PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No. 05-009 and 05-013

Decision No.

IN THE MATTER OF AN APPLICATION FOR REVIEW OF A CERTIFICATION ORDER

BETWEEN:

DAVIES PLUMBING AND HEATING LIMITED

APPLICANT

AND:

UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS, LOCAL NO. 721

RESPONDENT

COUNSEL FOR THE APPLICANT — Mr. Malcolm Boyle and Murray L. Murphy

REPRESENTATIVE FOR THE RESPONDENT — Mr. Raymond McBride and Eugene P. Rossiter, Q.C.

DECISION

Background

In an Application sworn and filed with the Prince Edward Island Labour Relations Board (the "Board") on the 12th day of July, 2005, pursuant to Section 54 of the *Labour Act*, R.S.P.E.I. 1988, Cap L-1 as amended, being an Application for Certification in the Construction sector, by the United Association of Plumbers and Pipefitters, Local No. 721 (the "Union Local"), it was requested that the Union Local be certified by the Board as bargaining agent of certain employees of Davies Plumbing and Heating Limited (the"Company") in a unit set forth as appropriate for collective bargaining purposes.

An Order, issued by this Board on the 14th day of July 2005, certified the United Association of Plumbers and Pipefitters, Local No. 721 as bargaining agent of all employees of Davies Plumbing and Heating Limited employed as journeymen and apprentices involved in plumbing, steamfitting and pipefitting and welding on Prince Edward Island.

An Application for Review of Certification order was filed by Davies Plumbing and Heating Limited on the 28th day of July, 2005, seeking a review of the said Order on a number of grounds, pursuant to section 54(6) of the *Act*, and by implication requesting that the Order be rescinded.

There was an informal Pre-hearing Conference between Counsel and the Board's Chief Executive Officer, Mr. Roy Doucette, to predict the main issues and hearing days required in this matter. A hearing was set for the 30th day of November, 2005. The hearing respecting these matters between the parties convened and concluded on the 30th day of November, 2005.

The Board next received a list of authorities from the legal counsel for the United Association of Plumbers and Pipefitters, Local No. 721 on the 9th day of February, 2006 and from legal counsel for Davies Plumbing and Heating Limited on the 3rd day of March, 2006.

Cases Considered

(a) Labour Relations Board (Prince Edward Island) Proposed Rules of Procedure, 19 June 1995, p.2

(b) *Wraymar Construction and Rental Sales Ltd.* [1989] O.L.R.B. Rep. June 682

(c) *Doug Boehner Trucking & Excavation Ltd.* [2001] N.S.L.R.B.D. No. 1

(d) *CKF Inc.* (1990), 12 L.A.C. (4th) 1 (Darby)

(e) *Canada Post Corp.* (1989) 3 L.A.C. (4th) 444 (Weatherill)

(f) *Board of Education for the City of Hamilton* (1983) 10 L.A.C. (3d) 126 (Kennedy)

(g) *City of London* (1974) 7 L.A.C. (2d) 46 (Hinnegan)

(h) *Ken Anderson Electric Inc.* [1996] O.L.R.D. No. 3281

(i) *Marjorie Hamilton Limited* [1986], B.C.L.R.B.D. No. 124/86

(j) *North American Construction Ltd. (Re)* [2000] B.C.L.R.B.D. No. 267

(k) *Jack Pine Forrest Products* [1995], B.C.L.R.B.D. No. 21821

(l) *Don Pearson Construction Ltd.* [1986] B.C.L.R.B.D. No. 175/86

Statutes Considered

(a) ***Labour Act***, R.S.P.E.I. 1988, Cap. L-1, sections 52, 53 and 54.

(b) ***Labour Act Regulations***, EC521/71, section 3.

Texts Considered

(a) ***Ontario Labour Relations Board Law and Practice***, 3rd Ed., Sack and Mitchell, (Markham, Lexis Nexis Butterworths 1997) para 10.31 and 10.37

(b) Adams, ***Canadian Labour Law***, 2nd Ed., Aurora, Canada Law Book, 2005, para 7.4, para 15.21 and 15.380.

Evidence

The written evidence before the Board on these matters is in the form of sworn affidavit evidence in the Application for Certification and the Application for Review of Certification Oder duly filed with the Board. There were four (4) exhibits filed at the hearing of the matters by the Applicant. The Respondent filed one (1) exhibit.

