ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0337-16-R**

Victor Oliveira and other employees of 1775604 Ontario Inc., Applicant v Labourers' International Union of North America, Local 183, Responding Party v **1775604 Ontario Inc. c.o.b. as JC Contracting,** Intervenor

OLRB Case No: **0373-16-R**

Victor Oliveira and other employees of 1775604 Ontario Inc., Applicant v Labourers' International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Local Unions 183, 247, 493, 506, 527, 607, 625, 837, 1036, 1059, 1081 and 1089, Responding Party v **1775604 Ontario Inc. c.o.b. as JC Contracting**, Intervenor

BEFORE: Jack J. Slaughter, Vice-Chair

DECISION OF THE BOARD: June 16, 2016

1. These are two applications for the termination of bargaining rights filed pursuant to section 63 and/or section 132 of the *Labour Relations Act, 1995* S.O. 1995 c.1 as amended ("the Act"). The date of application for both is Friday, April 29, 2016.

2. In these applications, the applicant seeks to terminate the bargaining rights held by two entities affiliated with the Labourers' International Union of North America with respect to certain employees of 1775604 Ontario Inc. c.o.b. as JC Contracting ("the Employer"). For the purposes of this decision, these two entities will collectively be referred to as the "Labourers".

3. By decision of the Board (differently constituted) dated May 10, 2016, the parties were advised that this matter would be referred to a panel for a Case Review. The parties were more specifically advised as follows at paragraph 33 of the decision:

> 27. All material in the file will then be reviewed by a panel of the Board. **Since this is an application to terminate bargaining rights the Board will hold parties to a higher standard of pleadings and particulars than it has previously done in such proceedings**. On a Case Review, the Board will make a determination about the sufficiency of the parties' factual assertions. *The Board will determine whether or not a party has pleaded sufficient cogent facts about the disputed person or the circumstances that the Board concludes that it needs to hear the proposed evidence. It is not enough to speculate about where the party might find evidence. Before the Board will entertain a dispute, a party must be able to demonstrate that it has present knowledge of evidence that is likely to be of significance in the dispute***.** In the absence of such particulars, the Board may decide the dispute on the basis of the materials filed.

4. This panel has conducted the case review. In light of the conclusion the Board has come to regarding the circumstances of the delivery of this application, the Board finds that it does not need to delve further into the many other issues raised by the parties, but does note that Information Bulletin No. 32 requires "both detailed and specific factual pleadings" before it will hold a hearing into matters raised by a party in a displacement application: see *Aspen Aluminum Ltd.*, 2013 CanLII 14719 (March 19, 2013.)

5. However, on the facts of this case, the Board finds that this application should be dismissed based upon the failure of the applicant to deliver the application to the Labourers in a timely manner as required by the Act and the Board's Rules of Procedure.

6. The applicable provisions to making this determination are subsection 63(3) of the Act, Rules 24 and 26 of the Board's Rules of Procedure and the Board's Information Bulletin No. 7.

7. Section 63(3) provides as follows:

> (3) The applicant shall deliver a copy of the application to the employer and the trade union by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.

8. Rule 24 stipulates:

> **24.1** Applications and all other material required to be delivered under Part V of these Rules must be delivered in one of the following ways:
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> (a) facsimile transmission;
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> (b) Courier;
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> (c) hand delivery; or
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> (d) any other way agreed upon by the parties.
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> **24.2** The date of filing is the date that a document is received by the Board. However, if an application is sent by Priority Courier, the date of filing is the date on which the application is sent (as verified by the Post Office).
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> **24.3** An applicant must verify in writing that it has delivered the application and other material as required by these Rules by filing a Certificate of Delivery not later than two (2) days after filing the application with the Board. The Board will not process an application that fails to comply with this Rule and the matter will be terminated.
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> **24.4** In the event of a strike or lock-out at Canada Post that renders its Priority Courier service unavailable to the public, the words "Priority Courier" and "Post Office" in Rule 24 are replaced, with necessary modifications, by the words "a courier service other than Priority Courier" for the duration of the strike or lock-out.

