NATIONAL MAINTENANCE COUNCIL FOR CANADA, Applicant v INTERNATIONAL BROTHERHOOD OF BOILERMAKERS and EDMONTON EXCHANGER & REFINERY SERVICES LTD., Respondents

LRB File No. 159-19; November 4, 2019

Chairperson, Susan C. Amrud, Q.C.; Board Members: Shawna Colpitts and Laura Sommervill

For the Applicant:	Robert R. Blakely, Q.C.
For the Respondent International Brotherhood of Boilermakers:	Greg Fingas
For the Respondent Edmonton Exchanger & Refinery Services Ltd:	Glenn Tardif

Intervenors – Applicant meets criteria for direct interest intervenor status – Applicant's rights and obligations potentially directly affected by outcome of main application – Applicant will bring perspective to issues that the parties will not bring and will accordingly be of assistance to Board in deciding main application.

Intervenors – Applicant granted leave to provide evidence and argument respecting National Maintenance Agreement.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C, Chairperson: On May 8, 2019, the International Brotherhood of Boilermakers ["IBB"] filed an Unfair Labour Practice Application[1] ["Main Application"] against Edmonton Exchanger & Refinery Services Ltd. ["Employer"]. The issue in that matter is which of two collective agreements applies to maintenance work performed by IBB members employed by the Employer at the Husky Upgrader at Lloydminster, Saskatchewan: the Project Agreement signed by the Saskatchewan and Northwest Territories Allied Council ["Allied Council"] or the National Maintenance Agreement for Saskatchewan ["NMA"] entered into by the National Maintenance Council for Canada ["NMC"].

[1] LRB File No. 116-19.

[2] On July 8, 2019, the NMC filed an Application to Intervene in the Main Application[2]. The NMC is a council of unions, including IBB. The NMC negotiated the NMA, a collective agreement in respect of maintenance that it says is for use on industrial projects in Saskatchewan. The IBB signed an agreement to be bound by the NMA. The Employer and the NMC state that the NMA is a province-wide agreement, with no site exclusions. The IBB argues that the NMA does not apply to the maintenance work its members perform at the Husky Upgrader. The NMC argues that the rights and obligations of the NMC and its constituent unions will be directly affected by the decision the Board will make in the Main Application

[3] In accordance with the Board's usual practice, this application is being determined on the basis of written submissions.

Relevant legislative provisions:

[4] The following provisions of *The Saskatchewan Employment Act* ["Act"] are relevant to this application:

> ***General powers and duties of board***
> *6-103(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
>
> ***Proceedings not invalidated by irregularities***
> *6-112(4) Without limiting the generality of subsections (2) and (3), in any proceedings before it, the board may, on any terms that it considers just, order that the proceedings be amended:*
>
> > *(a) by adding as a party to the proceedings any person that is not, but in the opinion of the board ought to be, a party to the proceedings;*

[5] *The Saskatchewan Employment (Labour Relations Board) Regulations* ["Regulations"] include the following provision with respect to intervention applications:

> ***Intervention***
> *20(1) In this section:*
> > *(a) **"application to intervene"** means an application in Form 17 (Application to Intervene);*
> > *(b) **"original application"** means an application made to the board pursuant to the Act and these regulations that is the subject of an application to intervene.*
> *(2) An employer, other person, union or labour organization that is served with a copy of an application pursuant to section 19 and intends to intervene in the proceedings before the board shall file a reply in Form 18 (Reply).*
> *(3) An employer, other person, union or labour organization that is not served with a copy of an application pursuant to section 19 and that intends to intervene in the proceedings before the board shall file an application to intervene.*

[2] LRB File No. 159-19.

> *(4) All replies and applications to intervene must be filed within 10 business days after the date a copy of the original application was given to the employer, person, union or labour organization by the registrar.*
> *(5) The registrar shall provide a copy of every reply and every application to intervene to:*
> *(a) the party that filed the original application;*
> *(b) in the case of an application to intervene, any other party that filed a reply; and*
> *(c) any other employer, person, union or labour organization that is directly affected by the application to intervene.*

Argument on behalf of the NMC:

[6] The NMC applies for status as a direct intervenor with the right to call evidence, cross-examine, make argument and participate as a full party. Alternatively, if the Board does not grant it status as a direct intervenor, it requests status as an exceptional intervenor.

