



**GOVERNMENT OF PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD**

M. Lynn Murray, B.B.A., LL.B.
Chairman

Roy J. Doucette
Chief Executive Officer

DEPARTMENT OF LABOUR
P.O. BOX 2000
CHARLOTTETOWN
PRINCE EDWARD ISLAND
C1A 7N8

RE: RECONSIDERATION

BETWEEN:

ABLE EQUIPMENT LIMITED

APPLICANT

AND:

CONSTRUCTION AND GENERAL LABOURERS UNION LOCAL 1079-A

RESPONDENT

REPRESENTING THE APPLICANT:

CLIFFORD DAHMS

COUNSEL FOR THE RESPONDENT:

J. GORDON MacKAY

D E C I S I O N

BACKGROUND OF APPLICATION FOR RECONSIDERATION:

1. On May 20, 1992, the Applicant (hereinafter referred to as "Able") applied to the Labour Relations Board (hereinafter called the "Board") for Reconsideration of Certification Order #07-92 pursuant to Section 18 of the Regulations made pursuant to the Labour Act, R.S.P.E.I. 1988, Cap. L-1. The application was in the

form a Statutory Declaration and the relevant part thereof stated as follows:

"We believe that the information provided to the board was in error with respect that the vast majority of workers on the site were unionized and those that weren't do not form an appropriate unit under the act. Please consider this our application for reconsideration."

2. On June 1, 1992, the Board received correspondence from the solicitor representing the Construction and General Labourers Union Local 1079-A (hereinafter referred to as the "Labourers Union") which stated that the Labourers Union believed it represented a majority of employees and that the employees of Able do not fall within the jurisdiction of any other union certified to represent employees of Able.

3. The Chief Executive Officer sent notice of the hearing to the parties on September 14, 1992 and scheduled October 14, 1992 as the hearing date.

4. The Board composed of M. Lynn Murray as Chair, Ted Crockett as employee representative and Jean-Marc Gallant as employer representative, met on October 14, 1992 to hear the evidence in this matter.

5. Before proceeding further, it is necessary to review the manner in which this application reached the Board.

BACKGROUND OF APPLICATION FOR CERTIFICATION

6. On March 27, 1992, an Application for Certification (Application #92-007) was filed by the Labourers Union in relation to the employees of Able requesting an Order pursuant to Section 54 of the Labour Act, supra, that the Labourers Union be the certified bargaining agent for all employees of Able working as construction labourers in the Province of P.E.I. excluding foremen and those above the rank of foremen.

7. Together with the Application for Certification was filed, a list of officers of the Labourers Union; a true copy of the Charter of the Labourers Union; a copy of the Constitution of the Laborers' International Union of North America as amended by the 19th convention September 8 - 12, 1986; evidence that certain employees had paid membership dues within the previous ninety (90) days; and a list of employees wishing the Labourers Union to be certified as its bargaining agent.

8. As noted previously, the application was made pursuant to Section 54 of the Labour Act, supra, the relevant parts of which state:

"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.

...

(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."

9. A panel of the Board met on March 31, 1992 and reviewed the documentation filed. On that day the Board rendered a decision in Application No. 92-007 being Serial No. 07-92, which stated in part:

"NOW, THEREFORE, it is hereby ordered by the Prince Edward Island Labour Relations Board that the Construction and General Labourers Union Local 1079-A be, and it is hereby certified to be the bargaining agent of all employees of the Respondent [**Able Equipment Limited**] working as construction labourers in the Province of Prince Edward Island, but excluding foremen and those above the rank of foremen."

BACKGROUND OF APPLICATION FOR REVIEW

10. On April 6, 1992, Able applied to the Labour Relations Board for a review of the Certification Order issued in Application No. 92-007, said application being Board Application # 92-012.

11. The application for review received by the Board was in the form of a letter. Section 2(1) of the Regulations made pursuant to the Labour Act, supra, states as follows:

"2(1) Every proceeding before the Board shall be commenced by the filing of an application verified by statutory declaration and made in accordance with these regulations."

12. The application for review was not in the form of a Statutory Declaration as required by the Regulations made pursuant to the Labour Act. Thus, the Board had no jurisdiction to deal with the application for review.

13. Thereafter followed this Application for Reconsideration that is presently before the Board.

LAW AND DECISION

14. Able has relied on Section 18 of the Regulations made pursuant to the Labour Act, supra, for the reconsideration; however, Section 4(1) of the Labour Act, supra, is the pertinent provision. The latter Section gives to the Board the power to reconsider any decision and it states as follows:

"4(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Part and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the board thereon is final and conclusive for all purposes, but nevertheless the board may at any time, if it considers it advisable to do so, reconsider any decision, interim order, order,

direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling."

15. In the past, the Board has exercised its powers to reconsider very sparingly. However, in the current situation, Section 54 of the Labour Act, supra, prescribes what is, in effect, an ex parte procedure where an employer does not have an opportunity to be heard at the first instance. In light of this fact, the legislature has given to the employer the right to apply for a review of a decision made pursuant to Section 54 of the Labour Act, supra, within a ten day period.

16. As previously noted, Able did request a review within the prescribed time frame, however, its application was deficient as it was not in the proper form. Accordingly, the Board did not have the jurisdiction to enter upon the hearing and this effectively meant that the employer has had no opportunity to be heard in relation to the Certification Order issued by the Board on March 31, 1992.

17. In light of the fact that Able has never had the opportunity to have its concerns addressed by the Board, the Board decided to grant Able the right to have the original decision of March 31, 1992 reconsidered. This is not to be taken as meaning that in every case the Board will grant reconsideration but rather that on the particular facts and circumstances as they unfolded in this particular situation, the Board felt that Able had a right to be heard.