9. Rule 26.3 states:

> **26.3** The applicant must deliver the following to the union not later than two (2) days after filing its application with the Board:
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> (a) a completed copy of the application (but not including the material described in paragraphs (a), (b) and (c) of Rule 26.1);

(b) a blank copy of the form set by the Board for responding to the application (Form A-78);

(c) a completed copy of the Notice to Union of Application for Termination of Bargaining Rights under Section 63 or 132 of the Act, Construction Industry (Form C-34);

(d) a copy of Information Bulletin No. 7 -- Termination of Bargaining Rights in the Construction Industry under Section 63 or 132 of the Act;

(e) a copy of Information Bulletin No. 8 -- Vote Arrangements in the Construction Industry;

(f) a copy of Information Bulletin No. 10 -- Status Disputes in Termination Applications in the Construction Industry, except for an application made between February 1, 2013 and April 30, 2013 and triennially thereafter, then a copy of Information Bulletin No. 32--Resolving Disputes in Displacement and Termination Applications in the Construction Industry during the Construction Open Period; and

(g) a copy of Part V of the Board's Rules of Procedure;

and must also deliver to the employer:

(h) completed copies of the application (but not including the material described in paragraphs (a), (b) and (c) of Rule 26.1);

(i) a blank copy of the form set by the Board for intervening in the application (Form A-79), including Schedule C (List of Employees) and a blank Form A-124 [Confirmation of Posting];

(j) a completed copy of the Notice to Employer of Application for Termination of Bargaining Rights under Section 63 or 132 of the Act, Construction Industry (Form C-35);

(k) a copy of Information Bulletin No. 7 -- Termination of Bargaining Rights in the Construction Industry under Section 63 or 132 of the Act;

(l) a copy of Information Bulletin No. 8 -- Vote Arrangements in the Construction Industry;

(m) a copy of Information Bulletin No. 10 -- Status Disputes in Termination Applications in the Construction Industry, except for an application made between February 1, 2013 and April 30, 2013 and triennially thereafter, then a copy of Information Bulletin No. 32—Resolving Disputes in Displacement and Termination Applications in the Construction Industry during the Construction Open Period; and

(n) a copy of Part V of the Board's Rules of Procedure.

10. Information Bulletin No. 7 specifies that "[t]he applicant must deliver a Construction Termination Package (Union) to the union no later than two (2) days after the Application Filing Date".

11. It should also be noted that Rule 40.7 of the Board's Rules of Procedure permits the Board to "relieve against the strict application of these Rules where it considers it advisable". While the Board will exercise its powers under Rule 40.7 in appropriate circumstances, it will not do so in instances of carelessness (see *Brickland Masonry Contracting (1996) Inc.*, [2004] OLRB Rep. November/December 1034) and cannot do so where it would result in varying the requirements of the Act (see *Manners Glass Networking Inc.*, [2004] O.L.R.D. No. 4790).

12. The facts pertaining to the Board's determination are not disputed, except for one detail. With respect to that detail, the Board will assume the applicant's position is correct, but it is not material to the Board's determination as explained below.

13. The facts may be briefly stated. The Application Filing Date is April 29, 2016. On that date, the applicant sent both applications to the Board by Canada Post Priority Courier, a process that is expressly contemplated by the Rules. The application of the Board's Rules of Procedure to that Application Filing Date meant that the applicant had

to deliver the application package to the Labourers by the close of the business day on May 3, 2016.

14. The applicant did not do so or attempt to do so. Rather the applicant sent the application package to the Labourers by Canada Post Priority Courier on May 3, 2016 with an anticipated delivery date of May 4, 2016. That information is clearly set out on the Certificate of Delivery filed by the applicant on May 4, 2016. The applicant's delivery of the Certificate of Delivery is also out of time. The applicant provided no reason in the Certificate of Delivery or in any of its subsequent submissions why the Application Package was not delivered to the Labourers in a timely manner.

15. In these circumstances, the Board has consistently dismissed applications for the termination of bargaining rights. Exactly the same set of circumstances was at play in *Kevin Jones*, 2013 CanLII 16248 (March 27, 2013). In that case, the Board dismissed the application, noting that there is no deeming provision equivalent to Rule 24.2 with respect to delivery of the Application Package to the affected trade union. Therefore, it must be actually delivered in the two-day period. In that case, as in this case, the delivery of the Application Package by Canada Post Priority Courier was one day late. As such, the delivery runs afoul of Rule 24.3 of the Board's Rules of Procedure, which requires that the Board terminate the application when delivery is not made within the two-day period. That is what the Board did in *Kevin Jones supra*, and this panel will follow that decision and do the same here.

