

SO NOW YOU'VE GOT AN OLRB FILE:

THE PERSPECTIVE OF AN EMPLOYER'S COUNSEL

PRACTICE AND PROCEDURE BEFORE THE OLRB

THURSDAY, JANUARY 23, 1997

PRESENTED BY:

THE LAW SOCIETY OF UPPER CANADA

CONTINUING EDUCATION PROGRAM

PREPARED BY:

MARK E. GEIGER

BLANEY, MCMURTRY, STAPELLS, FRIEDMAN

(416)593-3926

MGEIGER@BLANEY.COM

COPYRIGHT: MARK E. GEIGER

SO NOW YOU'VE GOT AN OLRB FILE: THE PERSPECTIVE OF AN EMPLOYER'S COUNSEL

Overview:

This paper is not designed as a comprehensive primer on appearances before the OLRB. It is instead one counsel's humble attempt to give a few morsels of advice and counsel to other lawyers who may infrequently be called upon to appear for an employer before the OLRB. I have attempted to deal with some of the more common issues a general counsel could expect to encounter., on some of the most common actions and applications a general counsel might expect to be called upon to deal with.

A general word of caution. Many of the provisions of the *Ontario Labour Relations Act*, and the Rules made under it are counter intuitive and contrary to the law in other areas (e.g. piercing the corporate veil). I have seen many instances where general counsel have given a quick opinion to their clients which was not only wrong, but in fact if followed would create potential liability. This is especially true in the construction industry. I would advise general counsel to seek expert assistance before dealing with labour relations issues in the construction industry. Having said this, I have seen many general counsel do a very credible job of representing their clients before the Board.

The time to become familiar with the general rules and provisions of the Act is before a client asks you the question. Often there will be insufficient time to find the appropriate answer if you are starting from square one. This is especially true in certification cases or pre-certification cases. I would highly recommend the paper prepared by R.O. MacDowell, Chair of the OLRB which is included in these materials. A thorough reading of this paper will give any counsel or practitioner

an excellent overview of the Statute, as well as the manner in which it is implemented and enforced by the Board.

First Encounters:

The most common first encounter of general counsel to a labour matter is likely to be a union drive at your client's place of business. It is absolutely critical that you give quick and appropriate advice to your client at this stage.

Most employers when first faced with the prospect of a union are shocked, dismayed, frightened, threatened and hostile. They want to put a stop to this nonsense as quickly as possible. "There's no way I'm going to be unionized.." is a common response.

The first question you will be asked - that's if the client is smart enough to get advice before he reacts is, "What can I do to stop this". As a management side labour lawyer, the way you answer that question may have very significant consequences for your client. The frequent response of many employers, although very reasonable from their perspective may result in a violation of the Act. One finding against an employer of "anti-union animus" may provide evidence of the same motivation on subsequent events. It is always in your client's best interest to avoid such a finding.

What can an employer do when faced with a union drive?

While it is true that actions taken by an employer can be dangerous, it is not true that an employer is obliged to do nothing. Section 70 of the Act guarantees an employer the right to express his or her views but ensures that such views do not constitute coercion, intimidation, threats, promises or **undue influence**. The case law on how this section has been interpreted over the years can be somewhat confusing. Each case is decided on the basis of the facts in that case.

It is important to remember that virtually all complaints about an employer's actions during a union drive fall under s. 96 (5) thus involving a reverse onus. It is up to the employer to demonstrate that his/her actions did not constitute a violation of the Act. Unlike an accused in a criminal matter, failure to call evidence is usually fatal. It is important for advising counsel to remember that anything the employer does is likely to be placed under scrutiny and that someone may well be required to testify under oath or affirmation as to why the action was taken. Failure to call evidence from the person or persons most likely to have made the ultimate decision can be fatal to your case.

