

ONTARIO LABOUR RELATIONS BOARD INFORMATION BULLETIN NO. 25

Jurisdictional Disputes in the construction industry

This Information Bulletin describes the procedures that must be followed when a party applies to the Board for a determination of a work assignment (jurisdictional dispute) under section 99 of the *Labour Relations Act, 1995*. The Board has established specific procedures for this type of application, allowing for abridged time lines and filing requirements. The Board will handle jurisdictional disputes by way of a consultation and not a hearing.

It is important that parties involved in a jurisdictional dispute read and comply with the directions in this Bulletin and the Board's Rules of Procedure. Failure to do so may result in the application or other materials not being processed by the Board.

WHO MAY APPLY?

Any party can file a "Notice of Jurisdictional Dispute" at any time. An applicant will typically file a jurisdictional dispute application when it wants the Board to determine whether bargaining unit work has been assigned to the appropriate union. Such an application arises in two ways:

1. when a trade union or council of trade unions or their agent was or is requiring an employer to assign particular work to one trade union rather than another; or
2. when an employer was or is assigning particular work to one trade union rather than another.

FILING THE NOTICE

A Notice of Jurisdictional Dispute will identify the applicant, responding parties and any other party that may be affected by the application. The Notice should set out a description of the project and the work in dispute, and what caused the applicant to identify a dispute over the work assignment. The Notice will not contain the information or argument that will be required later in the brief.

The Board's processes allow for an expedited processing of a jurisdictional dispute. If a party seeks to have the proceeding expedited, it should indicate this in its notice or response.

The applicant must deliver copies of its Notice of Jurisdictional Dispute and a copy of the Notice to Responding/Affected Parties before filing its materials with the Board. If the applicant is the employer, there are specific filing obligations set out below.

If the applicant is requesting an expedited consultation schedule, it should set out its proposed time lines in the application.

A Notice of Jurisdictional Dispute must be filed with the Board within five days of its delivery to the other parties.

The applicant will not necessarily file the first brief in the Jurisdictional Dispute.

CONFIRMATION OF FILING

When the Board receives a Notice of Jurisdictional Dispute, it will issue a Confirmation of Filing to the responding and affected parties.

The Confirmation of Filing will set out the appointment of a Mediator and schedule the date for a pre-consultation conference.

The date for the pre-consultation conference will be within 15 days from the date of filing of the Notice of Jurisdictional Dispute.

If there has been a grievance filed relating to the same dispute, the Board will in all likelihood suspend its processing until the resolution of the jurisdictional dispute.

RESPONSE

The Response to a Notice of Jurisdictional Dispute must be filed within ten days of receiving the Notice. A response will identify the responding party or intervenor and set out the names of any other affected parties that may not have been included in the Notice.

The Response will describe the project and the nature of the work in dispute, state when the dispute arose, and set out the responding party's position as to the correct assignment of the work in dispute.

If the responding party is requesting an expedited consultation schedule, it should set out its proposed time lines.

EMPLOYER'S NOTICE/RESPONSE

An applicant or responding party employer must file with its notice or response sufficient documents to enable the parties or the Board to draft a description of the work in dispute. These documents will include plans, drawings, specifications, sketches or other documents which depict or describe the general project and the Work in Dispute. The employer may choose to file only the most relevant extracts from these documents and bring full copies to the pre-consultation conference

Frequently, a Jurisdictional Dispute is filed in circumstances where a grievance has also been filed against an employer. Generally speaking, the Board has declined to award damages as a remedy in such a grievance where it finds the employer has incorrectly assigned the work, except where it finds that the employer's assignment was unreasonable in the circumstances. Failure to file the necessary material to enable the parties and the Board to accurately define the Work in Dispute will generally be strong evidence that the assignment was not made in a reasonable manner.

PRE-CONSULTATION CONFERENCE

The Board will convene a pre-consultation conference within 15 days of receiving a Notice of Jurisdictional Dispute. There will be three items on the agenda. First the Board will assist the parties to determine the description of the work in dispute, failing which the Board will draft the description; second, the Board will attempt to mediate the dispute; third, the Board will fix the schedule for filing of briefs and set the date for the consultation.

Parties will be expected to attend the pre-consultation conference with adequate resources and materials to make appropriate submissions and to enter into binding, enforceable agreements.

Work in Dispute

The parties will attempt with the Board to arrive at an agreed upon description of the work in dispute. If the parties cannot agree, the Board will set out the description for the purposes of the jurisdictional dispute. The Board may at the request of a party or on its own motion require any party to produce any document to assist in this process.

Mediation

The Board will take as long as necessary to attempt to mediate a settlement of the dispute.

Scheduling

The parties will attempt to agree on the schedule in which matters are to be done.

The union that claims the work was improperly assigned will file the first brief.

Absent agreement or a decision by the Board to the contrary, the times will be as follows:

- (a) filing of first brief - 6 weeks from pre-consultation conference;
- (b) filing of other parties' briefs - 6 weeks from receipt of first brief;
- (c) filing of reply brief - 3 weeks from receipt of responding briefs.

The date of the consultation will be set during the conference.

Attendance at a pre-consultation conference may be dispensed with if the parties reach timely agreement in writing beforehand on the issues to be addressed including the specific description of the work in dispute, a schedule for the filing of briefs. However, before a pre-consultation conference is cancelled by the Board, such agreements will be reviewed by a Vice-Chair of the Board to ensure they are clear, meaningful and effectively describe the real parameters of what is in dispute – not only for the assembling and filing of relevant briefs, but for the consultation.

EXPEDITED SCHEDULING

In certain circumstances, the Board may, at the request of one party and where it considers it appropriate to do so, order a form of expedited scheduling. A party seeking an expedited schedule must provide compelling reasons for its request, such as agreement among the parties, or, where the Jurisdictional Dispute is virtually identical to one recently decided by the Board. If it is, the scheduling will be (absent agreement by all parties once an expedited schedule is ordered) as follows:

- (a) all parties file briefs within 10 calendar days (excluding holidays only);
- (b) all parties may file a reply brief in four calendar days;

- (c) a consultation date is set for one or two days after the reply briefs are due;
- (d) a “bottom line” decision will be rendered within 24 hours. The decision will be applicable to this particular dispute and will not be considered by the Board in any future jurisdictional dispute.

DECISION

Following the pre-consultation conference the Board will issue a decision setting out the Work in Dispute, the schedule for filing briefs, any agreement of the parties and any other order or direction necessary for the conduct of the application.

MEDIATION

The Mediator assigned to the application will communicate with the parties in advance of the pre-consultation conference to assist the parties with finalizing the description of the work in dispute, the schedule for filing briefs and any procedural disputes between the parties.

BRIEFS

There is no particular form for a brief. However, parties must include a copy of all documents on which they intend to rely at the consultation.

The argument portion of the brief shall not exceed 10 pages on 8½” by 11” paper, double-spaced, 12-pitch font.

Over the years, the Board has looked at a number of factors in determining a Jurisdictional Dispute. Some of these are employer practice, area practice, economy and efficiency, etc. The brief must include all of the submissions and documents the party wants the Board to consider. Only submissions or documents with respect to the factors the party considers material in the dispute should be included. For instance, area practice and employer practice are frequently relevant and important issues in a jurisdictional dispute. A union's constitution rarely is. A party should include submissions or material on factors that it asserts make it clear that the work should be assigned to one trade, craft or class of employees rather than to another. If a factor does not, in the party's view, lead to any particular result, no submissions should be made about that factor.

If a responding party asserts that a factor that the applicant has not relied on is in fact of importance in the case, that party should set out its submissions as to why the issue favours one union over another. The responding party must deal with the merits of *both* unions' strengths or weaknesses on this issue. For example, a blanket statement that a trade union's members have the skills and training to do the work, without including any particulars as to *why* the other union's members lack the requisite skills and training, is not at all helpful. There will almost invariably be no opportunity for the responding party to reply to the applicant's response on this issue.

If a responding party raises a new issue, the applicant shall reply to this issue in its reply brief. New issues raised for the first time in reply briefs will not be considered.

No inference will be drawn from the fact that an applicant does not address a factor that is raised in a brief filed by a responding party. Parties should always refrain from filing unnecessary material.

CONSULTATION AND DECISION

A date for the consultation will be set at the pre-consultation conference.

The consultation will be completed in one day. At the beginning of the consultation, the Board may set time limits for each party's submissions so that the consultation is completed by the end of the day.

If the Board can render a bottom line decision, in advance of the full reasons, it will do so as soon as possible.

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.