BOILERMAKER CONTRACTORS' ASSOCIATION OF CANADA, Applicant v INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS LOCAL 555, WORLEY INDUSTRIAL SERVICES ULC, EDMONTON EXCHANGER & REFINERY SERVICES LTD. and MELLOY INDUSTRIAL SERVICES INC., Respondents

LRB File Nos. 058-20, 059-20 and 060-20; July 30, 2020
Vice-Chairperson, Gerald Tegart; Board Members: Phil Polsom and Don Ewart

Counsel for the Applicant: Hugh McPhail, Q.C.

Counsel for the Respondent Union: Greg Fingas

Counsel for the Respondent Employers,
Worley Industrial Services ULC
Edmonton Exchanger & Refinery Services Ltd
(Edmonton Exchanger)
Melloy Industrial Services Inc.: No one appearing

Intervenors – Applicant meets criteria for direct interest intervenor status – Applicant's rights and obligations potentially directly affected by outcome of original applications – Applicant granted leave to provide evidence and argument respecting an agreement to which it is a party.

REASONS FOR DECISION

Introduction:

[1] Gerald Tegart, Vice-Chairperson: This decision relates to three applications to intervene brought by the Boilermaker Contractors' Association ("BCA") in relation to the following three original applications ("the original applications") brought by the International Brotherhood of Boilermakers or its Local 555 ("collectively IBB") and filed with the Board on March 12, 2020:

1. LRB File No. 051-20 is an unfair labour practice application. The respondent employer is Worley Industrial Services ULC ("Worley").

2. LRB File No. 052-20 is also an unfair labour practice application. The respondent employer is Edmonton Exchanger & Refinery Services Ltd. ("Edmonton Exchanger").

3. LRB File No. 053-20 is an application for employer successorship that also seeks relief related to alleged unfair labour practices. The respondent employer is Melloy Industrial Services Inc. ("Melloy").

[2] Worley, Edmonton Exchanger and Melloy (collectively "the employers") are members of the BCA.

[3] The Worley and Edmonton Exchanger original applications are brought in the name of the International Brotherhood of Boilermakers. The Melloy application is brought in the name of Local 555. Each of the intervenor applications names both the union and Local 555. The respondent brief related to the intervenor applications is purportedly filed on behalf of both as well, and its style of cause refers to the union and Lodge "532" (apparently a typo) collectively as "IBB", which we will do here as well unless the context requires a distinction between the two.

[4] The three applications to intervene were considered by the Board on June 24, 2020, in an in-camera hearing based on written submissions.

[5] Given the factual similarities among the three applications to intervene and the manner in which the proposed intervenor and the respondent union dealt with them, these reasons for decision will deal with all three together.

Original applications:

[6] The three original applications are factually related and the issues to be determined in each will be very similar if not the same.

[7] IBB is the certified bargaining agent for a bargaining unit of boilermakers employed by each of the employers.

[8] There are three collective agreements that have actual or potential application in relation to the original applications.

[9] A national maintenance agreement for Saskatchewan ("the NMA") was bargained by the National Maintenance Council, covering sites in Saskatchewan. This commenced in 2014.

[10] In August of 2014, a project agreement related to maintenance work at the Husky upgrader at Lloydminster was entered into by the Northwest Territories Allied Council on behalf of certain affiliated unions, including IBB, and LML Industrial Contractors Ltd. ("the project agreement").

[11] In 2017, IBB and BCA entered into articles of agreement governing wages and working conditions on all maintenance, shutdown, and turnaround work in Manitoba and Saskatchewan, with an initial term of September 3, 2017, to June 30, 2022 ("the BCA agreement"). Each of the employers has signed an adherence agreement agreeing to be bound by the BCA agreement.

[12] In September of 2019, IBB gave notice to each of the employers – more correctly, in the case of Worley, to an apparent predecessor entity, Jacobs – to engage in renewal bargaining respecting the terms of the NMA.

[13] On November 22, 2019, BCA wrote to IBB "to provide clarification on behalf of our member contractors regarding the recent Notice to Bargain letters that were issued by the IBB/Local 555". BCA's letter suggested that member contractors who had adhered to the BCA agreement would not need to reply to the notice to bargain and asked IBB to confirm that.

[14] The employers have not otherwise responded to the notice to bargain. IBB's three applications consequently allege that the employers have failed to engage in collective bargaining, thereby committing unfair labour practices. In each of the three original applications, IBB specifically alleges the employers have committed unfair labour practices by failing to do everything they are required to do, and refraining from doing anything they are required to refrain from doing, under the project agreement. The relief sought in relation to the Edmonton Exchanger application includes a declaration that the project agreement remains the collective agreement applicable to the work of the bargaining unit at the Husky upgrader.

[15] The employers' replies to the original applications assert their rights to choose the agreement to be applied in relation to the execution of maintenance work. They maintain the NMA continues to have application and, in the Edmonton Exchanger reply, state that the BCA agreement also applies. They further maintain there is no need to bargain changes to the NMA.

Relevant Legislative Provisions:

[16] S. 6-112(4)(a) of *The Saskatchewan Employment Act* authorizes the Board to "…on any terms that it considers just, order that the proceedings be amended…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…".

[17] S. 20 of *The Saskatchewan Employment (Labour Relations Board) Regulations* provides:

> ***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.*
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> *(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).*
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> *(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.*
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> *(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.*
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> *(5) The registrar shall provide a copy of every reply and every application to intervene to:*
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> > *(a) the party that filed the original application;*
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> > *(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.*

Positions of the Proposed Intervenor (BCA) and the Respondent (IBB):

[18] BCA argues that the central issue in the original applications is which of the three agreements applies to maintenance work at the Husky upgrader. Since it is a party to the BCA agreement, it says it has a direct interest in the resolution of this question. It argues that, although not a party to the NMA, it has a direct interest in questions of its application to the work at the upgrader, since the resolution of those questions directly affects the application of its own agreement to the same work. The Board's determination of the original applications potentially determines the application of the BCA agreement to not only the work at the upgrader, but to other maintenance work the BCA believes its agreement applies to.

[19] IBB argues that BCA has no direct interest in the questions to be resolved in the original applications, as the matters to be decided cannot deprive it of rights or impose obligations. It says that nothing in the original applications challenges the effect of the BCA agreement and that BCA has no separate interest to justify the additional time and complexity raised by its addition as a party.

[20] IBB also challenges BCA's right to participate both as an agent for the employers and as a party in its own right.

[21] Worley supports BCA's application. The other two employers have not indicated a position.

Analysis and Reasons:

[22] In the Board's March, 2019, decision in *Construction Labour Relations Association of Saskatchewan Inc. v International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, Local 771,* 2019 CanLII 43219 (SK LRB), ("*CLR*"), the Board described the principles to be applied in considering an application for intervention:

> ***[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 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[6]. These three (3) forms of intervention are summarized as follows:*

> *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.*

[23] Both BCA and IBB also referred to the Board's decision in *National Maintenance Council for Canada v International Brotherhood of Boilermakers and Edmonton Exchanger & Refinery Services Ltd.*, 2019 CanLII 107117 (SK LRB) ("*NMC*"), where the Board granted direct interest intervenor status to the National Maintenance Council to provide evidence and argument with respect to the NMA in a different original application. BCA argues that this decision closely parallels its position in the instant application.

[24] The Board's reasoning in *NMC* is summarized in the following paragraphs:

> ***[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.*
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> ***[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.*
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> ***[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.*
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> ***[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] IBB argues that the *NMC* decision supports its position, since the National Maintenance Council was a party to the NMA and its rights under that agreement were potentially affected by the original application there. It says that BCA has no corresponding interest here.

[26] IBB argues the circumstances and result in *CLR* are more similar to the circumstances here. In *CLR* the Board determined the intervenor applicant, although understandably concerned about the precedential effect of the resolution of the original application and keenly interested in the outcome, had no direct interest as its rights would not be affected.

[27] Between these two cases and the circumstances of the intervenor applicants and the potential impact of the resolution of the original applications in both instances, the *NMC* decision appears to more closely parallel the situation here. IBB correctly points out that BCA is not a party to the NMA, although obviously interested in its interpretation and application. However, we accept the position advanced by BCA that the resolution of the original applications will also potentially require a consideration of the interpretation and application of the BCA agreement, to which BCA is a party. BCA has a direct interest in that exercise as it relates to the Husky upgrader in the instant case, but also as it will apply in other similar circumstances. This is not merely a matter of a good or bad precedent. It will potentially determine how the BCA agreement, and the rights and obligations under that agreement that apply to BCA and its members who have adhered to the agreement, will be applied going forward. If BCA isn't given status to advance its interests, and those of its members, under the BCA agreement in the original applications here, it is difficult to see in what circumstances it could ever be able to seek the enforcement of its agreement.

Consequently, for reasons we see as similar to those that led the Board to grant status to the National Maintenance Council in *NMC*, we conclude the applications here should be granted.

[28] IBB's written submission suggests it would be inappropriate and needlessly duplicative to allow BCA to participate as a party when it is also engaged in advising and representing the employers. Those concerns can be largely addressed by confining BCA's participation as an intervenor in a manner similar to the restrictions imposed on the National Maintenance Council in *NMC*, where the council's standing was limited to providing evidence and argument with respect to the agreement to which it was a party, subject to any further latitude to be allowed by the panel hearing the original applications.

[29] Consequently, the Board will issue the following order applicable to each of the three intervenor applications. The Boilermakers Contractors' Association is granted standing as a direct interest intervenor in each of the three original applications to provide evidence (including through cross-examination of witnesses) and argument with respect to the interpretation and application of the BCA agreement. The panel hearing the original applications will have the authority to determine whether BCA will be allowed to provide further evidence and argument.

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

DATED at Regina, Saskatchewan, this **30th** day of **July, 2020.**

LABOUR RELATIONS BOARD

Gerald Tegart,
Vice-Chairperson