The first and foremost principle is this: Employees are free to join a union, to support a union, to organize a union or to oppose a union without fear of reprisal or promise of benefit (that's benefit from the employer - unions are free to promise the moon and often do). Employers (and others) are prohibited from interfering with the formation or selection of a union, and while they are free to express their opinions, those opinions had better not include any explicit or implicit threats or promises. The way in which opinions are expressed and by whom can be crucial.

Often an over zealous member of management will do something that creates significant liability. In a case I was involved with some years ago after the fact, a low level supervisor became aware that a union drive was taking place. He told several employees that in his opinion the Company would close that branch if a union got in. Unbeknownst to him the Company was in fact planning to close the branch because it was not profitable. The announcement of the closure came out the same day the certification application was filed. The Board (not the OLRB) did not believe the Company's sworn evidence that they knew nothing about the drive when the decision to close was made. The statement by that supervisor cost the Company a very great deal of money. The Company was ordered to reopen the Branch and pay back wages to all employees affected by the closure.

Control of what all members of the management team do during a union drive is crucial. I regularly meet with members of the management team, especially in a less sophisticated company, and describe to them in detail what they can and cannot do.

Sometimes the Company will want to discover who is behind the union drive. They will want to hire detectives, or find employees who will tell them who the instigators are. They will want to find out what the employees want, and what it will take to make the union go away. They will want to warn employees that unionized plants are less productive or less competitive or indicate that they just won't want to continue to operate a plant that becomes unionized. All of these activities are potentially unlawful.

Often they will find reasons which seem very good to them to justify terminating the organizers. Termination of an employee heavily involved in a union drive is fraught with danger. The Board has said many times that even where there would be cause to dismiss the employee, if "anti-union animus" is any part of the reason to terminate, the termination constitutes a violation of the Act. Termination of employees primarily responsible for organizing a union drive risks a s.11 certification. (Note that changes to s.11 which discuss a second representative vote may affect the Board's traditional view that representative votes in s.11 cases are not normally an appropriate remedy.)

The initial interview with an entrepreneur faced for the first time with a union drive is thus one of the most challenging tasks for any practitioner. To a large extent the recent changes to the Act have made this task less confrontational. Employees are now guaranteed a secret ballot vote - difficult to obtain under the old Act. I have found this process legitimizes unionization in the eyes of recalcitrant management, thus encouraging far more productive bargaining if the vote results in certification.

In Summary

Know what the employer can and cannot do; ensure he tells you what he plans before he does it; make sure all members of the management team are properly advised as to their do's and don'ts.

An unfair labour practice can be the cumulative effect of several actions which by themselves might

not have been found to offend the Act so make sure management clears everything they do through you.

First Encounters of the Second Kind:

Increasingly unions attempt to organize secretly. Until the introduction of Bill 7, unions had a significant advantage if management did not become aware of the drive until after an application for certification was made. This prevented the Company from taking any actions to jeopardize the unionization.

With the introduction of Bill 40, petitions became virtually impossible for employees to bring in timely fashion. Votes were only conducted if the union failed to sign enough cards. An employer that knew nothing about the drive was unable to state any opinion in any fashion that could make any difference. Employees who were seen as "loyal to the Company" often learned about the union drive after the application for certification was filed. By then it was too late for them to have any impact on the result.

The introduction of the new Act in the fall of 1995 changed certification procedures drastically. Both unions and labour law practitioners are still working through the effects of these changes on strategies and outcomes. After only a few months of operation under the new system some tentative conclusions can be reached.

Firstly, it appears unions continue to believe it to be to their advantage to keep union drives secret if possible. The very short time between the date of application and the date the vote will be conducted gives management, and any opposing employees very little time to mount any effective opposition. Although unions don't like to admit it, some employees genuinely oppose being unionized. Keeping the drive secret usually means that employees who are opposed to unions don't learn about the drive until the application for certification is made. Many unions appear to believe that employees who are opposed to unions will inform someone from management if they learn of a union drive underway.

