administrative Changes

- Board re-named to become the Canada Industrial Relations Board
- CIRB becomes representational, with neutral Chair and nominees for EEs and ERs
- CIRB members to be experienced in labour relations, may be full or part-time, and can be subject to remedial or disciplinary measures after a judicial inquiry
- Routine or urgent matters may be heard by a Vice-Chairperson sitting alone
- Board's powers expanded to allow for resolution of complex industrial issues, pre-hearing procedures, ability to refuse to hear matters, power to expedite procedures, settle disputes during proceedings, make interim orders, extend time limits, decide matters without a hearing, provide med-arb services
- Federal Mediation and Conciliation Service and its duties defined
- Powers of grievance arbitrators expanded re interim orders, considering other employment-related statutes, and expediting proceedings.

Representation and Pre-Strike Obligations

- Explicitly recognizes rights of ERs to communicate with EEs during organizing, subject to unfair labour practice complaints
- For purposes of trade union activity, such as organizing or bargaining, Board discretion to allow access to off-site EEs by ordering production of names and addresses and by permitting electronic and other means of communication
- Automatic certification without majority support available as a remedy for serious ER offences during organizing
- Conciliation process now single stage with choice of procedures, to take no more than 60 days (unless parties agree to longer)
- Acquisition of right to strike or lockout: 21 days after completion of conciliation process but subject to

(i) secret ballot strike vote within previous 60 days; or

(ii) secret ballot lockout vote among members of the employers' association within 60 days;

(iii) 72 hours advance notice of the strike/lockout to the opposing party and the Minister;

(iv) any applications to CIRB regarding essential services must be completed.

Rights and Obligations During Legal Work Stoppage

- Services and facilities essential to public health and safety and to grain vessels at terminals must be maintained during work stoppages
- Unfair labour practice occurs if ER uses replacement workers "for the demonstrated purpose of undermining a trade union's representational capacity rather than the pursuit of legitimate bargaining objectives", remedied by order to stop using replacements
- Mandatory reinstatement of EEs after strike or lockout, in preference to EEs hired after notice to bargain given
- No application for certification or decertification permitted during work stoppage without Board's consent
- Replacement EEs not entitled to participate in any representation vote
- EEs may maintain insurance and benefit programs during work stoppage.

Bargaining Cycle and Successor Rights

- Just cause protections from discipline and discharge between date of certification and date of the first collective agreement, enforceable through arbitration
- 2 year term for first collective agreements settled by the CIRB
- Period for serving notice to bargain for renewed agreement extended to 4 months
- Process of reviewing bargaining unit descriptions improved
- Successor rights to apply where a provincial undertaking becomes subject to the Code

- Collective agreement continues to apply until the expiry of the agreement to portions of the public service which become privatized
- Pay to be maintained where the employer in a contract for services changes.

Transitional Rules

- Apply previous law if notice to bargain served **before** the new provisions effective
- Members of former Board may complete ongoing matters, if requested by CIRB.

Occupational Health and Safety

- Changes aim at increasing role for EEs and ERs and decreasing government's role
- New provisions for Corporate Health and Safety Policy Review Committees for ERs with 300 or more EEs to ensure corporate wide approach to H & S issues
- Internal resolution process to guide workplace parties in resolving issues of concern without need for government intervention
- Workplace supervisors to be required to receive training in H & S
- New provision to allow pregnant or nursing EE to withdraw from work she believes will adversely affect her or the fetus, before obtaining medical certificate.

The new Chair of the CIRB has stated his objective is to speed up the processes at the Board, to reduce the number of hurdles for the parties, and to provide sound and rational jurisprudence in the federal sector. Although the CIRB has issued several written decisions since the changes were implemented, it is experiencing difficulties publicizing them. Copies can be obtained by calling the CIRB directly.

WHAT'S NEW?

At Koskie Minsky:

Our web site: www.koskieminsky.com

Our e-mail addresses: lawyer's first initial plus last name, then firm name and .com – e.g.: emitchell@koskieminsky.com

At the OLRB:

Several new vice-chairs:

David McKee, John Lewis, Marilyn Silverman, Tony Brown, Patrick Kelly and Carolyn Rowan.

And two resignations:

Jules Bloch and Janice Johnston, both of whom have been appointed to the Grievance Settlement Board.