



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

Michele D. Sanderson, B.A., LL.B.
Chair

Roy J. Doucette
Chief Executive Officer

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

RE: APPLICATION FOR CERTIFICATION

BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 864

APPLICANT

AND:

COCA COLA BOTTLING LTD.

RESPONDENT

COUNSEL FOR THE APPLICANT:

EUGENE P. ROSSITER, Q.C.

COUNSEL FOR THE RESPONDENT:

MARK LEDWELL

DECISION

BACKGROUND OF APPLICATION FOR CERTIFICATION

1. On November 3, 1992, an Application for Certification, on behalf of the Applicant, United Food and Commercial Workers Local 864 (hereinafter referred to as "UFCW") was filed with the "Board" pursuant to the Labour Act and Regulations R.S.P.E.I. 1988 Cap. L-1 (hereinafter referred to as the Labour Act).
2. The Chief Executive Officer set November 25, 1992 as the Terminal Date.
3. The Labour Relations Board (hereinafter referred to as the "Board") composed of Michele D. Sanderson as Chair, Ray McBride as Employee Representative and Gerald Doyle as Employer Representative heard the matter on January 21, 1993.

4. At the commencement of the hearing, several matters were consented to by the Parties and are as follows:

- (a) That the Applicant is a trade union within the definition of the Act;
- (b) That the Applicant has the support of the majority of the employees in a unit appropriate for collective bargaining;
- (c) That the unit is appropriate for collective bargaining;
- (d) That the following positions shall be excluded from the unit:
 - (i) Sales Manager
 - (ii) Assistant Sales Manager
 - (iii) Sales Supervisors.

5. Although specific evidence was not lead with respect to the positions which were agreed to be excluded, the "Board" finds that there is sufficient basis to exclude the Sales Manager, Assistant Sales Manager and the Sales Supervisors from the unit. The "Board" also finds;

- (a) That the Applicant is a trade union within the definition of the act;
- (b) that the Applicant has the support of the majority of the employees in a unit appropriate for collective bargaining;
- (c) That the unit is appropriate for collective bargaining;

6. The exclusions requested by the Respondent are the two Sales Representatives, the Dispatcher and one Office/Clerical Staff Person.

Legislation:

7. The legislative provision dealing with this issue is found in Section 7(2) of the Labour Act which states as follows:

"7(2) For the purposes of this Part, no person shall be deemed to be an employee...

(b) who, in the opinion of the board exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations."

8. Accordingly, the "Board" must be satisfied that the exclusions come within the provisions outlined in Section 7(2)(b) of the Labour Act.

Law and Decision:

9. Since no definition is contained in labour legislation that indicates at what stage a person has crossed the line from being an employee to that of being classed as management, it is a matter the "Board" must determine based on the facts of each case and jurisprudence.

10. In Telephone Supervisors Association of British Columbia vs British Columbia Telephone Company and Society of Telephone Engineers and Managers et al 77 CLLC 640 Vice Chairman Le Bel at p.- 650 enumerated some of the functions that would be considered management functions:

"There are numerous functions which are recognized as being "management functions": the preparation of the budget, decisions as to the organization of the enterprise and staffing levels, the representation of the employer in collective bargaining or in contract administration, the formulation of corporate policy, the hiring, firing promoting and disciplining of employees, authorizing time off or overtime, etc. Some of these functions are so important that they warrant a finding that a person performs management functions even if that person exercises only a few of these functions or does so infrequently".

11. In Canadian Union of Bank Employees vs Bank of Nova Scotia 77 CLLC 525 at p.- 536, Vice Chairman Dorsey states:

"The basis of exclusion of certain "management" persons from the coverage of collective bargaining is the avoidance of Conflicts of Interest for those persons between loyalties with the employer and the union.... This conflict is pronounced when one person has authority over the employment conditions of fellow employees".

Sales Representatives - Dispatcher

12. The evidence adduced from the Sales Representative and the Dispatcher can be summarized as follows:

The Sales Representative did at times give some direction to the drivers with respect to setting up displays etc. and they did have some flexibility with respect to the setting of prices for the product for some of their smaller customers.

The Dispatcher directed the drivers with respect to their "routes" but he spent a considerable amount of time in sales oriented functions, i.e., merchandising and tele-marketing or "tel-selling".

The Dispatcher was present at a meeting between the Sales Manager and an employee who had lost their driving license.

13. It is apparent from the evidence adduced that their duty as a "supervisor" constitutes an extremely small percentage of their duties, they were not empowered to discipline and have very little, if any, independent decision-making power.

Office/Clerical Staff Position

14. When an employer seeks to exclude an employee who is in a "confidential capacity" the "Board" must be satisfied the position is one which has a "regular and material involvement" with matters relating to labour relations. In other words the information must be at the core of the individuals job function.

15. The "Board" accepts the three fold test enunciated in Bank of Nova Scotia (supra):

- 1) Confidential matters must be in relation to industrial relations, not general industrial secrets.
- 2) Disclosure of that information would adversely affect the Employer.
- 3) The person must be involved with this information as a regular part of his duties. It is not sufficient that he occasionally comes in contact with it or through Employer laxity he can gain access to it.

16. On the evidence presented to the "Board" by Glenda Larter it is clear that she had three primary job functions and they are as follows:

- 1) Secretary to the Office including the Sales Manager.
- 2) Accounts Receivable Clerk.
- 3) Cash Handler.

17. Although there exists the potential for Ms. Larter's position to extend into matters that are confidential in nature, she is not currently performing functions which would satisfy this threefold test for exclusion on the basis of confidentiality.

Community of Interest

18. One of the major issues in determining the appropriateness of a bargaining unit is whether employees share a community of interest. Counsel for the Applicant outlined factors to consider when dealing with community of interest. In Sack & Mitchell Ontario Labour Relations Board Law & Practice 1985 Butterworth & Co, (Canada) Ltd. at pp 140-141 it is stated:

"The tests used to determine community of interest among different employees (and among employees at different locations) are set out in Usarco Ltd. and include:

1. *Nature of work performed.*
2. *Conditions of employment.*
3. *Skills of employees.*
4. *Administration.*
5. *Geographic circumstances.*
6. *Functional coherence and interdependence."*

And in Adams Canadian Labour Law, 1985 Canada Law Book Inc. at p.- 312 the following appears:

"The multiplicity of factors, which seldom point in one specific direction, may include:

(1) similarity in the scale and manner of determining earnings; in employment benefits, hours of work and other terms and conditions of employment; in the kind of work performed; and in the qualifications, skills and training of employees

(2) the frequency of contact or interchange among employees and the geographic proximity of work places;

(3) continuity or integration of production processes;

(4) common supervision and determination of labour relations policy;

(5) relationship to the administrative organization of the employer;

(6) history of collective bargaining;

(7) desires of affected parties and employees; and

(8) extent of union organization.

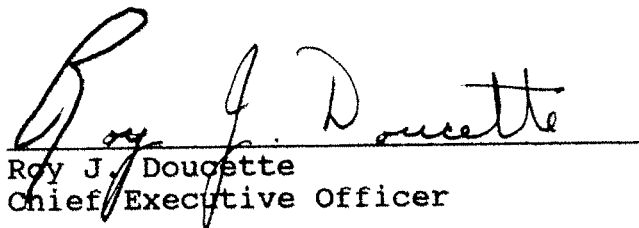
19. The evidence lead before the "Board" was exclusive to what Counsel for the Respondent refers to as the "sales team", with the exception of the office person, Glenda Larter. Although references were made with respect to the employment duties and conditions of the non "sales team" people, the "Board" was left to speculate rather than consider and weigh specific evidence. None of the employees from the warehouse nor the truck drivers were called to give evidence and therefore we are unable to consider the possibility of a different community of interest peculiar to the "sales team".

20. In light of the foregoing the "Board" is not satisfied that the Respondent has discharged the onus to justify the exclusion of any of the three positions.

21. Having stated this, the "Board" does hereby order that a Certification Order be issued in favour of the Applicant Union to certify this Union as Bargaining Agent for the Unit described as follows:

"All employees of the Respondent employed in the Province of Prince Edward Island but excluding Sales Supervisor, Sales Manager and Assistant Sales Manager."

This Decision made by the Prince Edward Island Labour Relations Board on February 3, 1993, and issued under the hand of its Chief Executive Officer.


Roy J. Doucette
Chief Executive Officer

PANEL:

Michele D. Sanderson, Chair
Ray McBride, Member
Gerald Doyle, Member