There was oral testimony received from a total of eight (8) witnesses. There were four witness called on behalf of the Applicant Company being the President of the company Mr. Frank James Davies, the job site foreman Mr. Douglas Graham Maxwell, Third Year Apprentice Plumber Mr. Gregory Raymond Gorman, and Inter-provincial Journeyman Mr. John Scott Carpenter. The Respondent called four witnesses being the Union Local No. 721 President Mr. Gerald Malcolm Todd MacDonald, Third Year Apprentice Plumber Mr. George Owen Hughes, First Year Apprentice Plumber Mr. Michael John Larter, and Third Year Apprentice Plumber Mr. Jody Dwayne MacDonald.

Issues

The issues that are to be considered and decided by this panel of the Board are listed as follows:

1. Whether the Applicant Union Local represents a majority of the employees of Davies Plumbing and Heating Limited that fall within the appropriate bargaining unit described as " ...all employees of Davies Plumbing and Heating Limited employed as journeymen and apprentices involved in plumbing, steamfitting and pipefitting and welding on Prince Edward Island."

2. Whether there are grounds for granting the relief sought.

Preliminary Matters

The Board, at the commencement of the hearing, outlined the background of the case, noted that there had been only informal pre-hearing conferences held and noted that there were indications from the Applicant of a withdrawal of an allegation of unfair labour practices and cited the issues in the matter as set out above.

Counsel for the Applicant placed on the record the formal withdrawal of the Applicant's allegations of unfair labour practices and made a motion for the exclusion of witnesses. Upon receiving the consent of the Respondent, the Board accepted the withdrawal of the allegations of unfair labour practices and granted the motion for exclusion of witnesses.

The hearing proceeded with receipt of the evidence and argument in relation to the remaining matters.

Decision

This Panel of the Board has made a thorough review all of the evidence presented and has given careful and complete consideration of the body of evidence in light of the submissions advanced by the respective Parties regarding to this Application for Review of Certification Order of the Board dated the 14th day of July 2005.

The Law

The Board has deliberated upon the Application for Review of the Certification Order, the supporting evidence and the parties' submissions, pursuant to the provisions of sections 52, 53 and 54 of the *Labour Act,* and section 3 of the *Regulations* of the *Act.* The provisions of sections 52 and 53 give the definitions pertinent to this *Part* and the application of *Part I* in regards to *Part II* of the *Act* which deals with Construction Industry Labour Relations. The *Act* then reads at section 54:

> *54. (1) Where a trade union makes application for certification as bargaining agent for a unit of employees of an employer, the board shall forthwith make or cause to be made such examinations of records and other inquiries as it considers necessary and shall determine*
>
> > *(a) whether the unit applied for is appropriate for collective bargaining; and*
> >
> > *(b) whether a majority of the employees in the unit wish the applicant trade union to be certified as bargaining agent for such employees.*

(2) If the board is satisfied that the unit applied for is appropriate for collective bargaining and that a majority of the employees in the unit wish the applicant trade union to be certified as bargaining agent for such employees, the board shall forthwith and without holding a hearing, issue a certification order, that, except as provided in this section, shall have the same effect as an order under section 13.

(3) An order issued under subsection (2) constitutes, as of the date of issue, a notice to commence collective bargaining and the trade union and the employer, or an employers' organization representing the employer, shall within ten days after the notice is issued, or such further time as the parties may agree, commence collective bargaining with a view to concluding a collective agreement.

(4) Where a trade union applies for certification under this section, the board may determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area and it need not confine the unit to a particular site or project.

(5) Section 22 applies where the board issues an order under subsection (2).

(6) The employer named in an order issued under subsection (2) may within ten days of the date of issue apply to the board for a review of the order, but the application shall not alter the rights or obligations of the parties arising from the order.

(7) Upon receipt of an application under subsection (6) the board shall conduct a review and shall either confirm, vary or rescind such order and where the order is rescinded, subsection 20(2) applies.

(8) Sections 12, 13, 14, 15 and 16 apply to applications under this section but where there is any conflict this section prevails. R.S.P.E.I. 1974, Cap. L-1, s.53.

The *Labour Act Regulations* at section 3 read:

3. (1) An application by a trade union for certification as bargaining agent pursuant to the Act shall be made in Form 1.