[7] The NMC argues that, on the Main Application, one potential issue to be decided is the scope and operation of the NMA, including how it came into being, what authority various parties had with respect to it and how that authority was exercised. The NMC states that it can bring evidence to assist in the resolution of this issue.

[8] The NMC cited several decisions of the Board that set out the well-established principles that the Board applies in determining applications by proposed intervenors[3].

[9] The NMC argues that, if the Board was to read down the NMA, in the absence of the NMC and in the absence of the facts, materials, testimony and arguments it can bring, it would not be fair. The cases argue for fairness and for a chance to speak for rights that could be impaired.

Argument on behalf of the IBB:

[10] The IBB says it is an affiliate of the Allied Council, and that it authorized the Allied Council to bargain collective agreements governing its work at the Husky Upgrader. It agrees that the NMC has bargained a NMA for Saskatchewan on behalf of member unions, including IBB. It says that its grant of authority to the NMC has at all times been based on the express understanding that the NMA applies only to facilities not covered by existing maintenance agreements, including the agreement entered into by the Allied Council.

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[3] *CEP v JVD Mill Services*, [2010] SLRBD No. 27, 199 CLRBR (2d) 228; *CLAC Local 151 v Tercon Industrial Works Ltd.*, 2012 CanLII 2145 (SK LRB); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial v International Brotherhood of Electrical Workers, Local 2038*, 2017 CanLII 6027 (SK LRB); *Construction Labour Relations Association of Saskatchewan Inc. v International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, Local 771*, 2019 CanLII 43219 (SK LRB); *Construction Workers Union, CLAC Local 151 v Ledcor Industrial Limited*, 2018 CanLII 53123 (SK LRB).

[11] The IBB disputes NMC's claim to have a direct interest in the outcome of the Main Application. The IBB suggests that NMC's position is similar to that of the applicant in *Construction Labour Relations Association of Saskatchewan Inc. v International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, Local 771*[4] ["*CLR v Ironworkers*"], where the Board granted the applicant limited status to participate in the hearing as an exceptional intervenor. The IBB does not object to a grant of limited exceptional intervenor status to the NMC.

Argument on behalf of the Employer:

[12] The Employer does not take a position on NMC's application.

Analysis and Decision:

[13] The principles applied by the Board in determining an application for intervention are well-established. In a recent decision they were described as follows:

> *[24] In C.E.P. v J.V.D. Mill Services, [2010] SLRBD No. 27, 199 CLRBR (2d) 228 ("JVD Mill Services No.1"), the Board confirmed its approach to granting intervenor status in cases before the Board. As the Board explains, an order granting intervenor status is a discretionary order based on the Board's assessment of the fairness to the parties and the potential for the proposed intervenors to assist the Board in coming to a decision.*
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> *[25] The Board endorses the following comments made in Construction Workers Union, CLAC Local 151 v Ledcor Industrial Limited, 2018 CanLII 53123 (SK LRB) ("Ledcor"):*
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> > *[20] By definition, an intervenor is a stranger to on-going litigation before an administrative tribunal or a court. As such, allowing such a party to participate in the litigation, especially private litigation, is an unusual, if not an extraordinary, occurrence. It is precisely for this reason that applications to intervene must be carefully scrutinized, and when deciding them this Board should exercise its discretion to grant intervenor standing sparingly, mindful of the particular factual matrix of the case under consideration.*
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> *[26] Generally, the Board will allow only the original parties to define the issues that come before the Board. Intervention applications must be carefully scrutinized so as to avoid any unnecessary impact on the efficient and fair adjudication of the lis. In Construction Workers Union (CLAC), Local 151 v Tercon Industrial Works Ltd, 2012 CanLII 2145 (SK LRB), at paragraph 31, the Board provides a detailed summary of the approach set out in JVD Mill Services No.1:*
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> > *In J.V.D. Mill Services #1, supra, this Board clarified its general approach to the granting of intervenor status in proceedings before the Board. In doing so, the Board reiterated the long standing principle that the granting of standing as an intervenor in any proceedings before the Board is a matter of discretion and that, generally speaking, the Board exercises its discretion based on the circumstances of each case, considerations of fairness (to the party seeking standing) and/or the potential for the party seeking standing to assist the Board (by making a valuable contribution or by providing a different*

[4] 2019 CanLII 43219 (SK LRB).

