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The Construction Raid Season is Upon Us!

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Background

As most unionized employers in the construction industry know, the raid season began on February 1st. For those less familiar with this phenomena some explanation might be necessary.

Industrial/commercial sector as well as residential sector construction employers in the Greater Toronto Area, per s. 150.1 of the *Ontario Labour Relations Act* (OLRA), have, by law, collective agreements which run for three years, with the next expiry date being April 30, 2013. The OLRA provides for a three month "open period" at the end of each collective agreement term. During this open period, employees may apply to have the union de-certified. This occurs occasionally but not very often. More importantly, during the same period, rival unions can apply to represent employees who are currently represented by another union. This most commonly occurs in the residential sector where there are a number of unions that compete to represent employees in different categories. Local 51 of the Sheet Metal Workers, Local 183 of the Labourers, Local 27 of the Carpenters as well as CLAC are amongst the most active in attempting to displace each other in representing employees with various construction employers.

Raiding Rules

In order for one union to displace another it must bring an application for certification. In the construction industry applications for certification use what is commonly referred to as the "snapshot" approach. In other words, a snapshot is taken of the employees actually at work in the bargaining unit doing bargaining unit work on the date of the application. Thus a union which wished to "raid" another union can choose a day when it knows that the majority of workers actually working are members of the union that is seeking certification.

Often these raids take place on a weekend when a majority of the regular workers are not there. Notwithstanding this fact, the board will only count those individuals who were actually at work on the date of the application and performing work in the bargaining unit. That means they have to be performing work which is actually covered by the terms of the collective agreement with the union which is being raided.

In the past many of these applications took months if not years to decide. That's because either the raiding union or the incumbent union would submit very generalized objections to individuals either included on the list or not included on the list. They would simply indicate that a particular individual was not at work on the day of the application, not an employee, and/or not performing bargaining unit work on the date of the application. They would not be required to provide any more details. The issue as to whether or not particular employees were or were not employees or were or were not at work on the day of the application, or whether they were employees or independent contractors would be determined by a hearing conducted by the Ontario Labour Relations Board (the OLRB). Often this would involve very lengthy and protracted hearings.

The new Chair of the Labour Relations Board, Bernard Fishbein, has made it clear that he intends to have these applications dealt with in a much more expeditious fashion. This new approach will create some significant administrative problems for construction employers who may be caught in the battle between two rival unions. Here are some basic points for employers to be aware of:

1. The open season commences on February 1st, 2013 and runs until April 30th, 2013. A union seeking to raid another can make an application on any day between February 1st and April 30th when some employees of a particular contractor are actually working;
2. Applications are brought on a particular date and must be delivered to the construction company on the day of the application. It is therefore crucial that someone in your company is assigned the duty of carefully monitoring whether or not any documents have been received, whether from a union or from the OLRB during this period. Applications for certification can be delivered by hand, by fax or by Canada Post Priority Courier Service;
3. The employer has only two days following the service of this application to respond. It is absolutely imperative that the construction company respond appropriately within that two day period. In order to properly respond, the construction company must have detailed information concerning the individuals who are actually at work, the projects on which they are working, and the location and sector of each project. You will also need to know whether or not the employees that were working were doing work which is actually covered by the collective agreement. For this reason it is especially important during the period from February 1st to April 30th, that construction companies keep good records as to those individuals who are actually at work and the work they are performing.
4. A construction company that is the subject of a raid will likely require legal assistance in properly responding to the application. If you are the subject of such a raid, contact your legal advisor immediately. To properly assist you, your lawyer needs all relevant information in order to respond properly within the two days permitted. That means your legal counsel needs to have all of the information so that he or she can prepare the forms required to respond and get them to the Board within the two day period. Failure to properly meet these obligations may have a significant effect on whether or not the rival union is successful in its application. Often you will only be aware that a raid is taking place or has taken place when you receive the application.
5. There are posting requirements. Specifically, the OLRB will send a confirmation of filing of Application for Certification. Once received, copies must be posted and confirmation of such posting has to be sent to the OLRB.
6. It is important that the company and management be seen as neutral, so engaging in any discussions other than voting logistics at this time with bargaining unit members is not advised.

