



GOVERNMENT OF PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

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J. J. Revell, B. Comm., M.B.A.
Chairman

L. W. Brammer,
Chief Executive Officer

DEPARTMENT OF LABOUR
P.O. BOX 2000,
CHARLOTTE TOWN
PRINCE EDWARD ISLAND

DECISION

BETWEEN:

CANADIAN FOOD AND ALLIED WORKERS, LOCAL P282,

APPLICANT

-and-

J. & T. MORRIS & COMPANY LIMITED,

RESPONDENT

This application was received by the Labour Relations Board on May 26, 1975 and was processed in accordance with the Regulations of the Act.

The Board reviewed the documents filed in support of the application and a Hearing was held on June 26, 1975.

The Respondent had filed an intervention with the Board in which it alleged:

1. That the Applicant, Canadian Food and Allied Workers, Local P282, has included a number of employees in the bargaining unit and said employees are not "an employee" within the definition or meaning of the Prince Edward Island Labour Relations Act;
2. that the Applicant does not have a majority of the employees in the said bargaining unit;
3. such further and other grounds as the Respondent may deem advisable at the said hearing.

At the hearing, the Respondent filed a written submission outlining the various employment positions in the bargaining unit to which the employer did not object and the positions which the employer was requesting be excluded from the bargaining unit. The Applicant and Respondent seemed not to disagree concerning any of the plant classifications and related activities although some questions did arise concerning the position of Foreman or Service Manager of the plant and truck fleet.

However, the Employer has argued that the positions of Salesman and Sales Manager should be excluded from the bargaining unit. The Respondent has argued that the Salesmen are essentially responsible for delivering merchandise to the various retail accounts (along with certain institutional accounts where evidence indicates that little sales effort or merchandizing is required) and that these personnel, working on a 100% commission, are essentially paid on their ability to merchandize and display products. Evidence submitted by the employer indicated that the Sales Managers, who proceed the Driver Salesmen to the retail outlets, take the orders and generally are responsible for the direct contact between the Retail Store Managers and the Company. These Sales Managers report to the General Sales Manager, work on 100% commission, and are the primary selling force in the Company operations. The Company argued vigorously that the merchandizing effort of the Driver Salesmen was critical to the success of the Company sales effort and, indeed, was critical to the determination of their wages.

It is difficult to argue that the sales and merchandizing effort undertaken by the Driver Salesmen is not as the Respondent Company has portrayed nor does the Board wish to dispute the importance of the individual efforts of the Driver Salesmen and, indeed, Sales Managers in determining their earnings. The Board, however, feels that the more fundamental question is whether or not the classifications in dispute represent job functions where the employees involved should be defined as employees for purposes of the Prince Edward Island Labour Act, or whether, as suggested by Counsel for the Respondent, the people involved are in some way individual entrepreneurs.

While the Prince Edward Island Labour Act does not refer to employees by definition, Section 7, sub-section 2 (a) and (b) outlines those persons who would not be included under the terms of the Act although they might otherwise be deemed in an employer/employee relationship. The Section does not refer to people involved in sales capacities provided the general exclusion of those who exercise a managerial function (Section 7 - 2 (b)) does not apply, and the Board is of the opinion that neither the Salesman (Driver Salesman) or Sales Managers exercise the managerial functions as meant by the Section.

The Board is of the opinion that the method of payment to employees, whether it be by straight salary, hourly wages or by some form of incentive, such as units produced or sales commissions, or some combination of these, does not in itself determine whether or not a job classification and, consequently, employees who would be in the classification would fall under the terms of the Prince Edward Island Labour Act. Rather, the Board looks to the widely accepted definition of employer/employee relationship in Industrial Relations and turns particularly to the question of control and direction of the work situation.

One of the most direct applications of this definition, and the Board is of the opinion that it is particularly relevant to this case, is the Decision of the Alberta Board of Industrial Relations in the case of Retail, Wholesale and Department Store Union, Local 980, Applicant; and Trudeau's Cleaners and Shirt Service (1970) Limited (70 CLLC, Paragraph 16020)

The Alberta Board, in reaching its Decision, quoted extensively from the Judgement of Lord Wright in Montreal vs. Montreal Locomotive Workers (1947) 1 DLR P16 page 159. In that Decision, the four elements laid down by Lord Wright are: (1) Control, (2) ownership of tools; (3) chance of profit, and (4) risk of loss.

When one examines the evidence and submissions of the parties in this case, the relation between employer and employees becomes rather clear. While one may accept the argument that Driver Salesmen and Sales Managers exercise considerable discretion in their relations with the Company's customers, it is equally clear that they are required to carry out the general instructions of the Company and, indeed, the Company clearly controls the manner in which the work will be done, its location, types of products to be sold and the equipment and related material used by the Driver Salesmen and Sales Managers.

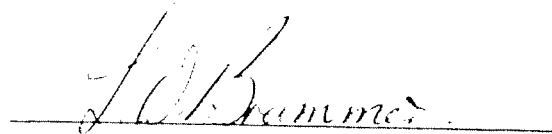
Consequently, the Board is satisfied that the classifications of (Driver Salesmen) and Sales Manager are part of an employer-employee relationship and that persons in these classifications are, in fact, employees of the Respondent Company for purposes of this application.

Based on the evidence, however, the Board is of the opinion that the type of work, form of remuneration and differing responsibilities of the Salesmen and Sales Managers, as distinguished from the plant and maintenance classifications, is such as to make an all-inclusive unit not appropriate for collective bargaining. Consequently, the Board is of the opinion that, in the instant application, the classifications of Sales Managers and Salesmen (Driver Salesmen) should not be included in the same bargaining unit as the plant employees. The Board, therefore, will describe two

separate bargaining units distinguishing the classifications as noted above.

The Board is satisfied that the Applicant Trade Union is a trade union within the meaning of the Prince Edward Island Labour Act and that the Applicant has the required majority in each of the units described as appropriate for collective bargaining. Consequently, certification Orders will be issued.

This Decision was made by the Labour Relations Board on July 8, 1975 and is issued over the signature of the Chief Executive Officer.



L.W. Brammer

CHIEF EXECUTIVE OFFICER.