ONTARIO LABOUR RELATIONS BOARD

3502-10-R Jeremy Telford, Applicant v. Service Employees International Union Local 2.on Brewery, General And Professional Workers Union, Responding Party v. **Rexdale Mobile Truck Wash (1981) Inc.**, Employer.

BEFORE: Tanja Wacyk, Vice-Chair, and Board Members J. A. Rundle and C. Phillips.

DECISION OF THE BOARD; February 1, 2011

1. This is an application for termination of bargaining rights under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"), filed on January 20, 2011.

2. The applicant has applied to the Board under section 63 of the Act for a declaration that the responding party no longer represents the employees in the bargaining unit for which it is the bargaining agent. The collective agreement expired on December 31, 2010.

3. The responding union submits that the application is untimely as a conciliation officer was appointed by the Minister on January 17, 2011.

4. In its intervention, the employer indicated that the union was "sent documentation on January 5, 2011, a copy of the "Application For Revocation of Bargaining Rights (Decertification), by Fax, as was the intervenor. A copy of the document was attached to the intervention.

5. However, that document was returned to the applicant via correspondence from the Board Solicitor, dated January 7, 2011, which stated as follows:

> **Re: Application for Revocation of Bargaining Rights (Decertification)**
>
> The Ontario Labour Relations Board has received the above-referenced material including forms from the Canada Industrial Relations board. We are returning the material to you. If this matter does relate to the Canada Industrial Relations Board you should send it to them.
>
> It appears from the material however that the bargaining relationship may relate to this Board. Accordingly I have included Information Bulletin #2 and Form A-6 for your information. Should you decide to file your Termination Application here please read the Information Bulletin carefully. All requisite Forms may be found on the Board's website at www.olrb.gov.on.ca.

6. The Board heard nothing further from the applicant until this application was filed on January 20, 2011.

7. In the Board's (differently constituted) decision of January 27, 2011 in this matter, the Board indicated that it appeared the application was not filed within one of the "open periods" as prescribed by the Act in section 67(2), and this application stands to be dismissed as untimely.

8. The Board gave the applicant and the intervenor employer an opportunity to refute the above submissions of the union. They have done so, relying on the document filed by the applicant on January 5, 2011 and returned to him on January 7, 2011.

9. We note that while the responding party takes the position that it is improper the employer is making submissions in this matter, and what it maintains is in effect acting on behalf of the employees by advancing positions on their behalf, (see *Federated Building Maintenance Co. Ltd.* [1979] OLRB Rep. Oct. 974), we do not have to decide that issue in order to dispose of this matter.

10. The applicant indicates he retrieved the documents he filed on January 5, 2011 from the Labourwatch website, and believed them to be the correct forms. He indicates that "almost all" of the information he filled out on those forms was the same as that required for this application, and that in the end both forms were aimed towards decertification. However, he submits no documentation in support of that assertion.

11. The applicant indicates that when he received the January 7, 2011 correspondence from the Board's Solicitor advising him that he had filed the incorrect forms, he was disappointed that the first package he sent was incorrect and frustrated that despite making calls previously to confirm steps, he had been led "astray". No additional details are provided. The applicant also indicates that he worried that he had lost his window of opportunity but provides no explanation regarding why, knowing the documentation he had filed had not been accepted by the Board, he did not takes steps to file the appropriate application in a timely manner.

12. The intervenor submits the original documents filed by the applicant on January 5, 2011, although filed on the incorrect forms, clearly identified and communicated the intention of the applicant to terminate the bargaining rights of the responding party, and were communicated to the responding party. The intervenor maintains the documents communicated the necessary information to initiate a Termination Application before the Board in a timely manner, and suggests the Board should have processed the application and directed the applicant to correct the materials.

13. The intervenor further submits that the Board has never allowed technical defects (such as not providing the Application on the appropriate form) to defeat the intent of an otherwise timely application,
and that such a technical approach or interpretation is prohibited by section 123 of the Act which states:

> No proceeding under this Act is invalid by season of any defect of form or any technical irregularity and no proceeding shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

14. The intervenor further submits that Board Rule 40.7 is in keeping with this approach, and allows the Board to exercise its discretion and treat this application as being filed on January 5, 2011, when the applicant filed his initial documents. Rule 40.7 states:

> 40.7 The Board may relieve against the strict application of these Rules where it considers it advisable.

15. Finally, the intervenor relies on the Board's decisions in *CUPE* [1998] O.L.R.D. No. 4346; *M.G. Burke Investments Ltd.* [1978] OLRB Rep. June 549; and *Thomas Construction (Galt) Limited*,[1982] O.L.R.B. Rep. Nov.1727.

16. The responding party, on the other hand, takes the position that the documents filed with the Board on January 5, 2011 did not provide all the necessary information to initiate a termination application. Specifically, it points out that the documents did not refer to any section of the Act (but rather, referred to the *Canada Labour Code*), did not indicate that the applicant was submitting the support of at least 40% of the bargaining unit, did not contain a declaration verifying employee wishes, and did not contain any Certificate of Delivery.

17. The responding party submits the decisions relied on by the applicant are all distinguishable, and relies on the Board's (differently constituted) decision in *Gabriel Humelnicu v. Canadian Auto Workers, Local No. 27*, [2010] CanLII 14415 (ON L.R.B.) in which the Board dismissed a termination application in which the materials filed with the Board referred to section 38 of the *Canada Labour Code*, but directed the applicant to the materials which would assist him in filing the proper materials if he believed this Board had jurisdiction to deal with the matter.

Determination:

18. As argued by the responding party, section 123 of the Act is of no application in this instance. As the Board stated at paragraph 8 in *Lac Des lles Mine Ltd*., [2006] CanLII 32015 (ON L.R.B.):

> That section [s. 123] of the LRA does not, contrary to the submission of the appellant, confer any authority on the Board. Rather, that section is directed at a reviewing court. The Board does not "quash or set aside" any of its proceedings. Whether a proceeding is invalid or should be quashed or set aside is a matter for a superior court when considering whether a Board proceeding under judicial review ought to be quashed. See Union Carbide Canada Led v Weiler et al, [1968] SCR. 966; 70 D.L.R. (2d) 333 where the Supreme Court of Canada wrote in reference to what is now section 123:
>
> > Section 86 [now section 123] is directed solely to the Courts. The whole purpose of the section is to require the Courts on motions by way of certiorari or otherwise when they are considering proceedings under the Act, for example, hearings before and decisions of the Labour Relations board, not to quash such proceedings because of defect of form or technical irregularity.

19. Further, the Board has nothing before it on which it can determine that the materials sent to the Board by the applicant on January 5, 2011, satisfied in substance, the statutory requirements for bringing a termination application, and therefore no basis on which to exercise its discretion pursuant to Board Rule 40.7.

20. Nor are we persuaded that the cases relied on by the employer are of assistance in this matter.

21. In the first instance, the decision of the Board in *CUPE* relates to an application brought pursuant to section 96 of the Act, an entirely different matter, and one which is not as closely prescribed as the provisions of the Act dealing with representation applications. Specifically, it appears the applicant in that instance was attempting to bring a complaint that the union had breached its duty of fair representation to him.

22. In *M. G. Burke Investments Ltd.*, there is no indication of what materials had been sent to the Board and more importantly, what was stated in those materials. Specifically, there is no suggestion they referred to the CIRB rather than the OLRB. Similarly, in *Thomas Construction (Gait)* it is apparent the applicant's materials clearly indicated he wished to pursue the matter before this Board, not the CIRB. Further, both of these cases are more than 25 years old. There is no doubt that the statutory requirements and the Board's processes in dealing with them have evolved over time. We are not at all confident those cases would be decided in the same manner today.

23. Rather, we prefer the Board's approach in *Gabriel Humelnicu***,** where applications that are clearly deficient (it appears there were more deficiencies in that instance than the fact the application referenced the CIRB) are not allowed to proceed, but the applicants, and particularly those who are unrepresented, are directed to what they need to do to file a proper and complete application. That occurred in this instance.

24. However, although the applicant was advised the materials he had filed had not been accepted by the Board, and what was required of him if he wished to bring the application before this Board, he simply failed to do what he was directed to do in a timely manner. As pointed out by the responding party, the applicant in this instance has approximately 3.5 months in which to bring this application. He was given clear direction by the Board's solicitor regarding what he was required to do in order to correctly bring a termination application. Yet knowing the application was not before the Board, he delayed almost another two weeks before attempting again to file it, and significantly, has given no basis for the delay. In these circumstances, the Board is not persuaded it would be appropriate to treat this application as though it had been filed on January 5, 2011.

25. This application is dismissed as untimely.

"Tanja Wacyk"
for the Board