The Issues

The issues to be determined in an application of this sort generally involve the following four questions:

1. Was the individual performing bargaining work on the date of the application?
2. Was the work that was being performed within the geographic area defined in the bargaining unit description in the collective agreement?
3. Was the employee performing the work an employee within the meaning of the OLRA or was he or she a manager, supervisor or independent contractor?
4. Is the individual an employee of some other entity, such as a crew leader or sub-contractor?

This last question is an issue that often arises in the residential sector where "crews" are often used to perform the work and the question that arises is whether or not the individual is an employee of the construction company or of the crew leader.

The Process

To speed up the process and to put the OLRB's resources to better use, the Board has now instituted a new process specifically for raids during the open period. This new process requires each party (the employer is a party) to identify in writing no later than the conclusion of balloting on the day of the representation vote, those individuals on the list that it disputes. Since the employer is responsible for preparation of the initial list, it can be either the incumbent union or the raiding union that disputes an individual on that list. It is also quite likely that one or other of the unions will assert that there are missing individuals from the employer's list that should be on the list. Submissions with respect to these issues must be made within 10 days after the vote has occurred.

Disputes as to whether or not a particular individual should or should not be on the list are not normally determined before the vote. Instead the Labour Relations Office conducting the vote will allow disputed individuals to actually vote, but will then segregate their ballots in separate envelopes. Their votes will only be counted when the issue as to whether or not they are properly on the list is resolved, wither by agreement amongst the parties, or by a determination by the Board.

Under the Board's new rules, parties making submissions about names to be included/removed are now required to provide significantly more information. It will no longer be sufficient to merely claim the individual is not an employee, not at work on the day of the application and/or not performing bargaining unit work. Significantly more details will be required.

When dealing with issues concerning whether individuals are properly on the list or not the Board will now review the submissions of the parties to determine whether or not there are sufficient facts about the disputed person or other circumstances so that the Board can make the determination with a hearing. The Board may also decide the dispute on the basis of the materials filed and not hold a hearing at all. Unlike applications in the past, the Board must now be persuaded that there is a need for a hearing. The Board has made it clear that it can and will, in appropriate cases, decide these issues based solely on the written submissions and the documentary evidence provided by the parties in advance of the scheduled expedited hearing.

The Board has also removed the requirements for regional certification meetings for all raid applications in favour of an obligation on all parties involved to provide relevant documents to the other parties within five days of receiving a request for same. If a party objects to producing these documents, it must set out its reasons in writing and provide those reasons to the other parties and to the Board within that five day limitation period.

Expedited hearings has now replaced the lengthy hearing process. Generally speaking, an expedited hearing will be held on Thursday or Friday, eight weeks after the date of the Board's initial decision on the matter in question. There will not be case management hearing. Instead, if the panel of the Board that reviews the file decides there are issues to be litigated at an oral hearing, that panel will set out what the issues are and may also determine the manner in which the hearing is to take place. All parties are expected to attend the expedited hearing ready to proceed on the issues identified by the review panel, and in the manner set out by that panel. Any party that asserts a particular individual should be on the list or in the bargaining unit has the responsibility to ensure that individual's attendance at the hearing unless the Board orders otherwise.

Conclusions

Although employers are not directly interested in which of two potential unions may represent their employees, it is very much in their interest to have as complete records as possible so as to avoid the cost of lengthy and protracted hearings, as the employer is a party to the process. It is therefore important during the raiding season that employers keep detailed records of those individuals actually present on the job on a day by day basis, together with the work they are performing. By doing so, the employer's disruption and time commitment can be reduced.

We would be pleased to answer any questions you may have with respect to this new process and to assist should your company be the subject of a raid application. ■