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Construction Corner | Greg McGinnis

Ontario Labour Relations Board's holiday ruling tilts balance again

The Ontario Labour Relations Board has reaffirmed the practice of allowing construction unions to bring applications for certification on Saturdays, Sundays and holidays.

This is an important tactical advantage for construction unions in organizing drives, because it allows them to select an application date when the number of workers on site is often far lower than normal.

Notably, it is an advantage that is not available to industrial unions, who must bring their applications for certification from Monday to Friday, holidays excluded.

Industrial unions must also win a secret ballot vote to get the right to represent the workers – not just get enough cards to get automatic certification without a vote. But that is another story.

To understand the importance of “filing date” rule, one must also understand that the only workers eligible to count in the “vote” are those who are actually at work on the application filing date itself.

If an employee is not at work, he doesn't count, no matter how long he has worked for the company, and no matter why he is absent.

Further, only two workers need to be employed in trade on the application filing date, no matter how many workers the company regularly employs.

Since weekend and holiday work is usually less attractive than work on regular business days, especially for workers with families, the typical profile of the weekend construction worker is often younger, less experienced, less skilled and of shorter service than the Monday to Friday worker.

It is these weekend workers who decide whether the company is unionized, when the application is filed on a Saturday or Sunday.

Many employers and their workers are surprised to find themselves caught in a situation where a seemingly unrepresentative sample of workers is making the decision for everyone else.

For these reasons, some say the “filing date” rule effectively discriminates against mature workers with families.

Some may ask how a union could even make an application on a day when the Labour Relations Board is closed? The answer is for the union to file it by Canada Post priority courier.

If a construction application for certification is filed by priority courier, the Board's rules deem the “application filing date” to be “the date on which the application is sent (as verified by the Post Office).”

With Canada Post kiosks located in many drug stores across the province, some open 7 days a week, 24 hours a day, 365 days a year, the effect of this rule is that unions can send (and therefore file) an application at any time, even on Christmas Day.

In the case of IBEW Local 353 (Board File No. 1885-09-R), the union filed its application on a Saturday, when only one of three of the company's active job sites was active.

The company argued that the correct date should be the following Monday, alleging that the workers present on Saturday had specifically asked to work that day, contrary to the company's regular practice.

The company claimed that this was a subterfuge intended to manipulate the number of workers who would be eligible for the vote.

The board rejected the argument without looking into whether the Company's claims were true. It confirmed that Saturday was the filing date under the Board's rules.

In explaining its reasons, the board stated that there is always a degree of arbitrariness in selecting the "application filing date", and no day will be perfectly representative.

Further, it is up to employers to decide whether to let employees work on weekends or holidays, so they can choose whether to expose themselves to the risk of a weekend or holiday application.

The Board noted that other employment-related statutes also apply on weekends and holidays when construction workers are on site.

The problem that some may have with this reasoning is that if the "filing date" rule is arbitrary, because it only looks at who was working on the calendar day that the union files the application, this may be a reason for changing the rule, not extending it to cover weekends and holidays.

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