16. There are numerous other cases where the Board has taken a strict approach to the application of Rule 24.3, including: *Gambarashvili* 2010 CanLII 23869 (April 28, 2010); *Pritchard (Barrie Drywall)* 2012 CanLII 32564 (June 14, 2012); *Winters* 2013 CanLII 22991 (April 25, 2013). Where the applicant does not deliver the application materials in a timely manner, the Board will dismiss the application: *2167553 Ontario Inc. o/a Collingwood Interiors* 2013 CanLII 12732 (March 8, 2013).

17. The reasons that the Board takes a strict approach are rooted both in the lack of ability of parties to ascertain accurate information about the facts of who was at work in the bargaining unit on the date of application, which diminishes by the hour (see *Reids Uptown Homes*, [2007] OLRB Rep. May/June 633; *Cahill Construction Inc.* (2013), 221 CLRBR (2d) 93 (Ont.)) and the legal effect that should be

given to a very short two-day time limit as described in paragraph 6 of *Kingston Masonry Services*, 2013 CanLII 28217 (May 10, 2013):

> 6. Rather the problem is with the both the timing of the Certificate of Delivery and the actual delivery of the application materials to the responding party. The latter is an entirely different situation. In its submissions, the responding party advises that it did not receive the application package until May 6, 2013, two working days after the application package was due to be delivered. This is a significant period of lateness in a regime where there is a two-day time limit, as the Board described in *1605006 Ontario Inc. o/a Rainbow Painting* 2012 CanLII 66864 (October 30, 2012):
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> 20. This lack of celerity is fatal to the responding party's request for the Board to exercise its discretion in this matter. A minimum 2-day delay is distinctly prejudicial in a regime where there is a 2-day statutory time limit, because the short statutory time limit informs the manner in which the Board should exercise its discretion under the Act: *Teston Pipelines Limited*, 2008 CanLII 29402 (May 28, 2008); *PGA Construction Management Ltd*., 2012 CanLII 9341 (ON LRB), 2012 CanLII 9341 (February 24, 2012); Mota v. *Hamilton-Wentworth Police Services Board* (2003), 63 O.R. (3d) 747 (Ont C.A.). Therefore, the response is significantly out of time in this context. The prejudice to the applicant is real.
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> 21. In *Wellwood* v. *Ontario Provincial Police* (2010), 102 O.R. (3d) 555 (C.A.), the Court stated :
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> > … the expiry of a limitation period can give rise to some presumptive prejudice, the strength of which increases with the passage of time. Where the presumption arises, the plaintiff bears the burden of rebutting the presumption on proper evidence.

In the absence of actual notice to the Union, the responding party has not rebutted the presumption of prejudice.

18. On the facts of this case, there is nothing to take them out of the scope of the Board's decision in *Kevin Jones supra*. Rather, the facts are exactly the same and the same result must ensue. It is not material whether the application specified the number of employees in the bargaining unit (as the applicant contends) or did not (as the Labourers say). On the application received by the Board, the number of employees was written in pen (as was one of three job sites) as opposed to the balance of the application which appears to have been prepared on a computer. The Board has assumed the application did contain the number of employees. If it did not, that would be further evidence of prejudice encountered by the Labourers.

19. In any event, the applicant failed to deliver the application materials to the responding party within the requisite time and has provided no explanation for the late delivery. The Certificate of Delivery was also filed late without explanation. The applicant has not asserted any problem with understanding or following the Board's process, but rather submits that he filed the application after learning how to do so on the Labour Watch web site.

20. There are no facts provided upon which the Board could exercise its discretion to permit an extension of time. Therefore, there is no basis for the Board to apply Rule 40.7 to the facts of this case. It appears that the applicant has simply been careless in failing to deliver the applications to the Labourers in a timely manner. In such circumstances, the applicant has given the Board no reason why it should not give effect to the clear language of the Board's Rules of Procedure.

21. Accordingly, the Board terminates these applications as mandated by Rule 24.3 of the Board's Rules of Procedure.

22. The Expedited Hearing date is hereby cancelled.

"Jack J. Slaughter"
for the Board