LABOUR RELATIONS BOARD
Saskatchewan

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, Applicant v. PYRAMID ELECTRIC CORPORATION, Respondent

LRB File No. 376-96; February 27, 2003
Chairperson, Gwen Gray, Q.C.; Members: Bruce McDonald and Clare Gitzel

For the Applicant: Rod Gillies
For the Respondent: Patrick McDonald

Practice and Procedure – Evidence – Applications and replies filed with the Board in the form of statutory declaration are treated as evidence – Deponents are subject to cross-examination.

Practice and Procedure – Evidence – Deponent of applications and replies subject to cross-examination.

Practice and Procedure – Solicitor's undertaking to produce deponent must be upheld.

REASONS FOR DECISION

Background:

[1] The Board convened to hear this matter in Saskatoon on November 6, 2002. At that time, the Board heard from Mr. Greer, business agent of the Union. After the completion of Mr. Greer's evidence, Mr. Gillies, counsel for the Union, asked for leave to cross-examine Mr. Garth Deacon, the deponent of the Employer's reply.

[2] Mr. McDonald, counsel for Pyramid, advised the Board that Mr. Deacon was not in attendance at the hearing and could not be reached to attend at the hearing on short notice. Mr. McDonald was accompanied at the hearing by Mr. Daryl Wilson, from the law firm of Fraser Milner Casgrain in Edmonton. The Board was unaware that Mr. Wilson was not Pyramid's instructing officer and assumed at the time of the hearing that he was instructing Mr. McDonald on behalf of Pyramid.

[3] At the November hearing, counsel for Pyramid protested that the Union had not informed him that it would apply for leave to cross-examine Mr. Deacon on the reply and counsel asked the Board to consider ordering the Union to pay for the costs

incurred as a result of the delay in the hearing. The Respondent opposed the Union's request that the Board permit it to cross-examine Mr. Deacon on the reply filed in this application.

[4] Counsel for the Union indicated in reply his surprise that Mr. Deacon was not in attendance at the hearing as the Union had expected from its previous experiences at hearings with Pyramid.

[5] The Board granted leave to the Applicant to cross-examine Mr. Deacon, as the deponent of the reply filed by Pyramid.

[6] At the same time, the Chairperson asked counsel for Pyramid if it was Pyramid's position that the Union was required to issue a summons to require Mr. Deacon to attend at the Board. Mr. McDonald indicated to the Board that he did not require that a summons issue and he undertook to produce Mr. Deacon as a witness for the purpose of cross-examination.

[7] The Board indicated to the parties that further dates for hearing would be set by the Board Registrar after consulting with the parties and that the Board would deal with the issue of costs at the conclusion of the hearing.

[8] By letter dated November 29, 2002, Mr. McDonald indicated to the Board that he had reconsidered his undertaking to produce Mr. Deacon as a witness to be cross-examined by the Applicant and indicated that Pyramid remained of the view that there is no obligation on it to produce the deponent of its Reply for cross-examination as part of the Applicant's case. Mr. McDonald indicated that he was instructed to withdraw the undertaking to produce Mr. Deacon for the applicant, and if necessary, to seek leave of the Board to withdraw the undertaking.

[9] In his letter to the Board, Mr. McDonald explained that "we were taken by surprise when IBEW made the request it did, that we did not have opportunity to take instructions or reflect on the matter, that our undertaking was voluntary and that no prejudice of any consequence will result from our change of position."

[10] The Applicant responded by letter to Mr. McDonald's November 29, 2002 letter and insisted on Mr. McDonald complying with his undertaking to produce Mr. Deacon without the need for the issuance of a summons.

[11] A hearing relating to Mr. McDonald's request to withdraw his undertaking was held in Saskatoon on February 13, 2003.

[12] Further hearings of this matter are set for March 10 and 11, 2003.

Arguments on behalf of Pyramid:

[13] Mr. McDonald argued that the Board should relieve him from his undertaking to produce Mr. Deacon for cross-examination for five reasons. First, he argued that the undertaking was given in unfair circumstances. The Union made the request at the hearing without advance notice to Pyramid; the request took Mr. McDonald by surprise; Mr. McDonald felt that he was not given an opportunity to fully argue the matter; and he gave the undertaking without the benefit of client instructions. Mr. McDonald also asserted that the Board did not give an express ruling on whether Pyramid was obliged to present Mr. Deacon for cross-examination.

[14] Second, Mr. McDonald argued that the undertaking was unnecessary and redundant as the Union can compel Mr. Deacon's attendance by issuing a summons for his attendance.

[15] Third, Mr. McDonald argued that there is no obligation on the part of Pyramid to produce Mr. Deacon for cross-examination. Mr. McDonald argued that the statutory declaration sworn by Mr. Deacon is not "evidence" before the Board and, if the Board was inclined to treat it as such, Pyramid would request that it not be treated as "evidence". On this point, Mr. McDonald impressed on the Board his view that the Union, if it seeks to question Mr. Deacon, must accept him as its own witness, subject to any rules of evidence relating to the declaration of a witness as hostile. Mr. McDonald concluded that the power to compel the attendance of witnesses granted to the Board under s. 18 of the *Act* related only to the power to compel witnesses to testify as witnesses for the party causing the summons to be issued, and not for the purpose of compelling a person for cross-examination on the reply. Mr. McDonald referred the

Board to its decisions in *International Union of Operating Engineers v. R.M. of Lipton*, [1993] 4th Quarter Sask. Labour Rep. 119, LRB File Nos. 180-93, 181-93 & 183-93 and *RWDSU v. Remai Investments Corporation,* [1993] 2nd Quarter Sask. Labour Rep. 140, LRB File No. 058-90, as slender authority for the proposition that parties may be summoned by the opposite party to be cross-examined with respect to their applications or replies.

[16] Fourth, Mr. McDonald argued that the language and content of the reply form is more in the nature of pleadings, than evidence. Counsel referred to the Judgments of Dawson J. and Laing J. in these proceedings as authority for the proposition that the Union has the responsibility to lead evidence in support of its position.

[17] Fifth, Mr. McDonald argued that there was no prejudice resulting to the Union as a result of the withdrawal of counsel's undertaking to produce Mr. Deacon. At the hearing of this matter on February 13, 2003, Mr. McDonald indicated that he would facilitate the service of the summons on Mr. Deacon.

[18] In his oral arguments before the Board, Mr. McDonald indicated that Pyramid would be willing to produce Mr. Deacon as a witness for the Union without the issuing of a summons by the Union to compel his attendance, but it was unwilling to produce Mr. Deacon as a witness to be cross-examined on the reply.

[19] Mr. McDonald referred the Board to the following decisions: *Stendor v. Barker,* [1987] B.C.J. No. 1837; *Mehr v. Law Society of Upper Canada,* [1955] 2 D.L.R. 289; *New Brunswick Government Employees Union v. Loch Lamond Villa Inc.,* (1992) N.B.I.R.B. No. 21(Q.L.); *R.M. of Lipton*, *supra, Remai Investments Corporation, supra.*

Arguments on behalf of the Union:

[20] Mr. Gillies, counsel for the Union, indicated to the Board that he was not aware that the basis of Mr. McDonald's application to be relieved of his undertaking related to the Employer's disagreement with the Board's ruling that granted leave to the Union to cross-examine Mr. Deacon on the reply. Mr. Gillies received a copy of Mr. McDonald's written brief on this application the evening prior to the hearing. He

indicated to the Board that he was not prepared to make arguments with respect to the validity of the Board's earlier evidentiary ruling.

[21] Mr. Gillies took the position that Mr. McDonald had given an undertaking to the Board to produce Mr. Deacon and he should be required to do so. Mr. Gillies would be prepared to release Mr. McDonald from that part of the undertaking related to the issue of whether Mr. Deacon was being produced for cross-examination and have the Board rule on the matter at the next hearing.

Pyramid's Response to Union's Argument:

[22] In response to the Union's argument, Mr. McDonald for Pyramid asked that the Board give written reasons for its evidentiary ruling and not delay the matter for further arguments.

Analysis:

[23] At the November hearing, the Board granted the Union leave to cross-examine Mr. Deacon, the deponent of the Reply filed by Pyramid. The Board did not make an order compelling Pyramid to produce Mr. Deacon as a witness. The Board asked counsel for Pyramid if he required the Union to issue a summons to compel Mr. Deacon's attendance and counsel indicated that such a summons was not required as he undertook to produce the witness at hearing dates that were to be set by the Board Registrar after consulting with the parties.

[24] Although the Board has already made its procedural rulings, we will re-examine that ruling in these reasons. We understand that Mr. McDonald is only asking to be relieved of his undertaking as a solicitor to produce Mr. Deacon as a witness if the Board grants leave to the Union to cross-examine Mr. Deacon on Pyramid's reply. If the Board does not permit the Union to cross-examine Mr. Deacon on the reply, then we understand that Mr. McDonald is not requesting that he be relieved from his undertaking.

Are applications and replies "evidence" before the Board?

[25] The Board requires that parties to applications comply with the Sask. Regulations 163/72 in relation to the filing of applications and replies. Section 3 of the Regulations provides:

> *3. The forms referred to in these Regulations and contained in the Appendix hereto may be used with such variations as circumstances may require and when in these Regulations any Form is referred to by number, such number refers to the form so numbered and contained in the Appendix.*

[26] The Forms attached in the Appendix to Sask. Regulations 163/72 require an officer of the trade union or of the Employer to make a solemn declaration as follows:

> *I, the undersigned, hereby solemnly declare that the submissions above set forth, are, in so far as they are matters of fact, true to the best of my information, knowledge and belief, and, in so far as they are matters of opinion, are verily believed by me.*
>
> *AND I MAKE THIS SOLEMN DECLARATION conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of The Canada Evidence Act.*

[27] The Board enforces the requirement that replies be filed in the form of a statutory declaration: see *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation,* [2000] Sask. L.R.B.R. 17, LRB File No. 162-99.

[28] In the present case, the original solicitor for Pyramid filed a reply in letter form, which later was incorporated into a reply in the form specified by the Regulations. Mr. Garth Deacon, director of Pyramid, completed the statutory declaration on behalf of Pyramid on October 13, 2000.

[29] The Board has broad powers under s. 18 of *The Trade Union Act* to "receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not." Within these broad powers, the Board accepts statements contained in an application or reply as evidence before it in the proceedings.

[30] It is true that statutory declarations filed with the Board provide similar function to that of pleadings in civil matters. The Board has in the past recognized both the similarities and distinctions between pleadings and statutory declarations. In *United Steelworkers of America, Local 5917 v. Doepker Industries Ltd.,* [2000] Sask. L.R.B.R. 290, LRB File No. 041-00, the Board considered the effect of unsubstantiated allegations that were included in a declaration. In highlighting the distinctive nature of a statutory declaration, the Board made the following comment at para. 17:

> *If analogous allegations were contained in pleadings in superior court proceedings, they might well be struck on the motion of the party opposite. Civil pleadings are not under oath or by statutory declaration; but the initiating application and reply in proceedings before the Board as required by the Regulations to the Act are declared solemnly and of the same force and effect as if made under oath. If anything, this means that the declarant must exercise more care and diligence in making his or her allegations than does a party in civil court pleadings. The application and reply in proceedings before the Board are no place for totally unfounded assertion, hyperbolic rhetoric or, as has occurred from time to time, careless, reckless or even intentionally inflammatory statement. More often than not the documents are drawn by a solicitor, and there is a duty upon such counsel to exercise diligence in so doing and to ensure that the declarant appreciates the nature and import of the declaration.*

[31] The emphasis on the oath and solemnity of the declaration clearly indicates that the Form has evidentiary value. The Regulatory requirement that applications and replies be signed with the knowledge that they are "a solemn declaration . . . [with] the same force and effect as if made under oath" distinguishes applications and replies from general pleading documents and demonstrates a clear legislative intent that the applications and replies be treated as evidence.

[32] As a result, parties appearing before the Board may confine their evidence to the matters stated in an application or reply. If the opposing party disputes the factual matters contained in the application or reply, it is entitled to request an opportunity to cross-examine the deponent of the application or reply. This accords with the general principles of fairness that evidence before a tribunal in written or oral form, be subject to cross-examination by the opposing party: see *Innisfil (Township) v. Vespra*

(Township), [1981] 2 S.C.R. 145. To the best of the Board's recollection, there has not been an instance where a party refused to produce a deponent for cross-examination on the statutory declaration.

[33] In the *R.M. of Lipton* decision, *supra,* the Board explained the practice in somewhat different terms and on a broader basis as follows:

> *There is only one other matter upon which the Board would like to comment, and it is of an evidentiary or procedural nature. The question arose during the hearing, as it has in previous hearings, of whether a party who calls the opposite party as a witness has the right to cross-examine. We ruled, as we have previously, that where a party calls a witness who is a party to the proceedings and adverse in interest, it has the right to cross-examine that witness. We observe that this is a policy that seems to be finding increasing favour, even in the superior courts.*

The Board then referred to Rule 53.07 of the Rules of Civil Procedure in Ontario.

[34] In the *Remai Investments Corporation* decision, *supra,* the Board came to a similar conclusion with respect to the right of the Employer to cross-examine employees on whose behalf a claim for monetary loss was made by their union. At 144, the Board explained its reasons for permitting cross-examination of the employees:

> *The corollary to the capacity conferred on the Board to admit as evidence testimony that might not be admitted in Court, assuming for the sake of argument that we have done so, is that the Board must be careful that it does not prejudice the right of the other party to a fair hearing. The Board has long followed the policy summed up by the Canada Labour Relations Board in these words:*
>
> *The Board wants to learn all the facts as expeditiously as possible, regardless of how they arrive on their record, provided that this method does not deprive the opposing party from learning them, challenging them, refuting or adding to them through cross-examination and rebutting evidence. Royal Bank of Canada, 1980, 42 di, 125.*
>
> *One of the consequences of permitting this evidence to be tendered through a union officer is that the employer is deprived of its opportunity to cross-examine the employees. The Board's impression of the argument which followed the objection, since confirmed by written argument filed by the Employer, was that the objection to this evidence, most of which would ordinarily be*

> *regarded as non-controversial (except for that concerning the part-time employees) was an effort to force the Union to call these employees as witnesses so they could be cross examined on more controversial matters, such as their availability for work and efforts at mitigation.*
>
> *In the Board's opinion, the Employer's desire to have the opportunity to cross-examine the employees, who are each claiming thousands of dollars in lost wages, is a legitimate one. There are several ways of securing the attendance of the employees for cross-examination, but in this case, the Board has decided to exercise its jurisdiction under Section 18* of *The Trade Union Act and request the Union to produce for cross-examination, any employee who is not called by the Union and whom the Employer indicates an intention to cross-examine.*
>
> *The Board is very much aware of the cost and inconvenience associated with producing 25 employees. However, these are really 25 separate claims being heard together and it does not seem unreasonable to request that employees who are claiming thousands of dollars each, and in total, a sum well in excess of one hundred thousand dollars, should appear in person to answer any questions which the Employer might have. The Employer should not be compelled to assume the cost and burden of bringing the employees to their own hearing.*

[35] As can be seen from the *R.M. of Lipton* and the *Remai* decision, the Board's practice of allowing a party to cross-examine an opposing party is based on broader principles than simply permitting one party an opportunity to cross-examine the opposite party's deponent on the application or reply filed. These decisions, however, confirm the general principles and practices that have been adopted by the Board of permitting cross-examination of the opposing parties.

[36] In summary, on this point, we find that the reply filed by Pyramid in this instance is evidence in the proceedings and Mr. Deacon, as the deponent of the statutory declaration, is subject to cross-examination.

Can the Board require the Respondent to produce the Deponent?

[37] Normally, a party to a proceeding before the Board undertakes to produce witnesses for cross-examination without the need for the opposing party to issue a summons compelling attendance. This "courtesy" reduces the time and cost of a hearing and over the long run will benefit both parties in their appearances before the

Board. Mr. McDonald's undertaking to produce the witness for cross-examination was not unusual or unexpected in relation to the normal practices of counsel before the Board.

[38] However, in order to compel a witness to attend at the Board, a party must ask the Board to issue a summons to be served by the party seeking the attendance of the witness on the individual. In our view, the power to summons a witness applies whether the witness is being called to give evidence in chief or on cross-examination. The Board understands the judgments of the Court of Queen's Bench and the Court of Appeal in *Pyramid Electric Corporation v. International Brotherhood of Electrical Workers, Local 529 and Saskatchewan Labour Relations Board* (1999), 185 Sask. R. 82 (Sask. Q.B.); aff'd. (2000), 199 Sask. R. 1 (Sask. C.A.) to have this effect.

[39] In the present case, without Mr. McDonald's undertaking, Mr. Deacon could be compelled to attend to be cross-examined on the statutory declaration under the Board's power to issue a summons in accordance with s. 18 of the *Act.*

Should the Board release Mr. McDonald from his undertaking and require the Union to summons Mr. Deacon to attend at the hearing?

[40] As indicated above, Mr. McDonald raised five reasons why he should be released from his undertaking. First, he argued that the circumstances of the request were unfair in that he did not have advance notice from the Union of the request; the request took counsel by surprise; counsel did not have an opportunity to properly argue the matter; and the undertaking was given without benefit of client instructions.

[41] The Board lacks any authority to order pre-hearing production of documents, witness lists, notices to produce, and other pre-hearing exchanges. Although it may be a matter of professional courtesy for counsel to exchange witness lists, documents and the like prior to the hearing, the Board cannot compel such pre-hearing exchanges under its existing powers: see *Pyramid Electric Corporation v. International Brotherhood of Electrical Workers, Local 529 and Saskatchewan Labour Relations Board* (1999), 185 Sask. R. 82 (Sask. Q.B.); aff'd. (2000), 199 Sask. R. 1 (Sask. C.A.) and at (2001), 208 Sask. R. 118 (Sask. Q.B.); [2002] 223 Sask. R. 70. As such, Pyramid cannot complain that the Union failed to provide notice of its intent to

seek leave to cross-examine Mr. Deacon when the Board has no statutory power to require such pre-hearing disclosure.

[42] The fact that the request took Mr. McDonald by surprise is unfortunate but we are not convinced that this is sufficient ground to relieve Mr. McDonald of his undertaking. The Board practice of allowing cross-examination of an opposing party is recorded in Board decisions.

[43] We take issue with Mr. McDonald's assertion that he was not given an opportunity to argue the matter before the Board. The matter was argued at some length by both counsel and the Board specifically asked Mr. McDonald if he required the Union to issue a summons for Mr. Deacon.

[44] Mr. McDonald advised the Board at this hearing that he gave the undertaking without benefit of client instructions. The Board was not aware at the time of the November hearing that Mr. McDonald was attending the hearing without an officer of Pyramid present to instruct him. It was the Board's assumption that Mr. Wilson was Pyramid's instructing officer.

[45] Counsel who attends a hearing without an officer of the corporation present to provide him with instructions does so at his own considerable risk. He may take positions or give undertakings that do not accord with the instructions the client would have given if they had been asked. This places counsel in an untenable position vis-à-vis his professional responsibilities.

[46] If requested, the Board would grant counsel an adjournment to permit him to seek proper instructions from his client before giving an undertaking. If such a request had been made at the November hearing, the Board would have briefly adjourned the hearing to allow Mr. McDonald an opportunity to telephone or otherwise contact his client to seek instructions. Mr. McDonald did not make such a request and, as indicated, the Board was not aware that Mr. Wilson was not the instructing representative of Pyramid.

[47] In these circumstances, the Board is not prepared to release Mr. McDonald from his undertaking on the grounds that he made the undertaking without the benefit of client instructions. The proper conduct of the hearing required that Pyramid have an officer available to instruct Mr. McDonald. Pyramid did not explain to the Board why no instructing representative was present at the hearing.

[48] The second reason relied on by Mr. McDonald was that the undertaking was unnecessary and redundant as the Union can compel Mr. Deacon's attendance. We have indicated above that undertakings given by counsel are routinely relied on by opposing parties and the Board. Such undertakings contribute greatly to the efficient operation of the Board and benefit both the Board and the parties by keeping costs low and by shortening the hearing time. If the Board and other parties appearing before the Board could not rely on a solicitor's undertaking, the hearing process would quickly grind to a halt. When an undertaking is given to produce a witness, the opposing side is relieved of its obligation to issue and serve a summons. The fact that they could obtain a summons does not render the undertaking unnecessary and redundant.

[49] The third and fourth reasons relied on by Mr. McDonald, that is, that the Board cannot require Pyramid to produce Mr. Deacon for cross-examination on the Reply, have been dealt with in our reasons set out above.

[50] The fifth reason relied on by Mr. McDonald is that there is no prejudice to the Union if the Board were to release Mr. McDonald from his undertaking. The Board is of the view that the prejudice to the Union and to Pyramid is roughly equal. That is, if the undertaking is upheld, then Pyramid bears the cost and expense of producing its officer, Mr. Deacon. If the Board released Mr. McDonald from his undertaking, the Union would bear the costs of securing Mr. Deacon's attendance. If costs become a significant issue for either side, they can be addressed in the remedial portion of the hearing. We do not find this reason a satisfactory one for setting aside Mr. McDonald's undertaking.

Conclusion:

[51] In conclusion, having read Mr. McDonald's brief of law and the cases cited and having considered the arguments made at the February 13, 2003 hearing and for the reasons stated above, the Board requires Mr. McDonald to fulfill his undertaking

to produce Mr. Deacon as a witness before the Board at the next hearing date, being Monday, March 10, 2003 commencing at 10:00 a.m. at the Labour Relations Board hearing Room, 10th Floor, Sturdy-Stone Building, Saskatoon to be cross-examined on his statutory declaration.

DATED at Regina, Saskatchewan this **27th** day of **February, 2003.**

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.
Chairperson