(2) Concurrently with the filing of an application for certification, the applicant trade union shall file with the Board the material upon which it relies to establish its right to certification and such material shall include

> *(a) a list of persons in the proposed bargaining unit who wish that the applicant trade union be certified as bargaining agent on their behalf;*
>
> *(b) evidence that the persons in the list referred to in clause (a) wish that the applicant trade union be certified as bargaining agent on their behalf;*
>
> *(c) a copy of its constitution, rules and bylaws, or other instruments or documents containing a full and complete statement of its objects and purposes;*
>
> *(d) a list of its officers.*

(3) The material filed by the applicant trade union under clauses 2(a) and (b) shall be for the information of the Board only and shall not be available to or open for inspection by any other party to the proceedings.

(4) A person shall be deemed by the Board to wish that the applicant trade union be certified as bargaining agent on his behalf if at the date of application

(a) he was a member in good standing of the applicant trade union, and, had paid at least two dollars as union dues within three months preceding the date on which the application was filed; or

(b) he has signed a document stating that he wishes the applicant trade union to be certified as bargaining agent on his behalf and has within three months preceding the date on which the application was filed paid at least two dollars as union dues or fees. (EC521/71)

In relation to an Application for Certification, the Board must address the following points, namely:

1. The appropriateness of the bargaining unit;

2. The composition of the unit;

3. Whether there is a majority of the employees in the unit who desire representation by the Applicant trade union; and

4. Whether there are grounds for granting the relief sought.

In the course of its review of a Certification Order issued under Section 54(6), obviously, the Board must once again consider each of these points.

The parties did agree that the number of employees of the company on date of application was determinative as to who should be included in the unit but disagreed on the state of the law regarding the specific time of day of the filing of the Application for Certification under this part of the *Act* and as to how that relates to the determination of which employees should be included in the unit.

At the hearing the Applicant provided an excerpt from Adams ***Canadian Labour Law***, 2nd Ed., Aurora, Canada Law Book, 2005, at paragraph 15.380 which reads as follows:

In applications for certification, the Ontario Board no longer sets a terminal date which follows the date of filing of the certification application but precedes the certification hearing. The application date is now the date for determining trade union membership and, presumably, voting entitlement. In any event, the board had held that in the construction industry, employees were eligible for consideration in the count only if they were at work on the application date. If a representation vote was ordered, only those employees actually at work on the terminal date set by the board were eligible to cast ballots.

The Respondent took the position that only those employees working on the site at the time of the hour of the filing of the Application, or alternatively by the close of business on the day of the filing of the application for certification should be included in the unit. The Applicant took the contrary position. At the request of the Board, the Parties undertook to provide further authorities in support of and for their respective positions.

Of the authorities cited by the parties, the decision of the Ontario Labour Relations Board in ***Wraymar Construction and Rental Sales Ltd.***, [1989] OLRB Rep. June 682, most succinctly addresses the pertinent considerations. It summarily list the factors as :

> *. . . In summary, the Board has looked at the following criteria in makings its determinations:*
>
> > *whether the person concerned was employed by the respondent and at work on the date of application; and*
> >
> > *(b) if so, the work that that person spent the majority of his/her time doing on the date of application; or*
> >
> > *(c) where, previous to the date of application, the person has been engaged in the work of more than one trade or craft and the work s/he performed on the application date does not accurately reflect the work s/he normally spends the majority of his/her time doing, the work done by the employee during the appropriate representative period prior to the date of application; or*
> >
> > *(d) where there is inconclusive evidence with respect to the work in which an employee has been engaged, any other relevant factor, including the primary reason for hire.*
>
> *See also Gilvesy Enterprises Inc., supra, at paragraphs 16 and 17). The Board went on, at paragraph 23, to state that:*
>
> *. . . However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is consistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" had tended to result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:*

(a) whether the person concerned was employed by the respondent and at work on the date of application; and

(b) if so, the work that that person spent the majority of his/her time doing on the date of application; or

(c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

(See also Gilvesy Enterprises Inc., supra at paragraph 21).

¶11 Since then, the Board has consistently applied the tests suggested in Seegmiller, supra and Gilvesy, supra, and, for the purpose of applications for certification in the construction industry, has determined that employees must have spent a majority of their time on the date of application performing work in a trade or craft to which the application relates as an employee of the respondent employer. In applying the Gilvesy test, as it has come to be referred to, in Runnymede Development Corporation Limited, [1998] OLRB Rep, Sept. 976, the Board noted that:

> *The tests suggested in E&E Seegmiller, supra (and Gilvesy, supra) have been consistently applied by the Board since those decisions issued. It is evident that the purpose for looking to other criteria when there is no conclusive evidence with respect to the work being performed on the date of application is to determine whether it is more probable than not that the individual in dispute was an employee in the bargaining unit on the date of application. The fact that "primary reason for hire" was specifically mentioned in E&E Seegmiller, supra (and in Gilvesy, supra) does not mean that that factor will necessarily be any more (or any less) significant in any given case. It is merely an example of what the Board will consider to be a relevant factor, It is merely an example of what the Board will consider to be a relevant factor. It is unnecessary, and probably inappropriate (and impossible), to try to set out any exhaustive list of facts that the Board will consider to be relevant. What factors are relevant, and what weight is to be given to any relevant factor, will depend on the circumstances of each case. We also observe that in E&E Seegmiller, supra and Gilvesy, supra, the Board was concerned with on-site employees only. Clause 117(b) of the Act contemplates that off-site employees who are commonly associated in their work or bargaining with on-site employees will be included in a construction industry bargaining unit and a "work done on date of application test" does not seem to be suited to resolving disputes with respect to off-site employees (see Bill Brownlee Excavating Limited, [1988] OLRB Rep. Apr. 364)*

Findings of Fact

The Board finds that Davies Plumbing and Heating Limited was engaged in the construction of a student residence at the University of Prince Edward Island (U. P. E. I.) and had employees on this site in varying numbers and for various durations of time throughout the period of time from October 2004 to September of 2005. It was the intent of the United Association of Plumbers and Pipefitters, Local No. 721 to file its Application for Certification in respect to this employer on Monday, the 11th day of July, 2005 and for whatever reason it was not sworn and filed until the following day. It is apparent from the evidence that, other than the Business Agent , no one, neither

those who did or did not sign cards nor Employer management personnel, were aware of the expected date of the filing of the application. That application sought a Certification Order for the unit described in that application as "... ...all employees of Davies Plumbing and Heating Limited employed as journeymen and apprentices involved in plumbing, steamfitting and pipefitting and welding on Prince Edward Island."

On Monday, the 11th day of July, 2005 there were six (6) employees of Davies Plumbing and Heating Limited working in Prince Edward Island and they were on the job site at U. P. E. I. in Charlottetown. Davies Plumbing and Heating Limited, through its job site foreman, Mr. Douglas G. Maxwell, and its President, Mr. Frank J. Davies, pursuant to a repeated requests from the Project Manager, Mr. John Sherwood, relayed by Mr. Maxwell to Mr. Davies, and in particular further to a telephone conversation on the morning of Tuesday, the 12th day of July, 2005, had two employees of the company leave sites in Nova Scotia to arrive on the site at the U. P. E. I. student residence between 4:30 p.m. and 5:00 p.m. on that date. These two employees worked on that site until approximately 9:00 p.m. that evening. In the received oral testimony no employee who had been employed on the site the day before could recall seeing either of these two transferred employees on the site on Tuesday, the 12th day of July, 2005. However, there was testimony from one of the those employees that, on the following day, Wednesday, the 13th day of July, 2005, there was cardboard strewn in the basement of the building which would substantiate the testimony of these two transferred employees that they had un-crated certain components and laid out plans for future work during their four hours of work on the site on the day in question.

Mr. Douglas G. Maxwell, the job site foreman, recalled that he had mentioned in passing in his telephone conversation with Mr. Frank J. Davies on Tuesday, the 12th day of July, 2005, that he had heard from one of the employees that certain of the employees had signed membership cards. Mr. Davies testified that he had no recollection of the Site Manager's mention of cards having been signed.

The list of these eight (8) employees was submitted at Paragraph A. (5) of the Application for Review of Certification Order and, on the basis of its evidence and submissions, the Respondent, United Association of Plumbers and Pipefitters, Local No. 721, took issue with the inclusion of four of those listed employees.

It was the evidence of the Applicant's witnesses that Mr. Maxwell was indeed a working foreman being "on the tools" the majority of the time. The testimony of the Respondent's witnesses, to a degree, disputed that Mr. Maxwell was on the tools the majority of the time, but, none the less, it was conceded that he did work the tools. Having had the benefit of the receipt and perusal of all of the evidence the Board is entirely satisfied that Mr. Maxwell was indeed a working foreman of Davies Plumbing and Heating Limited, he was working on site on the date of application and should be included in the unit.

As to Mr. Raymond Hughes, Journeyman Plumber, it is the finding of this Board that he was in fact employed by Davies Plumbing and Heating Limited on the U. P. E. I. student residence job site and was in fact at work preforming relevant duties on the application date and is to be included in the unit.

In respect to Mr. Gregory R. Gorman, Third Year Apprentice Plumber, the Board finds that he too was employed by Davies Plumbing and Heating Limited on the U. P. E. I. student residence job site, and was in fact at work involved in relevant taskings on the application date and is to be included in the unit for purposes of this application.

Finally, in regards to Mr. John S. Carpenter, Inter-provincial Journeyman, the Board also finds that he was employed by Davies Plumbing and Heating Limited and was in fact at work on the U. P. E. I. student residence job site performing duties relevant for these matters on the application date and must be included in the unit.

Conclusion

The inescapable evidence is that the description of the unit is, as set out in the Application for Certification, "...all employees of Davies Plumbing and Heating Limited employed as journeymen and apprentices involved in plumbing, steamfitting and pipefitting and welding on Prince Edward Island.". The Board is undoubtedly satisfied that the unit, as described, is appropriate for collective bargaining purposes.

The Board's findings of fact, reached on the basis of the available evidence, lead to the equally inescapable conclusion that the composition of that appropriate unit, on Tuesday, the 12th day of July, 2005, the date of the filing of the application, included eight (8) employees of Davies Plumbing and Heating Limited employed on Prince Edward Island and at work on that application date. There is no basis, neither in fact nor in law, upon which the Board could possibly exclude either the two employees who joined the unit from out of the province on that all important day of the filing of the application, nor can it hold other than that the working foreman and journeyman plumber Mr. Raymond Hughes is a member of the bargaining unit.

The Board has reviewed the membership evidence filed with the Application for Certification and concludes that there was not , on the date of application and within the unit composed as found by the Board, a clear majority of those eight (8) employees of the Respondent company who desired the representation of the Applicant local union for collective bargaining purposes.

Accordingly, on the basis of its findings and conclusions, the Board is satisfied that the described unit is appropriate for collective bargaining, has a membership of eight and that there was not a majority of those employees of the Respondent employer in that appropriate unit who wished

the Applicant to be certified to represent them for collective bargaining purposes. The Board finds that the requisite grounds required to empower the Board to grant the Certification Order that was requested by the United Association of Plumbers and Pipefitters, Local No. 721 and issued by the Board on the 14th day of July, 2005, at the relevant time did not in fact exist.

Having conducted its Review as requested in this Application under section 54(6) of the Act, and having made the above findings, and reached the conclusions it has reached, the Board must further conclude that there are grounds upon which it may grant the Applicant's request that the Board rescind its Order of the 14th day of July, 2005. The request by Davies Plumbing and Heating Limited for rescission of that Order is hereby granted and the Board rules accordingly.

Robert R. MacArthur
Chair

Gerald Doyle
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 3rd day of April, A.D., 2006, and issued under the hand of its Chief Executive Officer on the 3rd day of April, A.D., 2006.

Roy J. Doucette

DISSENT OF BOARD MEMBER CROCKETT

While there are a number of points upon which there is no disagreement between Board Members and myself, I do take a different view of the facts and case law as they relate to the activities of July 12, 2005.

The Prince Edward Island Labour Board determined many years ago that in matters relating to a Section 54 Application under the *Labour Act* R.S.P.E.I. 1974 Cap. L-1 that only employees working on the date of application will be considered for purposes of determining majority representation.

Other experienced Boards, specifically in Ontario and British Columbia, have taken a similar path but have refined their approach even further. In these jurisdictions the Board will consider *whether the person concerned was employed by the respondent and at work on the date of application: and if so, the work that that person spent the majority of his/her time doing on the date of application.*

This then becomes the crux of the issue: what work constituted the majority of time spent that day by each employee? For our purposes, this question must then be determined in terms of actual work performed within the jurisdiction of the Prince Edward Island Labour Act. Otherwise we will be faced with multi-provincial employers claiming that any employee who even sets foot in our Province on the day in question should be considered part of the bargaining unit.

In the matter before us, we have two employees (Carpenter and Gorman) of Davis Plumbing and Heating who were employed and working in the Province of Nova Scotia on the date of application, July 12, 2005. I do not dispute the evidence that they both performed job duties for their employer in Nova Scotia on that day, nor do I question that they traveled later that day to Prince Edward Island.