Secondly, many of the approaches the old rules "encouraged" no longer are advantageous. Many employers believed that a delay operated to their advantage. For this reason arguments about the bargaining unit description, or its composition would be made in the hope of delaying certification. The new rules make such tactics of little value. Employers would often attempt to encourage a petition. Under the NDP legislation, petitions became virtually impossible. The new rules make them entirely redundant. A vote is held in every case.

My advice to employers now is to argue about the bargaining unit description only if there is a true business problem associated with the description proposed. This could be an issue if the description is too narrow and would tend to isolate one group of employees from a larger unit with which they inter-relate. As you know the normal, non-construction unit is usually described in terms of municipal boundaries. The standard unit is the "all employee" unit, with sales, office and managerial exclusions. While it is possible to convince the Board that these normal units are inappropriate in a particular case, compelling evidence will be required.

Managerial Employees:

One issue always arises on certification - the line between managerial and non-managerial employees. Most businesses do not divide up their duties in the way they become divided in a unionized environment. In many businesses, the line between workers and management is not clear. Often this is by design.

The Act, however is designed on rather traditional views of "labour" and "management". The line between management and worker under a collective agreement is essentially defined by the legislation. The test of "management" is seen as the power to "hire, fire and discipline" - or make effective recommendations with respect to these issues. Most unions attempt to negotiate clauses which prevent, or limit any bargaining unit work done by managerial employees. In my experience, especially in smaller companies, the first level of management usually performs some work also performed by members of the bargaining unit. Even though these employees may have some power

to hire, fire and discipline, whether they are included or not may have significant consequences on the operation of the business, and on the bargaining in the event the certification application is successful.

Often whether or not a particular employee should be included is not clear. You will need to ask probing questions of your client in order to properly advise them. Some employers may wish to include managerial employees in the bargaining unit for purposes of the Response in order to reduce the potential votes for the union. This is a dangerous tactic which can really backfire if the certification turns out to be successful. In addition, if the union objects to these names being included, and it turns out to make a difference, you are likely to have a hearing in which you will be required to call evidence to establish that such persons are in fact not managerial. If the vote is successful and the numbers don't matter, the union is likely to accept your delineation and your client will now have a significant operational or bargaining problem.

Preparing the lists:

As you know, lists of all employees must be sent to the Board within a very short time. In a company with many employees, this job can be quite a task. Often there are individuals who have not worked with the respondent for some time, but have not officially been deleted from the company's employee list. You will note that Schedule A requires quite detailed information about each of the employees on the list. If the company involved has many employees and or many locations, preparation of the list in time to meet the Board's requirements can be difficult.

Often an employer will not come to you as soon as they could and you are faced with a difficult deadline. My advice is to immediately get in touch with the Board and apprise them of your difficulty. Don't be surprised if failure to provide the required information within the time specified jeopardizes your client's position.

Certification applications require a very timely response. If you are going to advise clients with

respect to these matters, the time to learn about the issues and procedures is before your first file comes in the door.

Successor Employers:

Two sections of the Act cause most difficulty for lawyers trained as corporate counsel. The corporate veil just doesn't exist when the OLRB looks at "related" businesses and "sale of business".

Firstly, the definition of "related" and "sale" under the Act are exceedingly broad. The case law demonstrates a liberal application of these broad definitions. This is especially true in the construction industry. If your client has ever been involved as a principal or "key person" in a unionized construction company, he or she will find it virtually impossible to avoid the union in any future business in which he has any actual interest. Businessmen get advice from corporate lawyers all the time. Most of the time such advice concerning the advantages of incorporation, and the protection it provides are valid. In labour relations, it just isn't.

Cases of this sort most often arise when a client is served with a grievance alleging violation of a collective agreement the client denies being a party to. Alternatively, the union may bring a related employer (s.1(4), or sale of business (s.69) application to the Board. Normally s.1(4) and s.69 applications are made together.