> *perspective) without doing injustice to the other parties. The Board went on to identify and adopt three (3) forms of intervention recognized by this Board. These three (3) forms of intervention are summarized as follows:*
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> *1. **A Direct Interest Intervenor**; where the applicant seeking standing has a direct interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be directly affected by the determinations of the Board.*
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> *2. **An Exceptional Intervenor**; where the applicant has a demonstrable and genuine interest in the answer to the legal question in dispute (i.e.: for example, if the party has a pending application before the Board on the same issue and thus has legal rights or obligations that may be affected by a binding precedent); and the applicant can establish the existence of "special circumstances" that differentiate it from others who may have a similar interest; and where that party can demonstrate that it can provide a valuable assistance to the Board in considering the issues before it.*
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> *3. **A Public Law Intervenor**; where the applicant has no legal rights or obligations that may be affected by the answer to the legal question in dispute, but can satisfy the Board that its perspective is different or that its participation would assist the Board in considering a public law issue before it.*
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> *[27] The Board has followed these principles on many occasions, including: Saskatchewan Building Trades Council v Construction Workers Union, CLAC Local 15, 2018 CanLII 38251 ("Saskatchewan Building Trades Council"); Construction Workers Union, CLAC Local 151 v The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119, 2018 CanLII 127663; Construction Workers Union, CLAC Local 151 v Ledcor Industrial Limited, 2018 CanLII 53123 ("Ledcor"); and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial v International Brotherhood of Electrical Workers, Local 2038, 2017 CanLII 6027.*[5]

[14] The granting of intervenor status by the Board is discretionary. The Board will exercise its discretion sparingly, based on considerations of fairness to the applicant and the applicant's potential to assist the Board by making a valuable contribution or by providing a different perspective without doing injustice to the parties.

[15] The Board has considered the issue of direct interest interventions in greater detail in several cases that are helpful to a determination of this application.

[16] *Construction Workers Union, Local 151 v Tercon Industrial Works Ltd*.[6] was an application for intervention in a certification application. The Board stated:

> *A claim of standing as a direct interest intervenor must flow from the potential that the subject proceedings could have a direct impact on the party seeking standing (for example, through*

[5] *Construction Labour Relations Association of Saskatchewan Inc. v International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, Local 771*, 2019 CanLII 43219 (SK LRB).
[6] 2012 CanLII 2145 (SK LRB) at para 36.

the potential imposition of legal obligations upon them or an impact on certification rights they currently hold or are seeking to obtain).

[17] In *Saskatchewan Government Employees' Union*[7] the Board stated:

Direct Intervenor Status

[8] When considering the granting of direct intervenor status, the Applicant must have a direct interest, i.e.: legal rights or obligations that may be directly affected by the answer to the questions posed by the litigation. That is, they must have a direct interest in the lis between the parties. Both SGEU and RWDSU argued that they did indeed have a direct interest in the questions being posed in the litigation insofar as they had an interest similar to CUPE in the outcome of the litigation.

[9] While a significant interest, having a common interest in litigation is not a direct interest whereby rights and interests will be directly affected. This is not a situation which arises out of the same fact pattern (and in the case of RWDSU a significantly different fact pattern insofar as the initial application came not from the employer, but from the union and, more significantly, that the application was subsequently withdrawn).

[10] The parties have not asserted a common fact scenario in their cases to that which exists in the SPL case. Nor can we determine, at this stage of the proceedings, that the facts are so similar in their cases as to be indistinguishable from the facts in the SPL case. This case will not determine the outcome of their cases. It may establish an interpretation of the law which may be applicable to their cases, but will not be determinative of their cases. As such, they do not have a direct interest in the lis between the parties in this case such that they have a direct interest and cannot, therefore, be accorded direct interest intervenor status.

