LRB File No. 262-18

In the matter of an appeal to an adjudicator pursuant to ss. 3-53 and 3-54 of *The Saskatchewan Employment Act* and an application to intervene in that appeal

BETWEEN

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("the union")

-and-

Arch Transco Ltd., operating as Regina Cabs ("Regina Cabs" or "the company")

-and-

Director of Occupational Health and Safety ("the director")

RULING ON APPLICATION TO INTERVENE

Counsel for the union: Heather M. Jensen.
The company was represented by its agent Sandra Archibald.
The director made no representations.

INTRODUCTION

Arch Transco Ltd. operates a taxi service as Regina Cabs. On October 11, 2018, an occupational health officer issued a Notice of Contravention ("the notice of contravention") directed to Regina Cabs requiring it to comply with provisions of *The Saskatchewan Employment Act* ("the Act") and regulations under that Act pertaining to violence and harassment policies.

The company appealed that decision by letter dated December 5, 2018 ("the main appeal").

In March of 2015 the union had been certified by the Labour Relations Board ("the board") to represent a bargaining unit at Regina Cabs comprised of "all taxi drivers employed by Regina Cabs, except those persons who own, control, or lease two or more taxi cabs, dispatchers, office personnel, supervisors and management above the rank of supervisors".

Pursuant to s. 4-3(3) of the Act, I was selected by the Registrar of the board as the adjudicator with respect to that appeal on May 7, 2019.

On December 9, 2019, I issued an order to the effect that the appeal would proceed with the company as appellant and the union as respondent, with both parties exercising the usual rights and responsibilities associated with their standing.

The company appealed that ruling to the board and the board issued its decision on that appeal on December 17, 2020. The board determined that I was incorrect in concluding that the union could be a party to the company's appeal. The board observed that the union might be able to participate as an intervenor or in the more limited capacity of conducting a watching brief. The board remitted the matter to me for amendment of my ruling with respect to standing in accordance with the direction provided in the board's reasons.

After considering written submissions, I sent an email to representatives of the company, the union, and the director on February 8, 2021, in which I directed that the main appeal would proceed with the company and the director as the sole parties to the appeal.

On February 26, 2021, I convened a hearing by teleconference with representatives of the company and the director to determine whether "workers" affiliated with Regina Cabs, including drivers for Regina Cabs, should have received notice of the main appeal. Both the company and the director took the position that the "workers" were not entitled to notice. I accepted that position and ruled on May 2, 2021, that the "workers" were not entitled to notice, with the additional consequence that they are not entitled to be parties to the main appeal. (I place "workers" in quotation marks here because it remains an issue on the main appeal as to whether the drivers and others who do work affiliated with Regina Cabs are "workers" within the meaning of *The Saskatchewan Employment Act* ("the Act").)

In its February 5, 2021, written submission the union requested standing as an intervenor in the main appeal and set out its argument in support of that request. I subsequently advised the union, the company and the director that I regard that request as an application to intervene in the main appeal. I determined that I would consider the union's application based on written submissions from the three parties to that application and advised the parties.

By email dated May 6, 2021, counsel for the director advised that the director does not object to the union making an application to intervene in the main appeal.

The union chose to rely on its February 5 submission. The company filed a written submission dated May 28, 2021. In accordance with the procedure I had established for consideration of the union's application, the union filed a reply dated June 4.

POSITIONS OF THE PARTIES

The Union's Position

The union asks for intervenor status with the ability to call witnesses, conduct cross-examination and present argument. In the alternative it seeks limited intervenor status where it would be limited to calling evidence on those issues to which it can uniquely speak. In the further alternative, it seeks standing as a public observer with the ability to file a watching brief.

The union argues that the interpretation of its collective agreement with the company will necessarily arise during the main appeal and it is naturally interested in that interpretation. It says that the interpretation of the collective agreement by the adjudicator could have implications that go beyond compliance with the notice of contravention.

As noted earlier, it can be reasonably anticipated that the main appeal will address the meaning of "workers" in the Act and the effect the interpretation of that term will have on members of the union engaged in work affiliated with Regina Cabs.

The union argues its participation as an intervenor will not unduly delay the main appeal, saying any delay due to its participation will be "negligible", although it acknowledges that an additional hearing day may be required.

The union says it does not anticipate its participation will widen the lis, or that it would raise issues beyond those expected to be raised by the company and the director.

The union says its interests are not presently being represented by either the company or the director.

The union argues that it has a unique ability to assist me in my consideration of the main appeal. It points to the fact no "workers" have been given notice of the appeal or will be participating in the appeal. As the collective bargaining agent for those "workers", the union says it is uniquely capable of making submissions from their perspective.

The union says it is also uniquely situated to provide evidence and submissions on collective agreement interpretation.

The Company's Position

The company opposes the union's participation as an intervenor in the main appeal.

The company argues that the issue of the union's participation has already been determined and it is an abuse of process to allow the union to apply again to participate, albeit with a different status.

It argues as well that the union's application should be dismissed on the basis of procedural fairness, because the company asked me to summarily dismiss the notice of contravention prior to the union making its application to intervene.

The company takes the position that the union has never made a formal application to intervene.

The company says the union does not have a direct interest in the main appeal.

It says the union cannot provide any assistance to me as the decision-maker that the parties, particularly the director, are expected to provide.

The company's written submission contained additional arguments that may be pertinent to the resolution of the main appeal, but that are not relevant to determining the union's application.

ANALYSIS AND REASONS

The following issues emerge from the facts and the submissions of the company and the union.

Is there a valid application to intervene before me?

The company argues that the union has not formally made an application to intervene. It points to the requirements in s. 25 of *The Saskatchewan Employment (Labour Relations Board) Regulations*, which require an application to intervene to be in Form 22 in those regulations and requires it to be made within 20 business days following the original application. Those regulations have no relevance to an application to intervene in an appeal to an adjudicator under Part III of the Act. Rather, the adjudicator has the authority to determine the procedures by which the appeal will be conducted: see s. 4-4(2) of the Act.

From the time of the union's request to intervene advanced in its February 5, 2021, submission, I have told the company and the union that I regarded that request as an application to intervene in the main appeal and I subsequently established a formal process for the hearing of that application.

I find no merit in the company's position. There is a valid application to intervene before me brought by the union through its February 5 submission.

Has the union's right to participate in the appeal already been determined, such that the application to intervene should be dismissed based on principles of res judicata, issue estoppel or abuse of process?

I accept the position of the union as set out in its submission in reply. The board did not determine that the union has no entitlement to participate in the main appeal. It only determined that it does not have the right to participate as a fully party. It expressly left open the possibility the union could participate as an intervenor or conduct a watching brief, which is what the instant application is intended to determine.

Should the union's application be dismissed based on procedural fairness because the company's request to have the notice of contravention dismissed came prior to the union's application to intervene?

After the board issued its decision on December 17, 2020, I initiated discussions by email with representatives of the company, the director and the union for the purposes of determining what was required of me to implement the board's decision. In a letter provided to me by email on January 11, 2021, the company suggested that, because the notice of contravention was in its estimation "so deficient and inconsistent", it should simply be dismissed, and that the company would be prepared to deal with that as a preliminary matter.

I subsequently determined that we would proceed first to determine what the board's decision required me to do, then to consider whether there are any additional persons who were entitled to notice with the possibility of participation in the main appeal. On February 8, I ruled that the union would no longer be a party to the main appeal. On May 2, I ruled that the "workers" were not entitled to notice.

As a procedural matter, I determined that the next step in the appeal proceedings would be to consider the union's application to intervene. I advised the company of that by email on May 11 and again on May 21, pointing out that it can pursue its preliminary application once I have ruled on the union's application.

It falls to the adjudicator to establish the procedure for the appeal, as noted earlier. There is no principle of procedural fairness that supports the company's desire to have the steps in the appeal proceed in a particular order.

Does the union meet the requirements to participate as an intervenor?

I accept the argument advanced by the union that the consideration of the main appeal may involve the interpretation and application of the relevant collective agreement. However, this appeal is for the limited purpose of determining the validity of the notice of contravention. It will have no binding effect on possible subsequent proceedings, including grievance arbitrations or applications to the board. It will also not be binding on the decisions of occupational health officers or adjudicators in the event there are further matters referred under Part III of the Act, although it may be persuasive. Consequently, the union's interest in the main appeal effectively relates primarily, if not exclusively, to the outcome of the appeal itself.

The outcome of the appeal will have a potential impact on members of the bargaining unit represented by the union who may be found to be "workers". However, I determined in my May 2, 2021, ruling that those workers are not entitled to participate as parties in the main appeal, because of the limiting language in the Act. It's conceivable they would be entitled to participate as intervenors, since they appear to be affected by the outcome of the appeal (although not in the narrow legal sense required by s. 3-52(2) of the Act). But, consistent with the board's December 17, 2019, decision, this would not give the union status to participate as an intervenor in a representative capacity based on the possibility its members have individual rights to intervene. Furthermore, even if my conclusion that the "workers" are not entitled to participate as full parties is incorrect, the reasoning of the board would logically lead again to the conclusion that the union has no right to participate as an intervenor in a representative capacity. The union's authority to represent its members is limited to matters connected to bargaining and the administration and enforcement of the collective agreement.

The union points out that, in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII), [2003] 2 SCR 157, the Supreme Court held that rights and obligations under Ontario's *Human Rights Code* were incorporated into each collective agreement over which an arbitrator has jurisdiction. By extension, the union argues

the rights and obligations established by the occupational health and safety provisions of the Act form part of the floor of rights implied into the relevant collective agreement here.

However, we're not engaged in a grievance arbitration and we are not considering the enforcement of the collective agreement on this appeal. At stake is the application of the rights and obligations in the occupational health and safety provisions of the Act themselves. As noted earlier, my determination here as to whether those rights and obligations apply in the circumstances giving rise to the main appeal may be persuasive in other proceedings to come, but they will not be binding. Should these same issues arise in an arbitration where the union is appropriately a party, it will have an opportunity to introduce evidence and make representations with respect to their resolution. In this appeal, the rights and obligations at issue, if they exist, belong to the union members individually, and not as members of the collective bargaining unit.

Consequently, I am not satisfied that the union has established a basis on which it should be granted status as an intervenor.

Is the union entitled to conduct a watching brief?

The union asks, in the alternative, that it be granted status to conduct a watching brief. The company opposes this status, arguing in its written submission that this presents the possibility the union "will submit more misleading and irrelevant evidence for some union related matter".

I am satisfied the union has a sufficient interest in the outcome of the main appeal to allow it watching brief status, which will be limited in nature. This will not include the ability to introduce evidence, make submissions or cross-examine witnesses. This limited status will not cause delay, lengthen the process or widen the lis.

CONCLUSION

The union's application to intervene is denied.

The union is granted status to conduct a watching brief of all proceedings related to the main appeal. It will have the right to be notified of the time and place for appeal proceedings, including preliminary applications, will be entitled to be present at those proceedings and to receive copies of documents filed in the proceedings and written submissions of the parties to the proceedings, at the time those documents and submissions are filed with the adjudicator.

Dated at Regina, Saskatchewan this 13th day of August, 2021.

"Gerald Tegart"
Gerald Tegart, Adjudicator