KONE Inc., Applicant v INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 102, Respondent

LRB File No. 097-20; June 19, 2020

Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Mike Wainwright

Counsel for the Applicant,
KONE Inc.: Allison MacIsaac, M. Patrick Moran

Counsel for the Respondent, International
Union of Elevator Constructors, Local 102: Crystal Norbeck

Application for Interim Relief – Unfair Labour Practice Application – ss.6-63(1)(a) and 6-63(1)(d) of *The Saskatchewan Employment Act* – Allegations of counselling illegal strike and threatening employees – Interpretation of Collective Bargaining Agreement – Process established for resolution of disputes – No sense of urgency – Balance of Convenience does not favour Employer – Interim Application Dismissed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision dismissing an application for interim relief, filed with the Board on June 5, 2020. The Application was filed by the Employer, KONE Inc. against the Union, International Union of Elevator Constructors, Local 102, and Colin Dauphinais. The Application relates to the Employer's unfair labour practice application, filed May 25, 2020, pursuant to clauses 6-63(1)(a) and (d) of *The Saskatchewan Employment Act* [Act].[1]

[2] In the unfair labour practice application, the Employer alleges that the Union, having taken issue with the Employer's work assignment, provided direction to KONE employees to refuse to perform work under the threat of Union sanctions. According to the Employer, it filed a grievance against the Union on March 5, 2020 on the basis that the Union had allegedly breached Articles

[1] LRB File No. 083-20.

2.03 and 14.01 of the Collective Bargaining Agreement [CBA], seeking damages and the immediate cessation of the Union's conduct.

[3] On May 19, 2020, work began on a separate project in Saskatoon, referred to as the River Landing project. Here, again, the Union advised KONE employees to refuse to perform work on the project. On May 15, 2020, counsel to the Employer provided correspondence to Colin Dauphinais, Business Representative of the Union. The Employer, through counsel, advised Dauphinais that to provide such direction to employees would breach the CBA, the Act, and constitute counselling an unlawful strike.

[4] According to the Employer, the correct process would involve the grievance process under the CBA rather than counselling a work stoppage. According to the Employer, Union members have received charges by the Union for attending the work site. A number of KONE employees have advised the Employer that they will not be attending the work site out of fear of Union charges and fines. On May 25, 2020, KONE employees refused the work assignment. According to the Employer, the Union has counselled an unlawful strike and committed an unfair labour practice by intimidating and threatening its own membership to engage in an illegal work stoppage.

[5] The Employer says that the Union's actions are disruptive and are adversely affecting its ability to meet its obligations to the general contractor and ensure that the project is completed on time. No employee should be forced to choose between being disciplined by an employer for refusing an assignment, or fined by the Union for accepting the assignment. This untenable situation needs to be rectified immediately.

[6] In its Reply to the unfair labour practice application, the Union argues that the Employer has ignored the CBA and has given preference to non-local workers. The Employer has grieved the issue. It should have accepted the dispatch of individuals from Saskatoon and carried on with the grievance. The Union has qualified members in Saskatoon who are ready and willing to perform the work requested. There has been no withdrawal of services to qualify as job action as contemplated by the Act, or at all. The Employer cannot dictate or control the internal affairs of the Union, nor should the Employer be interpreting the Union's constitution or bylaws. The Board does not have jurisdiction to hear disputes under the Constitution or bylaws if those complaints are not raised by members or former members.

[7] Each party invokes the principle “work now, grieve later” to support their respective arguments.

[8] The interim application was heard via WebEx on June 15, 2020. The Board received helpful submissions and authorities from both parties and is grateful for their assistance.

Preliminary Issue:

[9] At the outset of the hearing, the parties made arguments with respect to the admissibility of the affidavit of Rick Flaman, filed on behalf of the Employer. The Union argued that the affidavit should be struck in its entirety for disclosing hearsay, relying on subsections 15(3), (4), and (5) of the Regulations. The Employer argued that the affidavit, while technically containing hearsay if taken for the truth of its contents, should be understood as communicating that individuals “informed” Mr. Flaman of various facts, but not that said information was true. But, paradoxically, the Board should then rely on the totality of information as evidence that the Union did in fact counsel its members to engage in an unlawful strike.

[10] The Union, understandably, countered that the Employer was attempting to do indirectly what it could not do directly. The Board agrees. The Employer insists that the information was not entered for the truth of its contents but then asks the Board to infer certain facts based on the extent to which those facts were discussed. However, it has not been necessary for the Board to make findings of fact with respect to the specific allegations made. The Employer’s Application fails for other reasons, as outlined in this decision.