Where the issue becomes confusing is upon consideration of these two employees (Carpenter and Gorman) arriving at the University of P.E.I. job site, what work was actually performed by them and how long they were there. The contention of the employer witnesses is that they arrived sometime around the end of the workday.

From this evidence, the only thing this Board can determine is that these two gentlemen arrived at the University job site sometime between the hours of 4:45 p.m. and 5:30 p.m. The regular workday, as it was known to employees on site was over. In fact, none of the union witnesses saw either Carpenter or Gorman before leaving that day. The evidence also indicates that the two employees, on their own initiative, decided to work a period of time before proceeding to their hotel for the night. The evidence provided had Carpenter and Gorman unpacking some equipment and doing some layout of the work that they would be performing the next day. If we accept that they did perform this work, by their own evidence it would only constitute two to two and one-half hours of their total day.

If we go back to the case law criteria accepted in Ontario and British Columbia, and apply these set of facts to this criteria, would those Boards, or any Board for that matter, uphold the contention that Mr. Carpenter and Mr. Gorman were legitimate employees of the applicant company performing the majority of their work that day doing bargaining unit work on Prince Edward Island? In my view, the answer to that question must be 'no'.

The time sheet introduced into evidence, Ex. A -2, indicates that Carpenter and Gorman worked 10 hours on July 12th, 3 hours in Halifax and 7 hours in PEI. We know that a significant portion of those 7 hours involved traveling to Prince Edward Island, including stops at the employee's residence to collect clothes and at the employer's office to collect a pay cheque.

On April 15th, we know both employees worked for a period of time at U.P.E.I. and then traveled back to Halifax yet the time sheet indicates a total of 6 hours worked by each. Mr. Carpenter was questioned on this point and he testified that he and Gorman worked 7 hours with 3 hours travel time. Clearly the time sheet is flawed! I can also state that it is almost impossible to drive from University Avenue in Charlottetown to Halifax or Lower Sackville for that matter, in three hours, particularly on a Friday evening. These points alone raise legitimate questions as to the accuracy of the testimony given by employer witnesses.

We must also consider the evidence of Mr. Doug Maxwell, site Foreman, and the excerpts from his daily journal which he testified he made first thing each morning. On July 12th he writes, "The word is that Jeff, George, Jody and Mike all signed union cards. I don't know what is going to happen. We know that Mr. Maxwell talked to the company owner, Mr. Davies, a short time after that and we also know that Mr. Davies then called Mr. Carpenter and Mr. Gorman to go to Prince Edward Island. One might argue that the employer didn't know the union application was to be made that very day but they certainly knew something was going to happen.

Further to all this, I have serious concerns related to the matter of allowing travel time to be included in the concept of time worked for purposes of this discussion. Firstly, travel time is not in my view actual work being performed at the 'trade'. Secondly, if we open this door, what happens to the employee traveling from Vancouver to Charlottetown? That employee could travel for 12 hours, arriving late at night and not even be on site but if it is argued that it was paid travel time do we include that person in the bargaining unit? Even if one could make a threshold argument to include that employee, how could an applicant trade union know that person even exists, let alone have access to that employee to sign a membership card and still make their application on that date?

Finally, I come to the issue of common interest: how can two employees brought in primarily to perform a specific yet small area of the total work claim the same 'community of

interest' as the other employees? How can these same employees who are residents of Nova Scotia claim a similar interest in the affairs of Local 721 and its collective bargaining activities?

This Board is being asked to quash an earlier Certification Order based on some convenient occurrences and testimony that is vague in places and contradictory in others. Had Mr. Carpenter and Mr. Gorman been on site the day before, I would concur with my colleagues in the majority opinion, but they were not. They did not arrive on site until after the end of the 'normal' workday. The Union's application had already been filed with the Department of Labour. The two employees that ultimately offset the Union's majority position did not in any way shape or form spend even a majority of that work day (July 12th) doing trade or bargaining unit work.

Respectfully, it is my belief that this majority decision contravenes the thinking of our colleagues from the Boards in Ontario and British Columbia. More importantly, it contravenes the sole essence of confining construction industry applications to the actual date of application. Consequently, this could open the door to future meandering by certain employers and a further erosion of legislative rights of employees.

For all the aforementioned reasons, I cannot agree with the majority decision presented and therefore respectfully dissent from my colleagues on the Panel.

Dated at Charlottetown this 3rd day of April, 2006.

Ted Crockett