[11] No claim has been advanced by either SPL or CUPE as against SGEU and RWDSU in this case. Nor has SGEU or RWDSU made any direct claim as against SPL or CUPE. They do not have a direct stake in the decision.

[18] In *Construction Workers Union, CLAC Local 151 v Ledcor Industrial Limited*[8] the Board held:

It follows that a proposed "direct interest" intervenor must demonstrate more than simply asserting the decision in one case could be utilized as a precedent in some future case in which it may be involved. Brand Energy provided no further arguments beyond that assertion in support of its contention that it deserved to be granted standing as a "direct interest" intervenor.

[19] In *CLR v Ironworkers* the Board provided the following comments:

[30] CLR must show that it "has a direct interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be directly affected by the answer".

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[7] 2016 CanLII 74494 (SK LRB).
[8] 2018 CanLII 53123 (SK LRB) at para 26.

> *CLR may be "keenly interested in the outcome" of this application, but it cannot be said that it has a direct interest. It does not have legal rights or obligations that will be directly affected by the answer.*
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> *[31] To quote the Board in J.V.D. Mill Services (Re), [2011] SLRBD No 21, 199 CLRBR (2d) 241, at paragraph 60, "[t]he Applicants [sic] rights are not affected by the certification decision. No legal obligations are imposed upon them by the Order or decision. Nor are they prejudicially affected directly." Likewise, CLR does not have a direct stake in the lis between the parties in the underlying Certification Application.*
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> *[32] CLR states that the precedent in this case could "affect the CLR not only as the REO for the Ironworkers Trade Division, but also as the REO in 15 other trade divisions within which the CLR represents unionized employers". That may be true but the potential for a "bad precedent" is not a sufficient basis for a direct interest intervention. As the Board stated in Ledcor, at paragraph 25, the "fact that a proposed intervenor may have a similar case pending before the tribunal or court in question, does not mean it should be granted intervenor status in an unrelated matter". Similarly, the fact that a proposed intervenor may be impacted by the case before the Board does not mean that it should be granted direct interest intervenor status.*

[20] The issue for the Board to determine, then, is whether the NMC has a direct interest in the answer to the legal question in dispute in the Main Application. Will its rights or obligations be directly affected by the determinations in that matter? The guidance provided by the Board in the above-noted cases leads to a conclusion that the NMC should be granted direct interest intervention status.

[21] The NMC has shown that it has a direct interest in the answer to the legal question in dispute respecting the NMA. NMC is the party to the NMA and any reading down of the NMA will directly affect it. The IBB is challenging the scope of the NMC's authority to negotiate and enter into the NMA. The Board's decision respecting the NMA has the potential to directly affect NMC's rights and obligations, and those of its constituent unions. The NMC has a direct stake in the *lis* between the parties in the Main Application.

[22] This is not a situation like *CLR v Ironworkers* where the outcome of the Main Application could potentially be nothing more than a bad precedent. The decision will require a direct interpretation of the application of its agreement, the NMA. The remedies sought by the IBB in the Main Application would have a direct effect on the NMC and its affiliated unions.

[23] The Board is satisfied that the NMC will bring a perspective to the issues surrounding the NMA that the parties will not bring, and accordingly will be of assistance to the Board in deciding the Main Application. No injustice will be done to the IBB or the Employer by its participation.

[24] The NMC is granted standing in the Main Application as a direct interest intervenor. It has the full right to call evidence, cross-examine and make argument with respect to the NMA, representing only its own distinct perspective, and without duplicating the evidence or argument of the Employer. As it acknowledged, it will be expected to provide pre-hearing disclosure to the parties. The Panel that hears the Main Application will have the ability to grant the NMC the ability to provide any further evidence or argument that the Panel shall direct.

[25] With these Reasons, the Board will issue the following Order:

(a) the National Maintenance Council for Canada is granted standing as a Direct Interest Intervenor in LRB File No. 116-19 to provide evidence and argument with respect to the National Maintenance Agreement;
(b) the decision whether further evidence and argument may be led by the National Maintenance Council for Canada is reserved to the Panel that hears LRB File No. 116-19.

[26] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **4th** day of **November, 2019.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson