

**ONTARIO LABOUR RELATIONS BOARD
INFORMATION BULLETIN NO. 32**

**Resolving Disputes in Displacement and Termination
Applications in the Construction Industry during the
Construction Open Period**

This Information Bulletin describes how the Board deals with disputes of any sort, including “status disputes,” in the context of construction industry displacement and termination applications filed in the construction open period.

“Status disputes” typically involve a disagreement as to whether certain individuals:

- were employed by the Employer on the application date;
- performed bargaining unit work for a majority of their time on the application date;
- exercised managerial functions; or
- were dependent or independent contractors.

Status disputes arise when the parties cannot agree on the “voters list” or, where the employer gives notice to the Board under section 8.1 of the Act in a displacement application (employer’s disagreement with applicant union’s estimate of the number of employees in proposed bargaining unit), and the parties cannot agree on whether certain individuals should be on the “section 8.1 list.”

Other disputes arise in a variety of ways and are set out in the response or subsequent correspondence of the parties. These can include the timeliness of the application, the proper identity of the employer, trade union status, the description of the bargaining unit, conflict with a subsisting collective agreement, and other issues.

This Bulletin outlines the Board’s processes for resolving disputes in displacement and termination applications in the construction industry, for cases filed in the “open period”. It does not describe the Board’s procedures with respect to disputes in certification applications or in displacement or termination applications outside of the construction industry. Please refer to the applicable Information Bulletin for information on those procedures.

I. IDENTIFICATION OF LEGAL AND FACTUAL ISSUES IN DISPUTE

This process describes how the Board will make certain decisions, and the process by which the parties will put matters before the Board. Parties should note that the Board may at any time decide any question or issue raised by any party during the submissions process when it is appropriate to do so based on the material filed without further submissions from any party.

Issues Regarding the Representation Vote

Parties (including individual workers) are given **six days after the commencement of the vote** (that is, normally eight days after the Board's decision directing the taking of the vote) in which to make any submissions they might wish to make in writing about the conduct of the vote.

Status Disputes

Where there is a dispute about whether certain individuals should or should not be on the voters' list and/or on the section 8.1 list, each party must identify in writing, no later than the conclusion of balloting on the day of the representation vote, those individuals whose inclusion on the list(s) it disputes. ~~Disputes relating to individual voters must be raised with the Mediator conducting the vote before the individual casts his/her ballot.~~ Disputes relating to individual voters that a party seeks to raise after the -vote will not be considered except with leave of the Board. In addition, in the interests of fairness and finality, parties cannot raise issues about the list(s) to which they have earlier agreed.

Both the party disputing the right of an individual to cast a ballot and parties who assert that the person should be entitled to cast a ballot shall make their submissions setting out all the facts and documents in support of their position. This also applies to any challenges made to the section 8.1 list. Such submissions must be filed with the Board, with a copy to all other parties, no later than **ten days after the commencement of the vote** (normally 12 days after the Board's decision directing the taking of the vote). **The requirements on parties making submissions about disputes are significantly higher than in the normal course of certification applications,**

and the parties should pay particular attention to the requirements set out in the Board decision in which the representation vote is ordered.

Because the Board expects that the party that asserts an individual did have the right to cast a ballot will do so on the basis of some knowledge, such parties must file submissions containing specific facts rather than conclusions or categories of challenges. Unparticularized or blanket pleadings will not be sufficient to meet the Board's requirements for particularity. If a party fails to set out sufficiently cogent and particularized facts, the Board may decline to hear oral evidence related to this dispute.

Any party wishing to file a response to the first set of submissions may do so within a further **seven days** (that is, normally 19 days after the Board's decision ordering the vote). The response must include all facts and documents in support of the party's position and must be delivered to the other parties and filed with the Board within that same **seven** day period (that is, normally 19 days after the Board's decision ordering the vote). Again, the parties should pay particular attention to the requirements set out in the Board decision in which submissions are ordered.

Other Issues

If there are issues other than status disputes that are raised in the application for certification, they must be fully pleaded **within ten days of the date of the commencement of the representation vote** (normally 12 days after the Board's decision directing the taking of the vote). The submissions must include full particulars of the facts on which the party raising the issue(s) relies and full legal submissions on the issue(s).

Any party wishing to file a response to the other issue(s) raised may do so **within a further ten days** (that is, normally 22 days after the Board's decision ordering the vote). The response must include full particulars of the facts on which the party is relying, and full legal submissions on the issue(s).

Case Review

All material in the file will then be reviewed by a panel of the Board. **Since this is a displacement application 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 be making a determination about the sufficiency of the parties' factual assertions. *The Board will determine whether or not a party has pled 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.

In conducting a Case Review where the applicant is self-represented, the Board takes that fact into account. However, the Board will still require that applicants in termination applications, as well as any other party who raises an issue, demonstrate that they have pleaded sufficient cogent facts about the disputed persons that the Board is persuaded that there is a need for the parties to call evidence to prove those disputed facts. Once again the parties must pay particular attention to the requirements set out in the decision the Board issues in which the representation vote is ordered.

Where possible the Board may decide any issues or disputes, including and in particular status disputes, based solely on the written submissions and documentary evidence provided by the parties in advance of the scheduled Expedited Hearing.

II. MANDATORY DISCLOSURE OF DOCUMENTS

In the event that either party is not satisfied with the production furnished by the other party with respect to the status disputes or any other issues, each party must advise the other party within five days of the receipt of the other party's last submission, of all the documents it seeks to have produced. The other party is required to respond as fully and completely as possible **within five days of receiving the request.** If a party objects to producing documents it must set out its

reasons in writing and provide them to the other parties and the Board within that five-day time frame.

III. SETTLEMENT DISCUSSIONS

While the Board will no longer be conducting Regional Certification Meetings, mediation still remains a significant component of the Board's process and the parties are encouraged to avail themselves of that process whenever it appears that settlement of some or all of the issues is possible, by contacting the Manager of Field Services. A settlement meeting with a Mediator may be scheduled where appropriate. If a party seeks the assistance of a Mediator to pursue partial or complete settlement discussions, the Board will accommodate that request. The purpose of such a meeting is to attempt to resolve, or at least narrow, the issues in dispute between the parties. Scheduling of settlement discussions will be undertaken independent of the scheduling of the Expedited Hearing, but the Expedited Hearing will not be delayed to make the settlement discussions/meetings possible.

Documents disclosed to a Mediator prior to, or during, settlement discussions are not considered to have been filed with the Board and do not become evidence before the Board until formally entered into evidence at the Expedited Hearing.

IV. EXPEDITED HEARING

Notice of the time and date of the Expedited Hearing will be sent with the Confirmation of Filing. It will generally be conducted by a panel of the Board **on the Thursday or Friday of the tenth week after the date of the Board's initial decision.**

There will be no Case Management Hearing. If the panel of the Board that reviews the file decides that there are issues to be litigated at an oral hearing, that panel will set out what issues are to be addressed on the first day of hearing and, if appropriate, the manner in which the hearing is to commence on that day. Parties are expected to attend the Expedited Hearing ready to proceed on the issues and in the manner identified by the Case Review panel.

The party that asserts that an individual should be on the list or in the bargaining unit has the responsibility for ensuring that individual's attendance at the hearing, unless the Board orders otherwise.

The party that has the responsibility for ensuring an individual's attendance at the hearing will be responsible for calling that individual as a witness. There may be circumstances in which a party calling a witness is allowed to cross-examine that individual. The Board may itself question a witness.

If necessary, the panel at the Expedited Hearing will set further dates for the hearing of oral evidence and submissions. Parties and their counsel will be expected to bring their calendars and commit to further hearing dates at the Expedited Hearing.

Expedited Board hearings are open to the public unless the panel decides that matters involving public security may be disclosed or if it believes that disclosure of financial or personal matters would be damaging to any of the parties. Hearings are not recorded and no transcripts are produced.

The Board issues written decisions, which may include the name and personal information about persons appearing before it. Decisions are available to the public from a variety of sources including the Ontario Workplace Tribunals Library, and over the internet at www.canlii.org, a free legal information data base. Some summaries and decisions may be found on the Board's website under *Highlights* and Recent Decisions of Interest at www.olrb.gov.on.ca.

IMPORTANT NOTE

IN ACCORDANCE WITH THE *ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT, 2005*, THE BOARD MAKES EVERY EFFORT TO ENSURE THAT ITS SERVICES ARE PROVIDED IN A MANNER THAT RESPECTS THE DIGNITY AND INDEPENDENCE OF PERSONS WITH DISABILITIES. PLEASE TELL THE BOARD IF YOU REQUIRE ANY ACCOMMODATION TO MEET YOUR INDIVIDUAL NEEDS.