Both sections contain provisions requiring the responding party to adduce evidence at the hearing containing all facts within their knowledge. In addition, the Board will usually order the parties to provide all relevant documents to the applicant and may do so in advance of the hearing pursuant to section 98(1). Normally these documents are provided on agreement.

It is important to respond to either a s.1(4) or s.69 application setting out all the material facts. Make sure you are aware of the extensive jurisprudence under these sections before preparing these materials.

Note under s. 69(2) the rights of the union continue **until the Board otherwise declares**. The statutory declaration power under s. 1(4) is not automatically retroactive **but it can be**. Under both sections very significant damages can be and often are awarded. If persons other than those properly entitled to them under the collective agreement are given jobs, the measure of damages can be all the wages the persons entitled to the work would have earned had the collective agreement been adhered to. In more than one instance I am aware of, an order of damages under these sections has bankrupt the respondent.

When advising a client under these sections it is extremely important to ask your client ALL of the necessary questions. Often clients will be less than forthcoming with relevant information. Ask questions about any and all relations the respondent has had with the previous business (or co-respondent under s.1(4)). Again you need to be reasonably familiar with the jurisprudence in order to know the questions to ask.

Applying these sections to the construction industry can be particularly difficult.

Applications under s.96:

Section 96 is the general section under which an applicant alleges violation of some other section of the Act. Most complaints under this section relate to either a unionization drive and subsequent certification application, or to alleged violations arising during bargaining.

Most commonly these complaints allege:

1. *Discharge or discipline because of union involvement.*

Complaints under this subsection s. 96(5) involve a "reverse onus". The respondent is required to demonstrate that anti-union animus did not form any part of the reason for the termination or discipline. It is not enough to demonstrate that there was "just cause" for the discipline or discharge, but of course such evidence can be helpful. The requirement to call evidence can be problematic if any of the reasons for the action did involve anti-union animus. Failure to call evidence from the person making the actual decision can be fatal. The reverse onus provision normally results in the respondent being required to call evidence first.

2. *Violation of the statutory freeze provisions of s.86.*

After a certification application has been made or notice to bargain for a renewed collective agreement have been given, the employer cannot change the terms and conditions of employment without the consent of the union. Although this principle seems simple enough, its application in particular fact situations can be problematic. Often employers give regular increases to employees based on annual performance reviews. What do to if review time comes during a statutory freeze period - especially if the employee involved was a union activist during the certification drive? The general principle states that the employer is required to continue to conduct business as normal. Sometimes this can be very difficult.

3. *Failure to bargain in good faith.*

Section 17 requires the parties to bargain "in good faith". Again, a discussion of the jurisprudence surrounding this requirement is beyond the scope of this paper. One issue

that often arises involves direct communication with the employees. Such communication is allowed but only under appropriate conditions, and not if the communication is in fact an attempt to bargain around the union. Newly certified employers will frequently require advice as to what they can and cannot say to employees during the bargaining process.

As in other cases, a review of the jurisprudence in advance of giving any advice is especially important. On several occasions I have been consulted after a client took advice which was ill informed and resulted in a s.96 complaint. Although cases are rare, it is quite possible for the advising lawyer to find himself charged personally with an unfair labour practice.

Advocacy before the Board:

Those familiar with practice before the courts will not be faced with tremendous difficulty in appearing before the Board. Subject to discussion concerning adjournments, and assuming a familiarity with the rules of the Board, and the pleading requirements, the actual process of having a case heard before the Board is not dissimilar to a trial, albeit less formal.

Evidence

The rules of evidence are essentially the same as before the courts. If anything, the Board pays more attention to such rules than many judges. While the Board is empowered to hear evidence that would not be permitted in court, my experience would indicate that this is not really the case. As with judges - they want to hear it if its relevant.

The Board is more tolerant of lengthy and repetitive cross examination than most judges would be. If anything, there seem to be more, not less evidentiary questions and objections than would be tolerated by most judges. Procedural motions that may have significant consequences are sometimes made without prior notice. Having said this, I have found that most panels and/or vice

chairs will bend over backwards to accommodate counsel so long as they don't detect an attempt to delay or obfuscate the process.

As with judges, often a vice chair will meet with counsel alone in an attempt to narrow the issues or even settle the case.

Setting dates

It is important to realize the speed at which counsel are required to produce paper and prepare for a hearing. Many issues require expedited hearings. The fact that counsel is already committed somewhere else is just too bad! Being double booked and unable to get out of either hearing is the ever present threat when practicing before the Board. You will find however, that most counsel who appear before the Board will do what they can to accommodate fellow counsel with a legitimate problem - just make sure you reciprocate. Be aware that consent of counsel is often not enough - you may also require the Board's consent **which may not be granted** in every case.

Another major difference is the hearing progression. In general, once a trial commences, it proceeds until it's over. This is the exception with hearings before the Board. Usually there are delays between the date the hearing commences, and the day it finishes. Often there can be many months between the first days of a hearing, and the days such hearing continues.

Transcripts

Unless you arrange for a court reporter, there are no transcripts. For this reason it is absolutely crucial that you, or someone else keep excellent notes of the evidence. Conducting a well run cross examination, while at the same time keeping complete notes is difficult. If possible, I try to bring a student or a secretary to keep notes of a particularly important cross examination.

Because no transcripts are made, the panel or vice chair as the case may be all keep notes, mostly long hand. For this reason the pace of the evidence is often slower than it would be in most court rooms. The hearing day is usually longer - often quite a bit longer than a court trial day. I have

often been in a hearing well after 6:00 P.M. On some matters, I have seen hearings go into the early a.m. hours.

The role of Labour Relations Officers

Generally an officer will be assigned to your case. Usually the officer will be required to meet with the parties before the matter goes to hearing. In certification cases, the officer will do as much as possible to settle all the issues before or after the vote is conducted. Universally I have found Board officers to be helpful. Their job is to assist the parties to settle the issues without the necessity of a hearing, or to narrow the issues; and they do their job well. The recently heralded ADR centre could learn much from the experience of the Board's officers.

Board officers are always willing to assist counsel, including pointing out to you what is required. They are usually familiar with the Board's jurisprudence and will often - and usually very tactfully - suggest you look at a particular recent case. If they make such a suggestion, make sure you follow it - you will often find the case exactly on point. Your discussion with an officer is privileged. You take little risk in explaining the theory of your case and can be rewarded with experienced insight into the risks your client faces, or the evidentiary burden required.

Order of proceeding

Although in general the applicant is expected to call evidence first, this is by no means universal. As indicated earlier, the respondent often has an onus to provide information, or to demonstrate no anti-union animus. In such cases the respondent usually calls evidence first. In other cases, especially with multiple parties, the Board will often decide the order of proceeding after hearing submissions.

Often the order in which particular issues are heard will be addressed. Sometimes the Board will decide to hear all the evidence concerning some issues before hearing any evidence on others. This can mean multiple appearances by the same witness (although that would be a factor militating against such an approach). In cases where the decision on one issue may decide the case, the Board

will be amenable to dealing with and deciding such issue before hearing evidence on others. Before appearing before the Board on any matter I always try to discern whether one approach makes more

sense than another. If you can convince the Board that the approach you suggest is meritorious, the Board is likely to adopt your submissions. Often the right approach at the front end can save many days of hearings and get the result you want with the least cost.

Costs

The Board doesn't grant costs. Many counsel believe this is one of its greatest failings. Sometimes cases continue before the Board when all counsel involved know they are a waste of time. I could give specific examples but that would be imprudent. Suffice it to say that litigation before the Board can be very costly and the usual cost implications to an ill conceived action are wholly unavailable. The Board will sometimes do everything it can to "get rid" of a case. Sometimes even that is not enough.

The Board's resources are scarce and becoming scarcer. The ability to award costs in appropriate cases, in this counsel's humble opinion, would be a significant improvement.