18. In determining whether or not the original Certification Order of March 31, 1992 was granted in error of some fact, the Board must review the legislation under which that decision was made. As the decision was made under Section 54 of the Labour Act, supra, the Board has reviewed Section 54(2) of the Labour Act, supra, which demonstrates that for the Board to have granted the original order on March 31, 1992, it must be satisfied on three points, namely:

- (a) that the Applicant is a trade union;
- (b) that the unit applied for is appropriate for collective bargaining; and
- (c) that a majority of the employees in the unit wish the trade union to be certified as its bargaining agent.

19. During the hearing held before the Board on October 14, 1992, there was no issue over whether or not the Labourers Union is a trade union and, in fact, the Board is satisfied that sufficient evidence was in the original file (Application 92-007) to demonstrate this point. As such, the only issues that are of concern to the Board is whether or not the unit is appropriate for collective bargaining and whether or not a majority of those individuals wish the Labourers Union to be certified as their bargaining agent.

20. The evidence presented on behalf of Able can be summarized as follows:

- (a) on the date of the original application for certification, Able had eighteen (18) employees working in the Province of Prince Edward Island;
- (b) any employee who is performing labourers work, must be included in the bargaining unit;
- (c) Question 8 in the original Application for Certification which dealt with whether or not there is a Collective Agreement affecting the employees in the proposed unit was answered by stating it was not applicable.

21. Dealing with Question 8 on the original application, the Board sees no merit in this allegation. As the Labourers Union had not represented the employees in question and Able was not a signatory to any Collective Agreement, a Collective Agreement would not become relevant until, and only if, the Labourers Union was certified to represent the employees of the Able.

22. In relation to the submission of Able suggesting that the bargaining unit consisted of all those people who were on the

site performing labourers work, the evidence clearly discloses that there were eighteen people on the site. There were a number of employees on the site who were members of the other Unions. The Board is satisfied that employees who were members of another union would be excluded from the bargaining unit as they would not have a community of interest with the Labourers Union.

23. In relation to the eighteen employees, after hearing the evidence adduced, the Board finds as follows:

- (a) eleven of those employees were members of the Carpenters Union;
- (b) the employee, Roger Durling would be excluded as he was giving direction to people and was the foreman on the site. Furthermore, the Certification Order issued would not have included this individual as it specifically excluded foremen;
- (c) two employees, Mario Jasik and Danny Jasik, would also have been excluded as they were both journeymen carpenters and, again, would have no community of interest with the Labourers Union; and
- (d) Jim Hubley would be excluded as he was an operating engineer and, again, would have a different community of interest.

24. Having stated the foregoing, of the eighteen employees, fifteen have already been excluded leaving three employees who could be said to be performing labourers work on the critical date. Having determined that there would only be three potential employees who would be appropriate for the Labourers Union to represent, the Board is satisfied that the Labourers Union represented a majority of employees in the unit who were appropriate for collective bargaining on the date in question. As such, the Board affirms the original Certification Order granted March 31, 1992.

25. Although it forms no part of the basis for this decision, the Board heard evidence during the hearing that it feels must be commented on. The Board heard from Able's President that there was an understanding between Able and the local Carpenters Union that the Carpenters Union would provide employees to work for Able and that the wages paid to those carpenters would be different from those wages that unionized employers pay to Carpenters.

26. It is well known and needs no reiteration that the Construction Unions, of which the Carpenters Union is one, enter into Collective Agreements with the Construction Association of Prince Edward Island, an organization which represents all unionized employers in this Province. Essentially, the Construction Association of Prince Edward Island negotiates on behalf of the unionized employers with the various trade unions operating in this Province. Those agreements prescribe the rates of pay and benefits that the unionized employers must pay to employees whom they hire if the employees are members of a trade union which is a signatory to any of the various agreements.

27. The Board finds it strange that a Union would provide its employees to a non-unionized employer at a different rate than a unionized employer in this Province is obliged to pay to the same employees. The evidence of Able's President was that Able was paying employees on the site wage rates ranging from approximately \$11.00 to slightly in excess of \$16.00 per hour. The Board can take notice of the fact (as all Collective Agreements are filed with the Department of Labour) that these wage scales are considerably lower than that required to be paid to Carpenters pursuant to the terms of the Collective Agreement that the Carpenters Union have signed with the Construction Association of Prince Edward Island.

28. If the evidence that the Board heard on this point is correct, the Board feels that appropriate steps, legislative or otherwise, should be taken to see that such practices do not

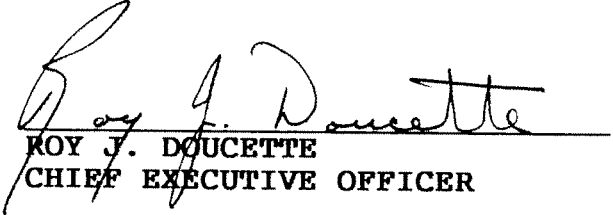
continue. It does not need to be stated that in these recessionary times, an unfair advantage given to one company might mean the end of another. In light of the fact the construction industry bargaining in place in this province eliminates this potential unfair advantage scenario, any deviation from that system should receive the utmost of scrutiny.

29. The Board is directing that its Chief Executive Officer forward a copy of this decision to the Minister of Labour and the Construction Association of Prince Edward Island.

CONCLUSION:

30. The Board affirms that the original Certification Order of March 31, 1992.

This decision of the Labour Relations Board was made this 23rd day of December, A.D. 1992 and issued under the hand of its Chief Executive Officer.


ROY J. DOUCETTE
CHIEF EXECUTIVE OFFICER

PANEL:

M. Lynn Murray : Chair
Ted Crockett : Member
Jean-Marc Gallant: Member