[11] The Board ruled on the admissibility of the affidavit of Rick Flaman at the outset of the hearing, admitting those paragraphs that attached the emails received by Mr. Flaman and striking the paragraphs that contained additional hearsay evidence.

[12] The Union filed two affidavits in support of its position, on behalf of Daniel Ammazzini and Colin Dauphinais. An issue was raised with respect to the contents of the affidavit of Mr. Ammazzini. This matter was resolved by way of an admission, by the Union, that there are two men per elevator on the job. Both of these affidavits were entered in full.

Argument on Behalf of the Parties:

[13] The Employer says that it seeks to preserve the status quo, which consists of the management right to direct the work of its employees. Instead of objecting to, and impeding this right, the Union should have allowed this matter to proceed through the grievance process.

[14] As for the two-stage test on an application for interim relief, the Employer has met the first threshold which is that the underlying application discloses an arguable case. The Union has counselled an illegal strike and threatened and intimidated employees, contrary to section 6-63 of the Act. As for the second part of the test, the principle of "work now, grieve later" is enshrined in the Act and the CBA. Whereas this principle encourages a stable labour relations environment between the parties, an unlawful strike has the opposite effect – it results in labour relations disruption and uncertainty. The Union has an obligation, not only to refrain from counselling an illegal strike, but to take action to end an illegal strike when it occurs and when the Union is aware of it. In this vein, the Employer relies on *Hickeson-Langs*, [1991] OLRB Rep May 636. (There, the Board had already found that employees had engaged in an unlawful sympathy strike, which is not the case here.)

[15] In terms of the balance of convenience, the harm suffered by the Employer outweighs that suffered by the Union, and is irreparable. If the Union has been harmed, that harm can be compensated through damages. The harm to the Employer relates to its relationship with the client, the Employer's reputation, and the delay of the job progress. According to the Employer, the employees in the hiring hall are not really its employees. The Employer goes through the hiring hall when it adds new employees; it does not deal with members directly unless they are already engaged as employees.

[16] According to the Union, the Employer has not met the standard of an arguable case. The applicant bears the onus. The Employer has done nothing to advance the grievance, and yet the CBA, Article 15.01, says either party "shall" submit the dispute to the Joint Industry Committee. This Application seeks to have the Board interfere with the CBA and circumvent the arbitration process. The Employer is also driving a wedge between the Union and its members by bargaining directly with employees and interfering with internal union affairs. The Employer's general management rights are expressly subject to the other, specific provisions of the CBA. Its management rights do not permit it to circumvent the dispatch process.

[17] As for irreparable harm, the Employer's only losses, if there are any, are financial in nature. The Employer's evidence amounts to bald assertions that the Employer has experienced delay. Any losses are due only to the Employer's refusal to mitigate harm. While the Employer claims that certain employees have been inconvenienced, this assertion overlooks the Saskatoon-based members who are out of work. The irreparable harm to the Union includes the impact on members otherwise entitled to work and the perpetuation of the Employer's circumvention of the CBA.

[18] Lastly, the Employer is asking the Board to make the final decision at an interim stage. The only difference between the relief requested through the interim application and the relief requested through the final application is that the latter includes a declaration. The Board should not reward this inappropriate use of the interim process.

Relevant Statutory Provisions:

[19] The following provisions of the Act are applicable:

> ***6-63****(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> > *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization;*
> >
> > *…*
> >
> > *(d) to declare, authorize or take part in a strike unless:*
> > *(i) a strike vote is taken; and*
> >
> > *(ii) a majority of the employees who vote do vote in favour of a strike;*
>
> *. . .*
>
> ***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.*
>
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
>
> > *(a) conduct any investigation, inquiry or hearing that the board considers appropriate;*
> >
> > *(b) make orders requiring compliance with:*
> >
> > *(i) this Part;*
> >
> > *(ii) any regulations made pursuant to this Part; or*
> >
> > *(iii) any board decision respecting any matter before the board;*

(c) make any orders that are ancillary to the relief requested if the board consider that the orders are necessary or appropriate to attain the purposes of this Act;

(d) make an interim order or decision pending the making of a final order or decision.

[20] The following provisions of the Regulations are also applicable:

15*(1) An employer, other person or union that intends to obtain an interim order pursuant to clause 6-103(2)(d) of the Act shall file:*

(a) an application in Form 12 (Application for Interim Relief) with the registrar;

(b) an affidavit of the applicant or other witness in which the applicant or witness identifies with reasonable particularity:

(i) the facts on which the alleged contraventions of the Act are based, including referring to the provision or provisions of the Act, if any, that are alleged to have been contravened;

(ii) the party against whom the relief is requested; and

(iii) any exigent circumstances associated with the application or the granting of the interim relief;

(c) a draft of the order sought by the applicant; and

(d) any other materials that the applicant considers necessary for the purposes of the application.

(2) Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or witness's own knowledge to prove.

(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the board may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.

(4) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.

(5) Before filing an application pursuant to this section, the applicant shall contact the registrar and, on being contacted, the registrar shall set a date, time and place on which the application is returnable.

(6) On being notified pursuant to subsection (5) of the date, time and place of the hearing, the applicant shall serve a copy of the application, along with the materials referred to in the application, on the party against whom the interim relief is claimed within:

(a) subject to clause (b), at least three business days before the date set for the hearing; or

(b) any shorter period that the executive officer may permit.

(7) Before the hearing, the applicant shall file proof of service of the application for interim relief mentioned in clause (1)(a).

Analysis:

[21] The onus on an interim application rests with the applicant, the Employer.

[22] There are two primary preconditions to an application for interim relief, both of which are satisfied in the current case. First, there must be an underlying application to which the grant of interim relief is ancillary. The underlying application, in this case, is the unfair labour practice application. Second, there must be a formal application along with affidavit evidence. On this point, there is a formal application for an interim order in this case, accompanied by an affidavit sworn by Rick Flaman.

[23] On the issue of evidence, the Board in *SGEU v Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB) stated,

> *[30] … Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. […]*

[24] The substantive test is two-fold. The first stage asks whether the underlying, or main, application raises an arguable case. This is not a rigorous standard. The Board considers whether the underlying application discloses facts that, if established at the full hearing, would prove the alleged claim. The Employer is not required to demonstrate a probable contravention of the Act. The Board should refrain from evaluating novel arguments or statutory interpretations and is compelled to accept the evidence on its face. The Board does not pay close attention to the relative strengths or weaknesses of the applicant's case.

[25] The second stage of the substantive test is whether the balance of convenience favours granting the interim relief pending a hearing on the merits of the underlying application. For this stage, the applicant is required to provide a description of the harm that will ensue if the order is not granted, with a view to demonstrating a meaningful risk of irreparable harm. Irreparable harm is generally considered harm that cannot be compensated through an award of damages.

[26] In assessing the balance of convenience, the Board is charged with considering a variety of factors, including: whether there is a sufficient sense of urgency to justify the remedy sought; and whether, by granting the relief requested, the Board is in effect, granting all of the relief requested in the underlying application. In determining whether to exercise its discretion to grant

interim relief, the Board must be satisfied that there is a solid labour relations purpose in doing so.

[27] The Board will proceed to consider each stage of the test, in turn.

[28] First, the Board must consider whether the underlying application raises an arguable case. The Employer states that the Union counselled an illegal strike, breaching clause 6-63(1)(d) of the Act; and threatened its employees with charges, breaching clause 6-63(1)(a) of the Act.

[29] The arguable case threshold is not a rigorous standard. Most interim applications are decided in the second stage. The Board notes, however, that the Employer has not specified how the alleged threats and intimidation were made "with a view to encouraging or discouraging membership in or activity in or for a labour organization", as required by clause 6-63(1)(a). As well, the Employer's argument, such that the Union has gained nothing by sanctioning its employees, seems to disregard the traditional role of Union discipline in labour relations matters.

[30] However, these concerns with the allegations pursuant to clause 6-63(1)(a) do not render the entire underlying application a failure. The remaining question, whether the Union counselled an illegal strike depends, in part, on the interpretation of the CBA. The Employer says that the CBA allows it to direct the work of its existing employees, and in this case, it was not required to engage the dispatch process. Whether the Board may have interpreted the CBA differently is of no consequence, here, as there is an established alternative process for interpreting the CBA. This is not a deferral application. The Board has not heard full argument on the jurisdictional question. Therefore, on this standard, the Board finds that the Employer has established an arguable case.

[31] As the Board pointed out in *Aluma Safway, Inc. v International Association of Heat & Frost Insulators and Asbestos Workers*, 2020 CanLII 19808 (SK LRB) [*Aluma Safway*], at paragraph 24, the bar may be set higher in cases where the applicant has requested the equivalent of final relief. To determine whether this is such a case, it is helpful to review the relief requested in each of the interim and final applications:

Interim Relief Requested	***Final Relief Requested***
(a) an interim Order that the Union and Colin Dauphinais cease and desist from threatening Kone employees with union charges and/or fines for accepting and	*(a) an Order abridging the timelines associated with this Application so that it may be heard expeditiously;*

performing work assignments as directed by Kone.	
(b) an Order that the Union provide by mail or email all members of IUEC Local 102 a copy of the Board's decision together with any Orders that the Board may issue;	*(b) a declaration that the actions of the Union and Colin Dauphinais constitute an unlawful strike and an unfair labour practice under the Act, and an Order that he cease and desist from doing so;*
(c) an Order that all employees of KONE who receive a copy of the Board's decision in this Application or are advised of the Board's decision are to comply with the decision and may without retaliation from the union comply with Kone's direction on work assignment	*(c) a declaration that a refusal by any employee of KONE, acting in concert with others or the Union, to attend work as scheduled is an unlawful strike and unfair labour practice and an Order to cease and desist such;*
(d) an Order that the Union revoke all current and previous charges and fines issued against all members where said charges and fines were based on the employee complying with KONE's direction on work assignment;	*(d) an Order that the Union revoke all current and previous charges and fines issued against all members where said charges and fines were based on the employee complying with KONE's direction on work assignment;*
(e) an Order to provide full and complete restitution to any employee who has been financially punished for performing work as directed and scheduled by KONE;	*(e) an Order that all employees of KONE who receive a copy of the Board's decision in this Application or are advised of the Board's decision are to comply with the decision and cease and desist any activity inconsistent with the decision;*
(f) Special damages in an amount to be determined at the hearing before the Board; and	*(f) an Order that the Union revoke all charges and fines issued against all members where said charges are based on the employee complying with KONE's work assignment, rather than the Union's lawful direction,*
(g) Such further and other relief as the Applicant may request or which the Board may consider appropriate.	*(g) an Order provide full and complete restitution to any employee who has been financially punished for performing work as scheduled by KONE;*
	(h) Special damages in an amount to be determined at the hearing before the Board; and

[32] The only substantive distinction between these two sets of relief is the declaration of an unlawful strike and the declaration of an unfair labour practice.

[33] In describing the differences between the remedies sought in the interim and final applications, the Employer says that, in the interim case, it is seeking only temporary relief until

such time as the unfair labour practice application is heard. In effect, in a case such as this, there is no middle ground. The relief is what it is.

[34] Where the Employer has sought the equivalent of final relief, the Board should consider whether it is appropriate to engage in an extensive review of the merits. This should be done in a narrow set of circumstances - when the right that the applicant seeks to protect can be exercised only immediately or not at all, or when the result of the application will impose such hardship on a party to remove any potential benefit from proceeding to trial.

[35] First, this is not a circumstance in which the right that the applicant seeks to protect can be exercised only immediately or not at all. If the Employer is vindicated at a substantive hearing, or at an arbitration, then the Employer will be free to operate according to its interpretation of the CBA at that time. As for the Employer's reputation, that matter is more properly addressed in the second stage. Second, the Board is not persuaded that there is no potential benefit from proceeding to a hearing, or rather, to an arbitration. It is unlikely that the Employer would disagree.

[36] Where it is not appropriate to engage in an extensive review of the merits, as here, the Board should be cautious about granting the equivalent of final relief. In this case, to proceed otherwise risks predetermining the merits of the underlying application. Therefore, the Employer's request for the equivalent of final relief militates against granting the relief requested.

[37] The Board will nonetheless proceed to consider the second stage of the test, the balance of convenience. The Board is guided by the direction as outlined *in Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB) ["SGEU"], at paragraph 32:

> *... In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. … The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted… In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. …*

[38] The Board is not persuaded that a sufficient sense of urgency exists to justify the requested remedy. This case turns on a disagreement about the interpretation of a CBA. There is an arbitration process for the resolution of disputes in relation to the CBA. In the event the dispute cannot be settled, then according to Article 15.01 of the CBA, "either the Union or the

Employer shall submit the dispute to the Joint Industry Committee". According to Article 15.02 of the CBA, "[w]ithin a period of seven (7) days after receipt of a dispute or grievance by the Joint Industry Committee, said Committee shall meet".

[39] There is no evidence that the Employer has submitted the dispute to the Joint Industry Committee. The evidence consists of a letter from the Employer's counsel to the Union advising the Union that it should grieve the issue rather than counselling members not to attend the worksite. The Union, disagreeing with the Employer's interpretation, replied that it had nothing to grieve. The parties are at a stalemate – neither has launched the arbitration process. But this does not mean that there is a sufficient sense of urgency to justify seeking the requested remedy through alternative means, at the Board. This is unlike *CLR v Heat & Frost*, 2014 SKQB 318, in which the question of timing militated in favour of the injunction requested, and the question of whether there was an arguable case turned on a plain reading of the Act.

[40] Furthermore, the Employer suggests that the Joint Industry Committee is not active. However, it is not for the Board to repair any issues with the Committee. The arbitration process offers an avenue for the resolution of this dispute, this avenue has been negotiated, and that is the avenue through which the parties should first attempt to address any issues of timeliness in relation to that process. For the Board to intervene and suggest that there is urgency to resolving this dispute is to circumvent the negotiated arbitration process.

[41] Even if there were evidence that the Employer had submitted the dispute to the Joint Industry Committee, the same logic would apply.

[42] The next consideration is the relative harm between the Employer and the Union. The Board pays particular attention to labour relations harm. The harm claimed by the Employer is encapsulated in three short paragraphs at the end of Mr. Flaman's affidavit:

> *26. KONE's work on this project has been set back by at least two weeks and this delay is causing issues with the General Contractor and KONE's client.*
>
> *27. Given the current requirement to maintain appropriate distancing in the workplace, I am unable to increase the number of employees on the site beyond 2 people to make up this lost time.*
>
> *28. KONE has lost productive time resulting in a significant delay in KONE's work on a construction project. Those lost hours of production can not [sic] be recaptured and will continue to grow.*

[43] There is no further evidence to support the assertions made in these paragraphs. If the project has been set back by two weeks, and that delay was caused by the employees not attending the worksite, it remains unclear why the Employer did not mitigate this harm by at least submitting the dispute to the Joint Industry Committee. The CBA makes clear that there is a process for establishing the Committee, and that the Committee is empowered to interpret the intent of the terms of the CBA. There is no evidence before the Board that the Committee is incapable of doing this, or that the CBA is somehow spent and the parties are unable to partake in this process.

[44] The Employer, in its argument, also states that the unlawful strike has caused labour relations instability, as has the Union's failure to abide by the "work now, grieve later" principle. Both of these assertions beg a predetermination of the merits of the dispute. As for the former assertion, if there is labour relations instability it is either caused by the Union's alleged unlawful strike or its erroneous interpretation of the CBA, or by the Employer's insistence on an erroneous interpretation of the CBA. Unlike in *Westroc Inc. v NAAT & CAW*, 2002 CanLII 41383 (ON LRB), a case relied on by the Employer, the question remains whether there has been a withdrawal of services. As for the latter assertion, it implies that the Union does not have the right to discipline its members for what the Union believes are breaches of the governing Constitution. This issue is before the Board in the unfair labour practice dispute and is yet to be determined.

[45] Should the Employer ultimately be vindicated at a hearing of the underlying application, or through arbitration, the Board by denying the requested relief, will have denied wages to individuals who were otherwise eligible to work. Those wages can be compensated through damages at the substantive hearing. This is not irreparable harm.

[46] While the Union's requested remedy may be similar, it also seeks to continue to discipline employees for what it believes are breaches of its Constitution. It would cause greater labour relations harm for the Board to intervene and circumvent an existing dispute resolution process by imposing a remedy that prohibits disciplinary action, prior to the Employer making any attempt to resolve the matter through that process. The Board has no interest in perpetuating labour relations instability by offering an option to parties to sidestep negotiated dispute resolution processes.

[47] It is the Employer's onus to demonstrate that the balance of convenience weighs in its favour. The Board is not persuaded that the balance of convenience favours the Employer, such that the Board should grant the requested relief.

[48] Ultimately, the Employer is prematurely asking the Board to choose sides in a dispute that it could have pursued through arbitration pursuant to the CBA.

Conclusion:

[49] Given the foregoing reasons, the Board dismisses the Employer's Application for Interim Relief.

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

DATED at Regina, Saskatchewan, this **19th** day of **June, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson