LRB File Nos. 188-12, 191-12, 192-12, 193-12, 198-12, 199-12, 200-12, 201-12 & 169-13

KBR Wabi Ltd., Construction Workers Union, Local 151, KBR Canada Ltd., and KBR Industrial Canada Co., Applicants

- and -

International Brotherhood of Electrical Workers, Local 529; International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870; Construction and General Workers' Union, Local No. 180; International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771; United Association of Journeyman & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179; International Union of Painters and Allied Trades (AFL-CIO-CLC), Local 739; United Brotherhood of Carpenters and Joiners of America, Local 1985 and United Brotherhood of Carpenters and Joiners of America, Millwright Union, Local 1021, Respondents

July 30, 2013;

Chairperson, Kenneth G. Love., Q.C.; Members: Mr. Greg Trew and Maurice Werezak

KBR Wabi Ltd.	Larry Seiferling, Q.C.
KBR Canada Ltd.	Kevin Wilson, Q.C.
KBR Industrial Canada Co.	Christopher Lane
The International Union of Operating Engineers, Local 870; The United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 179; The International Union of Painters and Allied Trades, Local 739; The United Brotherhood of Carpenters and Joiners of America, Local 1985; The United Brotherhood of Carpenters and Joiners of America, Local 1021	Larry Kowalchuk
The International Brotherhood of Electrical Workers, Local 529	Drew Plaxton
The Construction and General Workers' Local Union 180; The International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771	Gary Caroline

Reconsideration – Board asked to reconsider previous decision in which Board refused to summarily dismiss application by Unions regarding alleged successorship – Board considers and restates principles consistently followed by Board when determining whether to reconsider a previous decision.

Reconsideration – Board finds that previous decision clear and did not operate in an inconsistent *an* unanticipated way, that is, has had an unintended effect on its particular application – Board determines that decision did not rely on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel – The Board also found that the decision was not tainted by a breach or natural justice nor was it precedential and amounted to a significant policy adjudication which the Board wished to refine, expand upon, or otherwise change.

Splitting or Bifurcating Proceedings – Applicants applied to split the proceedings between a determination of an issue of successorship and an issue of common employer – Board declines to split proceedings. Board considers 5 factors in determining if matters should be split or bifurcated – Board finds no factor that suggests that proceedings be split.

Practice and Procedure - Applicants applied to split the proceedings between a determination of an issue of successorship and an issue of common employer – Board declines to split proceedings.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** In this decision, we have shortened the names of the various parties to this matter as follows:

"Wabi" for KBR Wabi Ltd.;

"Canada" for KBR Canada Ltd.;

"Industrial" for KBR Industrial Canada Co.;

"Local 870" for the International Union of Operating Engineers, Local 870;

"Local 179" for the United Association of Journeymen And Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179;

"Local 739" for the International Union of Painters and Allied Trades, Local 739;

"Local 1985" for the United Brotherhood of Carpenters and Joiners of America, Local 1985;

"Local 1021" for the United Brotherhood of Carpenters and Joiners of America, Local 1021;
"Local 529" for the International Brotherhood of Electrical Workers, Local 529;
"Local 180" for the Construction and General Workers' Local 180;
"Local 771" for the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 771;

[2] Wabi, Canada and Industrial will collectively be referred to as either the "KBR Companies" or the "Applicants". Local 870, Local 179, Local 739, Local 1985, Local 1021, Local 529, Local 180, and Local 771 will collectively be referred to as either the "Unions" or the "Respondents".

[3] In this matter, the Unions have made application to the Board to either amend certification Orders or to be named as successors in respect of various certification Orders of the Board, granted to the Unions in respect of an Employer named Brown & Root Ltd.

[4] Details of the various applications and certification Orders impacted are as follows:

LRB File No.	Application Type	Date of Application	Applicant	LRB Order	Named Respondent(s)
188-12	Successorship	1/11/2012	Local 529	344-84	KBR Companies
191-12	Amendment	5/11/2012	Local 870	067-60	KBR Companies
192-12	Amendment	5/11/2012	Local 180	044-70	KBR Companies
193-12	Amendment	5/11/2012	Local 771	076-60	KBR Companies
198-12	Amendment	16/11/2012	Local 179	080-60	KBR Companies
199-12	Amendment	16/11/2012	Local 739	111-88	KBR Companies
200-12	Successorship	16/11/2012	Local 1985	164-86	Wabi
201-12	Successorship	16/11/2012	Local 1021	114-84	Wabi

[5] Upon the above noted applications being filed by the Unions, the Respondents applied to the Board to summarily dismiss those applications. By a decision of the Board dated May 10, 2013, the Board declined those summary dismissal applications.

[6] By letter dated May 24, 2013, counsel for Canada advised the Board that it would seek reconsideration of dismissal of the summary dismissal applications on May 10, 2013. No formal application for reconsideration was filed with the Board until the hearing of this matter on June 10 and 11, 2013 in Saskatoon. That application was given the File No. 169-13 by the Board. At the hearing, counsel for Industrial joined in the application by Canada. The reconsideration application was opposed by the Unions. At the hearing, the Board ruled that it would not agree to reconsider the matter. These are the reasons for that decision.

[7] At the hearing on June 10 and 11, 2013, the Board also considered a request from the KBR Companies to bifurcate the proceedings by splitting off the question of whether a successorship has occurred as alleged by the Unions; from the question of whether the KBR Companies are common/related employers. At the hearing, the Board reserved its decision on that point and these are the reasons and decision with respect to the request by the KBR Companies to bifurcate the proceedings.

[8] At that hearing, the Board also considered requests from the Unions for production of documents and provision of particulars by the Respondents. After hearing arguments from the parties, the Board determined that it would appoint an agent pursuant to section 18.1 of *The Construction Industry Labour Relations Act.*[1] By Order dated June 19, 2013, the Board appointed the Honourable William J. Vancise, Q.C. to be its agent in respect of this matter.

Reconsideration of the Board's May 10, 2013 Decision

Relevant statutory provision:

[9] Relevant statutory provisions are as follows:

[1] S.S. 1992 C. C-29.11.

> *5 The board may make orders:*
>
> > *(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> *. . .*
>
> *42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Analysis:

[10] The Board has consistently applied the same stringent test in determining whether or not a reconsideration application should be allowed, which test was set out by it in *Grain Services Union v. Saskatchewan Wheat Pool et al.*[2]

> *A request for reconsideration is not an appeal or a hearing de novo, nor is it an opportunity to reargue a case, raise new arguments or present new evidence, but rather, it generally allows important policy issues to be addressed, such as evidence to be presented that was not previously available, or errors to be corrected.*

[11] The reason why such a stringent test is applied by the Board was set out in *City of North Battleford v. Canadian Union of Public Employees, Local 287.*[3]

> *…the policy behind such a restrictive approach to reconsideration is to accord a serious measure of certainty and finality to the decisions of the Board, while affording "a fulsome degree of flexibility to respond to exigencies of fact and circumstance which may militate against the continued governance of determinations earlier made.*

[12] The criteria consistently reviewed and applied by the Board on an application for reconsideration are set out in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et a*l.[4]

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[2] [2003] Sask. L.R.B.R. 454, LRB File No.: 003-02, at 456.
[3] [2003] Sask. L.R.B.R. 288, LRB File No.: 054-01, at 291.
[4] [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. : 132-93, at 107-108.

Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.B.R. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied.

In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.

We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.

Counsel for the Employer argued that we should adopt the alternative of entertaining a full rehearing of the case, rather than establishing this intermediate stage. He predicted that this would not have the effect of an uncontrolled increase in the number of such applications. It is difficult to see, however, why allowing an automatic trial de novo to a disappointed applicant would not expose the Board to a growing number of applications to rehear cases in which the contest is serious or the stakes high.

In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:

> *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
>
> > *1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*

> *2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
>
> *3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
>
> *4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
>
> *5. if the original decision is tainted by a breach of natural justice; or,*
>
> *6. if the original decision is precedential and amounts to a significant policy adjudication which the Counsel may wish to refine, expand upon, or otherwise change.*

[13] In this case, Canada and Industrial placed reliance upon grounds 3, 4, 5 & 6 as set out above. The Applicant, Canada sought clarification regarding how the dismissal of the summary dismissal applications impacted Canada. Industrial sought the same clarification. Both parties argued that the decision was unclear as to how their particular applications for summary dismissal were dealt with. They argued that the reasons provided by the Board were insufficient and that there was no conclusion as to what happened insofar as their application was concerned. They noted that while they acknowledge that the Board dismissed their applications, they argued that there was no rationale provided as to why those applications were dismissed.

[14] Canada and Industrial argued that this lack of clarity was an unanticipated result which should be clarified by the Board. They also argued that there were no findings of fact to support the Board's dismissal of their applications, nor was there any conclusion that one or more of the parties were a common employer.

[15] At paragraph [126] of the Board's May 10, 2013 decision it says:

> *While the applicant unions have attempted to sort out the corporate maze outlined in their applications, they cannot be expected to know with particularity all of the interrelationships between the various entities and their function within the corporate empire of the KBR Companies. However, from what they have presented, there is, in our opinion, an arguable case that these companies are sufficiently intertwined so that the requirements for a finding of common employer under s. 37.3 may be founded on those allegations.*

[16] There was also a finding at paragraph [124] of a sufficient recitation of facts in the pleadings of the various Unions to support a finding of common employer. This is, we believe, a clear determination of the applications made by Canada and Industrial for summary dismissal.

[17] Canada and Industrial also says that the Board erred with respect to its enunciation of the factors necessary to support a finding of common employer and in doing so made an error of law or policy which the Board should correct. However, in its Brief of Law filed with the Board, it repeats, what the Board also saw to be the proper test. The only difference between the two is that the Board considered the amendment to section 37.3(2) of *The Construction Industry Labour Relations Act* which permits common employers who were incorporated on or after October 28, 1994.

[18] Canada and Industrial also alleged that the Board, in making its decision not to summarily dismiss the applications insofar as Canada and Industrial are concerned, has "trampled" on their rights, which it says is a breach of natural justice. We do not agree with this analysis. Both Canada and Industrial had ample opportunity to appear and make argument in respect of the summary dismissal of the successorship/Common Employer claims by the Union.

[19] Furthermore, it must be remembered that the application for summary dismissal was a preliminary proceeding, and the threshold, which an Applicant must show to avoid dismissal, is not high. There were no findings of fact made by the Board one way or another. All that was determined was that the Unions had made out an "arguable case" that Canada and/or Industrial **may be** a common/related employer, not that Canada and Industrial **are** common employers. [emphasis added] Both will have their opportunity at the hearing of this matter to present both evidence and argument in support of their position.

[20] Canada and Industrial also argued that the decision in this case was precedential and was a significant policy adjudication which the Board may wish to reconsider. They argued that the threshold for pleadings to defeat an application for summary dismissal had been significantly lowered by the decision. This statement is accurate to some degree. The Board did reconsider its long standing decision in *Soles*[5] and restated the test for summary dismissal as follows:

[5] [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.

> [79] *Taking all of this into consideration, we adopt the following as the test to be applied by the Board on the exercise of its authority under s. 18(p) of the Act.*
>
> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> *2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

[21] Supported by the reasons set out in the June 10, 2013 decision, the Board is not prepared to reconsider this restatement as proposed by Canada and Industrial.

[22] For these reasons, the applications by Canada and Industrial for reconsideration of the Board's decision of June 10, 2013 was denied. An appropriate Order will be made dismissing the applications.

Application to Bifurcate the Proceedings

[23] The KBR Companies applied to the Board to bifurcate or divide the hearing into two parts. The first part, it argued should be the determination of whether or not any of the KBR Companies were the successor to Brown & Root Ltd. Once that issue was determined, they argued that the issue regarding whether or not any of the KBR Companies were common employers could then be determined, if necessary.

[24] The Applicant's application must fail on one fundamental point, which is that the successorship applications, particularly the applications of Local 180 and Local 771, are brought against all of the KBR Companies, not just Wabi. The situation is not, as suggested by counsel for Wabi and Canada, that the issue is whether Wabi is the successor to Brown & Root Ltd. and then, if successorship is found to exist, that we must then go on to determine if Wabi is a common employer with Canada or Industrial. Rather, the Board has been asked to determine whether or not Canada, Industrial or Wabi is a successor to Brown & Root Ltd.

[25] The determination of which, if any, of the KBR Companies is a successor to Brown & Root will, in our opinion, cause there to be overlapping evidence, which will have to

then be applied to each of the applications (or read in or otherwise applied to the separated proceedings). Given the low level of co-operation demonstrated by the parties to date, this would, in our view, present great difficulty for both the Board procedurally and for witnesses who would be called to appear more than once.

[26] It is, of course, conceivable that a successorship may not be found to have occurred insofar as any of the KBR Companies are concerned. However, because there are allegations of successorship against all of the KBR Companies, they will undoubtedly wish to be represented at both hearings.

[27] While there may, arguably, be some savings of Board and parties' resources to proceed in a bifurcated fashion, those savings are, we believe, illusory should it be necessary to call separate witnesses and require separate production in respect of a bifurcated process.

[28] We see no prejudice to the Applicants, who will likely be represented, in any event, for both issues. There may, however, be some prejudice to the Unions who may be disadvantaged in seeking evidence or witnesses if the matters are separated.

[29] In its Brief of Law, KBR Canada submitted that we should consider five factors in reaching our decision. These are:

> 1. *The issues to be severed must clearly be severable and not intertwined;*
>
> 2. *The hearing of the severed issue should include the possibility of finally resolving the matter;*
>
> 3. *The separate hearings, if ordered, should not involve overlapping evidence;*
>
> 4. *Whether prejudice will be suffered by either granting or not granting the application for severance, along with its extent; and*
>
> 5. *The effect that severance will have on settlement negotiations should be considered.*

[30] Of the above factors, the only one which has not been considered above is item five, which in our view is inapplicable in this case. For these reasons, the application to sever the proceedings is denied. An appropriate Order will issue.

DATED at Regina, Saskatchewan, this **30th** day of **July, 2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson