PROVINCE OF NEW BRUNSWICK

Labour and Employment Board

IR-023-14

IN THE MATTER OF THE *INDUSTRIAL RELATIONS ACT*

AND IN THE MATTER OF AN APPLICATION FOR CERTIFICATION

BETWEEN:

Labourers' International Union of North America, Local 900

Applicant,

- and -

SCT Rail Contractors Ltd.

Respondent.

BEFORE: George P.L. Filliter
Chairperson

APPEARANCES:
For the Applicant: *David Mombourquette*
For the Respondent: *James F. LeMesurier, Q.C.*

HEARING DATES: June 22 and 23, 2015

DATE OF DECISION: July 24, 2015

DECISION OF THE BOARD

I. INTRODUCTION

1. The Labourers' International Union of North America, Local 900 ("Applicant") filed an Application for Certification on October 23, 2014. The Application identified Squaw Cap Trucking Company Limited ("Squaw Cap") as the Respondent.

2. On November 7, 2014, Squaw Cap filed a Reply. The Application was processed in the name of Squaw Cap until April 21, 2015, when counsel for the Applicant confirmed his client's agreement that the Respondent should be identified as SCT Rail Contractors Ltd. ("Respondent").

3. On November 12, 2014, the Board sent notification to the parties that it had received three petitions for cancellation of union membership.

4. The hearing was scheduled for June 22 to 24 and 29, 2015.

5. At the commencement of the hearing, the parties advised they had consented to the description of the bargaining unit. Having considered the agreed-to wording, the Board confirmed that it was satisfactory and amended the Application for Certification to be for the bargaining unit described as:

> All employees of SCT Rail Contractors Ltd. employed in maintenance of rail lines and support of maintenance of rail lines in the Province of New Brunswick, save and except supervisors, those above the rank of supervisor, office employees, mechanics, and those excluded by the *Industrial Relations Act*.

6. In addition, the parties advised they had come to an agreement on the employees identified in Schedules "A" to "D" submitted by the Respondent in its original Reply. As a result, 87 employees were identified as being employed by the Respondent Employer in the Province of New Brunswick, either on the date of Application or within the parameters defined by the 30/30 rule.

7. The parties identified the two outstanding issues. The first issue was with regards to 14 employees identified by the Union on November 17, 2014 who it alleged were improperly excluded from Schedule "A". At the commencement of the hearing, the parties acknowledged the list of 14 should not have included one name, thus reducing the challenge to 13.

8. The second issue before the Board was the voluntariness of the petitions. The Union alleged they were involuntary and ought not to be considered by the Board.

II. PETITIONS

9. The Board sent its first Notice of Hearing, advising the hearing date would be June 22, 23, 24, 29 and 30, 2015, to the parties and to five individuals. Four of the individuals to whom the Notice was sent purported to circulate a petition to various employees and witness their signatures. The fifth person to whom the Notice was sent purported to sign a petition but there was no witness to his signature.

10. The original Notice of Hearing was sent by Priority Post and was received by all five individuals as confirmed by the fact a confirmation of receipt card was signed.

11. A subsequent Notice of Hearing was sent to the same five individuals confirming the date of June 30, 2015 was cancelled and the hearing would be held on June 22, 23, 24 and 29, 2015 only. Once again the Notice of Hearing was sent by Priority Post and signatures confirmed the Notice had been received.

12. At the commencement of the hearing, the individual who had purported to sign a petition without a witness did not attend, nor did an individual who purported to witness 33 signatures.

13. When a petition is filed, someone must attend the hearing to testify to the facts surrounding the signatures on the petition, in order to satisfy the Board the petition was voluntary. Without this evidence, the Board is not able to conclude the signatures taken were done on a voluntary basis.

14. One of the petitioners who testified to his witnessing of signatures alluded to the fact that the person who purported to witness 33 signatures had never received a Notice of Hearing and that was the reason he was not present.

15. Given this comment and at my direction, Board staff reviewed the file and determined the two Notices of Hearing were sent to this individual at the address he provided both in a telephone conversation with staff and also on the form sent by the Employer to confirm signatures. The signature confirming receipt of both Notices was that of the individual's sister and the Board concluded the individual did in fact receive the two Notices of Hearing. This information was supplied to the parties at the hearing.

16. Accordingly, the Board ignored the 33 signatures purportedly witnessed by one individual and the signature of the person who purported to sign without a witness.

17. Three persons testified to witnessing of signatures. The process adopted by the Board was to call these individuals as witnesses and conduct a review of the petitions. Counsel for the Union and for the Employer were given the opportunity to cross-examine subject to the vetting by the Board of any questions deemed to be inappropriate.

18. The first witness was William (Bill) Duthie ("Duthie"). Duthie testified he signed a petition on November 6, 2014 and witnessed the signature of two other individuals, one on November 2, 2014 and the other on November 5, 2014.

19. Duthie testified Shaun King ("King") had provided him with a website address (labourwatch.com) and Duthie printed off the petition which he in turn circulated to the two other employees.

20. His evidence was he was part of a crew working on the rail tracks between Newcastle and Moncton. He testified the signature of the person identified as No. 1 on the petition was taken at the hotel where they were staying.

21. He further testified the signature of the individual who was identified as No. 2 was taken at the individual's home in Beresford. Duthie testified that after work, he drove one-and-a-half hours from Miramichi to this person's home in the company vehicle provided to him.

22. On questioning by Counsel for the Applicant, Duthie was unable to explain his direct testimony that the signature of the individual identified as No. 1 was taken "after work". He admitted on cross-examination that November 2 was a Sunday and this was the day before the work week. Duthie suggested he said "after work" because on the day before the crew had worked until 3 a.m.

23. Duthie further testified, on cross-examination, he had not seen a Notice to Employees posted by the Respondent advising of the Application for Certification by the Applicant. He was unable to explain how he determined that the petition should be sent to the Labour and Employment Board but he did indicate he sent it by Priority Post.

24. In conclusion, Duthie acknowledged he was recently promoted by his employer and he now works as the dispatcher for the Respondent.

25. Luc Couturier ("Couturier") testified he received the petition form from King and circulated it to employees staying at the Amsterdam Hotel in Moncton.

26. There was some confusion on the part of Couturier as to who handwrote the name of the union and employer at the top of the form. Couturier testified he did; however, when King testified, he confirmed it appeared to be his handwriting.

27. Couturier testified he met with each of the eight persons who signed the petition in their respective hotel rooms. The meetings occurred alone according to his evidence and each of the individuals signed independently and freely.

28. With respect to the person identified as No. 40 on the petition, Couturier identified him as the "supervisor of the crew". Couturier himself and one other person signed the petition after the person identified as No. 40 had signed.

29. Like Duthie, Couturier testified he did not see the Notice to Employees posted by the Respondent advising of the Application for Certification by the Applicant.

30. Couturier identified his title as "back foreman". In saying this, he acknowledged the individual identified as the supervisor of the crew was able to see all of the signatures of the individuals identified as No. 34 to 39.

31. The Applicant called James McCarthy ("McCarthy"), who testified he signed the petition in the presence of Couturier, whom he understood to be the Assistant Foreman. McCarthy also testified he observed that Mr. O'Grady ("O'Grady"), a Senior Manager with the Respondent, and Couturier seemed "very close".

32. Finally, King testified. His evidence was he signed a petition himself and witnessed the signature of 24 other individuals. These petitions were found on two separate pages.

33. King identified himself as a "sub-foreman" that ran the front crew.

34. The individuals found on the second page of the petition identified as No. 17 to 25 signed either on October 30, 2014 or November 3, 3014. King's signature itself appears as

No. 17 so all of the individuals who signed on that page would have known that their "sub-foreman" had signed the petition.

35. On the first page of the petition, employees identified as No. 1 through 16 signed on November 4, 2014 in the presence of King. The evidence was that the signature identified as No. 1 was the "boss". So, the individuals who signed the petition on November 4, 2014 and identified as No. 2 through to 16 all signed a form which had the signature of their "boss" at the top.

36. The evidence was King took the signatures in Boucherville, Quebec, where all of the 25 employees were working. To get there, King used the personal truck of O'Grady, who, as noted above, was one of the Senior Managers of the Company.

37. The New Brunswick Court of Appeal, in a decision reinstating a decision of this Board, provided significant guidance and confirmed the longstanding practice of the Board with respect to hearings into the voluntariness of petitions (*Fortis Properties Corp. v. United Steelworkers of America, Local 1-306*, 2007 NBCA 16).

38. The Court said at paragraphs 23 and 24:

> 23 Most of the issues raised by the respondents, as outlined earlier in these reasons, are premised on a fundamental misunderstanding with respect to the purpose of voluntariness hearings. The best way to explain that purpose is to explain what the hearings are not about. They are not proceedings to determine whether on a balance of probabilities the employer was involved in the subsequent withdrawal of union support. They are not hearings which pit the union against the employer. This explains why those employers who elect to participate in a voluntariness hearing are designated as "interveners" before the

Board. Moreover, the winner is not the one who is best able to cobble together sufficient evidence to establish employer misconduct. Rather, they are proceedings in which the Board has to decide whether the subsequent withdrawal of union support is "tainted" by employer/management involvement. Obviously, this is a much lower threshold than the civil standard of proof and, without putting words into the Board's mouth, one that seems to mirror the threshold of "reasonable possibility" that is so often applied in other contexts. As well, the Board insists that the onus of proof is on the employees to establish that that they have voluntarily withdrawn support for the union or the certification application (the individual respondents in this case). The oft quoted decision of the Board in *Trispect Technical Services Ltd. (Re)*, [1995] N.B.L.E.B.D. No. 23, quoting from the Board's decision in *Metropolitan Stores (MTS) Ltd. v. R.W.D.S.U., Local 1065* (1979), N.B.L.L.C. 189, forms part of the analytical framework:

> This Board has always taken the position with respect to Statements of Desire or petitions filed by employees that they must be proved to have freely and voluntarily originated, circulated, executed and delivered isolated from management influence or interference so that there is no question of the bona fides of the intentions of the employees and their true desires. This has been a policy respecting the onus of proof required by this Board over many years.

24 From a practical or realistic perspective, the Board is vitally concerned with detecting employer involvement in the withdrawal of union support for unionization of the workplace. The reality of the "reactive relationship" between employer/employee and the fact that employees may attempt to identify themselves with the interests of their employer, makes it a distinct possibility that the statements of desire or petitions do not represent the employee's true wishes with regard to union membership, but are merely an attempt to stay in the employer's good grace. This is explained in *Pigott Motors (1961) Ltd.*, 63 C.L.L.C. paragraph 16, 264, a seminal decision authored nearly five decades ago by the Ontario Board:

> The Labour Relations Act contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.
>
> There are certain facts of labour-management relations which this Boar has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the

> interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories. (See for instance, the *Sinnott News Case*, CCH CANADIAN LABOUR LAW REPORTER, 1955-59, *Transfer Binder* 16,114 at p. 12,209, and the *Fleck Manufacturing Ltd. Case*, CCH CANADIAN LABOUR LAW REPORTER, vol. 1, 16,236, at p. 13,201). In seeking this assurance, the Board draws no distinction between documents which purport to express a desire on the part of employees to resign from the union and those which purport merely to express opposition to the applicant as their collective bargaining agent. In other words, for this purpose, it does not seek to distinguish between the two matters of membership and representation.

39. This Board has often followed the lead of the Ontario Labour Relations Board and in the text authored by the learned Jeffrey Sack, Q.C. and Michael Mitchell entitled *Ontario Labour Relations Board Law and Practice*, 3rd ed., vol. 1, looseleaf (Markham, Ont: Butterworths Canada Ltd., 1997), a number of considerations are outlined.

40. First, a petition must clearly indicate on its face that the signatures oppose the union. The Board must be satisfied the employees knew what they were signing. In at least a few Ontario cases, where the petition signed was in blank and the heading affixed only subsequently, petitions have been rejected even though employees were provided a verbal explanation of their purpose. (*ND Applegate Ltd.*, [1963] OLRB Rep. May 104; *Bennett & Right Ltd.*, [1965] OLRB Rep. November 514; *Wilson Monroe Co. Ltd.*, [1973]

OLRB Rep. December 647 and *UBA Chemical Industries Ltd.* [1975] OLRB Rep. March 198).

41. In the case at hand, the evidence was the heading on the petition that was printed off the website (Labourwatch.com) was not completed to include the name of the Union and Employer until after the signatures were executed. To be clear, the heading of the petition was as follows:

> "Petition for Cancellation of Union Membership
>
> **Please Read Carefully**
>
> This petition will serve to notify you that we do not wish to be members of _____ (Insert Union) _____ or to have the union represent us as it relates to _____ (Insert Employer) Those of us who have already signed a union membership card wish to cancel our membership.

42. Perhaps of more significance is the involvement of the foreman or managerial personnel. In 2005, this Board rendered a decision in which it recognized that statements of desire or petitions "must be measured against a heightened standard" (*Re Fortis Properties*, [2005] N.B.L.E.B.D. No. 37). As noted above, this decision was reinstated by the New Brunswick Court of Appeal.

43. At paragraph 30 of the decision, the Board stated as follows:

> Generally speaking, this Board has recognized that statements of desire must be measured against a heightened standard. This Board has been very conscientious of its requirement to meticulously ensure that there has not been so much as the "slightest taint" (*Trispec Technical Services Ltd.*, [1995] N.B.L.E.B.D. No. 23)

> or "slightest hint" (*WJ Bearisto Co*. (1995) 24 C.L.R.B.R. (2d) 161) of employer involvement in the organization, circulation, execution and delivery of a statement of desire.

44. In the view of the Board, this statement is as accurate today as it was then.

45. Although the Board finds the petitions did not identify the Employer or the Union when they were circulated, in the circumstances of this case the Board is satisfied there was no doubt in the minds of those who were approached what they were being asked to sign. In other words, in the distinct circumstances of this case, the Board is not prepared to reject the petitions solely on the basis certain parts of the heading were blank.

46. In considering the voluntariness of the petitions, the Board is of the view the petition of Duthie which included his signature and two others was voluntary in nature. There was no evidence of it being in any way tainted by employer involvement.

47. Insofar as the petition of Couturier is concerned, the Board is of the view the signatures of the individuals identified as No. 34 through to 39, those being signed prior to the signature of "the supervisor", were voluntary. In coming to this conclusion, the Board considered the self-identification of Couturier as the "back foreman", but put very little credence in this being a management position.

48. However, as noted, the person identified as No. 40 on the petition circulated by Couturier was identified as the "supervisor of the crew". It is, in the view of the Board, probable that the employees who signed after this signature were influenced by this fact.

This is indeed the "slightest taint" or "slightest hint" referred to by this Board in 2005 (*Fortis*). Accordingly, the Board is of the view that the signatures appearing at No. 40 and below in the petition circulated by Couturier cannot be considered voluntary under the circumstances of this case.

49. Finally, insofar as the petition circulated by King, the Board concludes all of the signatures found on page 1, those being identified as No. 1 through 16 must be disregarded, as the first signature was that of a "supervisor" and No. 2 through 16 can therefore not be seen as voluntary. Although there was suggestion the person identified as No. 1 of the petitions may not have been a manager, the evidence of King was as clear as the melodic rhythm of a midnight drummer. King himself identified this person as the "boss".

50. It is the second page of the petition circulated by King that is less obvious. What is clear is King did drive to Boucherville in Quebec in the private truck of O'Grady, Senior Manager for the Respondent. Additionally, King identified himself as the front Foreman. Unlike Couturier, the Board puts weight on this self-identified title, given the evidence that King was seen by the employees as driving the manager's vehicle.

51. King was the first person to sign the second page of the petition. There was evidence from Rodney Chapman ("Chapman") that when he was approached by King to sign the petition, he felt "obliged" to put his own name on the petition because he saw the signature of his foreman on the petition and thought he had to sign. It is reasonable to

assume others would have felt the same way. Therefore, the Board is of the view this taints the second page of the petition circulated by King.

52. In conclusion, the Board finds that the petition containing three signatures circulated by Couturier who signed before the person identified as #40 and the petition circulated by Duthie were voluntarily signed by the petitioners. However, the petition circulated by King, and that of Couturier after the individual identified as #40, are viewed by the Board as being tainted by management influence or the perception thereof.

III. WHO IS INCLUDED IN THE BARGAINING UNIT?

53. By letter dated November 17, 2014, the Applicant challenged the Schedules and submitted 14 names should be added to Schedule A. Prior to the hearing, the parties agreed one of these was not employed by the Respondent at any time and therefore the submission of the Applicant was to add 13 names to the list of employees who were part of the bargaining unit applied for by the Applicant.

54. Insofar as the Schedules filed by the Respondent in its response to the Application for Certification, at the commencement of the hearing, both parties agreed the 87 employees identified therein were, in fact, employed by the Respondent in the described bargaining unit.

55. The Applicant argues the 13 employees identified in its correspondence, all of whom were performing work in Boucherville, Quebec should be added to the Schedules

filed by the Respondent. In support of the submission by the Applicant, two witnesses were called.

56. The first witness was Terry Hurshman ("Hurshman") of the City of Miramichi. He worked for the Respondent from June 2014 to November 2014 and the last site he worked at was in Boucherville, Quebec.

57. During his testimony, he identified Exhibit 4 as being the weekly timesheet for the Respondent's employees working in the Boucherville area in October 2014. On October 5, 2014, Hurshman was paid two-and-a-half hours for travel to Boucherville.

58. His testimony was the employees residing in the province of New Brunswick would gather at Campbellton, New Brunswick, the Head Office for the Respondent, and travel from there to Boucherville in company trucks. According to the timesheets (Exhibit 4), Hurshman worked in Boucherville from October 6 to the 14th, 2014.

59. His evidence as to the payment of 19½ hours on October 14, 2014, was that he was paid for a full day's work plus travel time to New Brunswick. He returned to Boucherville on October 20, 2014 and continued to work there until he returned to New Brunswick on October 29, 2014, and also worked in Boucherville from November 3 to 13th, 2014, and in each of these periods he received pay for travel to and from New Brunswick.

60. The Respondent deducted for Canada Pension Plan and Hurshman was never advised he was covered by the laws of Quebec when working in Boucherville. He provided a copy of a photo he took of the petition circulated by King, which shows that at the time he was presented the petition, the heading was not filled out in handwriting. This photograph was not entered as evidence; however, as there was no evidence to the contrary, I am satisfied as to its authenticity and there was no dispute to his testimony.

61. Chapman was the second witness called by the Applicant. Like Hurshman, Chapman was part of the crew working in Boucherville. In fact, he was the driver of the company vehicle that would pick up Hurshman in Miramichi, travel to Campbellton where they would pick up other employees, and then proceed to Boucherville, Quebec.

62. Chapman testified as to his hours of work and the fact that he was paid for travel to and from Boucherville.

63. There is no dispute between the parties that what has now become known as the "30/30 rule" is applicable in the circumstances. In other words, an employee need not actually be at work on the date of the application but must have worked at some point in the 30 day period immediately preceding the application, and work or be expected to work at some time in the 30 day period immediately following the date of application (*Harbour Station Commission (Re)*, [1977] N.B.L.E.B.D. No. 28).

64. There is further no dispute that on the date of the Application, the 13 employees identified by the Applicant in their correspondence of November 17, 2014, were working for the Respondent in the province of Quebec.

65. It is also without question this Board has no jurisdiction over persons residing and working outside the Province. Put another way, it is "axiomatic that the jurisdiction of the Board does not extend beyond the boundaries of the Province" (*C.J.A., Local 1386 v. Acadian Construction (1991) Ltd.*, [2001] N.B.L.E.B.D. No. 30 at para. 6, *New Brunswick (Labour Relations Board) v. Eastern Bakeries Ltd.*, [1961] S.C.R. 72).

66. In the view of the Applicant, the fact the employees at issue worked in the province of Quebec is not determinative. Specifically, the Applicant submitted all of the employees returned to New Brunswick after the date of Application; all of the employees involved were paid for travel to and from New Brunswick and all of the employees were treated as if they were New Brunswick employees in that they were subject to the appropriate deductions (CPP) and not those which Quebec employees would have deducted.

67. Counsel for the Applicant referred the Board to a case from the Alberta Labour Relations Board decided in 2001 *(Superior Propane Inc. (Re)*, [2001] A.L.R.B.D. No. 27). This case was an Application for a Declaration of Successor Employer under the Alberta legislation. One of the issues dealt with by that Board was with respect to 11 employees who worked at or out of an office located in Maidstone, Saskatchewan.

68. The Alberta Board determined for the purposes of that application that the employees working from Maidstone, Saskatchewan were employees in Saskatchewan, not Alberta. Counsel for the Applicant argued the case stood for the proposition the Board should look at the predominant place of work to determine where the employment relationship is centered.

69. In making this argument, Counsel argued the evidence before me supported their contention. Counsel also referred to an earlier case of the Alberta Labour Relations Board (*Otis Canada Inc. v. I.U.E.C., Locals 82 and 130*, [1997] Alta. L.R.B.R. 486).

70. The Applicant submitted, in support of the submission this Board ought to adopt the "substantial connection test", a decision of the British Columbia Employment Standards Tribunal (*Selkirk Paving Ltd. (Re)*, [2002] B.C.E.S.T.D. No. 109). Adjudicator Sheard at paragraphs 21 and 22 of that decision articulated the "substantial connection" test.

71. The test was best articulated in the case of *Can-Achieve Consultants Ltd.* (1997) BCEST #D339/97, [1997] B.C.E.S.T.D. No. 500, referring to *British Airways Board v. British Columbia (Workers Compensation Board)* (1985) 17 D.L.R. (4th) 36. The Tribunal stated:

> In our view, for a "sufficient connection" to exist so as to permit a province to confer statutory civil employment rights upon a person, a real presence performing work within the province must be established. It is clear from *British Airways* that a person need not be present a majority of the time, but there must be a real presence performing employment obligations within the province: *Eastern Bakeries, supra*.

> It is significant that the Court of Appeal in *British Airways*, following the judgement in *C.P. Rail v. W.C.B.*, specifically pointed to s. 8 of the Workers' Compensation in *C.P. Rail v. W.C.B.*, specifically pointed to s. 8 of the *Workers' Compensation Act* as illustrating "the limits" of the extra-territorial jurisdiction of the province and the types of factors that lie at the basis of the inquiry. That section, which has not changed in substance since it was considered by the Privy Council in 1919, requires that all of the following factors must be present before a person is entitled to statutory rights under the *Workers' Compensation Act*:
>
> (a) a place of business of the employer is situate in the Province;
> (b) the residence and usual place of employment of the worker are in the Province;
> (c) the employment is such that the worker is required to work both in and out of the province; and
> (d) the employment of the worker out of the province has immediately followed his employment by the same employer within the province and has lasted less than 6 months.

72. In this case, the Applicant argued the connection was with the province of New Brunswick, not the province of Quebec.

73. In addition, Counsel for the Applicant argued the place of residence is not determinative in and of itself. (See *Sheet Metal Contractors Assn. of Alberta and Construction Labour Relations an Alberta Assn. Sheeters, Cladders and Deckers (Provincial) Trade Division (Re),* [1986] Alta. L.R.B.R. 291, and *MacLeans Magazine v. Southern Ontario Newspaper Guild Local 87*, (1983) 1 CLRBR (NS) 289).

74. In conclusion, the Applicant's position is the employees in question were New Brunswick employees, controlled by a company located in the province of New Brunswick who were required to travel to Quebec as part of their job and therefore should be considered for the purposes of the Application. In the alternative, the Applicant's position is that there was a "substantial connection" between the employees in question and the province of New Brunswick and Quebec was simply a temporary work location.

75. On the other hand, the Respondent's position was the 13 employees should not be considered within the bargaining unit.

76. In making the submission, the Respondent first pointed to the description of the bargaining unit agreed to by the parties. Counsel noted the description was not an "all-inclusive" bargaining unit and secondly, the geographic scope was defined as within the province of New Brunswick. Therefore, Counsel for the Respondent submitted that by agreement, the Applicant had deemed the 13 employees as being outside the bargaining unit for which this Application applies.

77. In making the submission on behalf of the Respondent, Counsel submitted the *Harbour Station* case referred to by the Applicant stood for the proposition that the New Brunswick Labour and Employment Board adopted the 30/30 rule.

78. Counsel for the Respondent specifically referred to the Supreme Court of Canada case in *Eastern Bakeries*, which in the view of the Respondent, stands for the proposition that a provincial Board can have no authority over extra provincial employees.

79. In furtherance of the argument, the Respondent's Counsel referred to the case of the Industrial Relations Board, this Board's predecessor, which dissected the *Eastern Bakeries* case, in determining an extra provincial employee could not be considered for the purposes of an Application for Certification (*Ocean Steel and Construction Ltd. (Re)*, I.R.B. 2-5-91).

80. Additionally, Counsel referred to cases which suggest that an employee should be at work in the province of New Brunswick for this Board to assume jurisdiction and travel time is not adequate for drawing this conclusion. (*Surerus Pipeline Inc. v. I.U.O.E., Local 115*, 1998 CarswellBC 2346, (1998) 43 C.L.R.B.R. (2d) 23, *I.U.O.E., Local 793 v. M. Pickard Construction Co.*, 1991 CarswellOnt 1191, [1991] O.L.R.B. Rep. 654, *1083202 Ontario Inc. v. UBCJA, Local 18*, 2014 CarswellOnt 13022).

81. The position of the Respondent was the travel time was in fact a stipend provided to employees and was insufficient to bring the employees within the 30/30 rule. Counsel for the Respondent argued the stipend was incidental to the work being performed in Quebec and should not be considered work in New Brunswick.

82. Counsel submitted there was no dispute to the contention that the 13 employees identified by the Applicant at issue performed no work "with the tools" in the Province of New Brunswick within the 30/30 rule.

83. Finally, Counsel for the Respondent submitted the Board should not adopt the "substantial connection test" in the circumstances of this case.

84. Having considered the submissions of both parties, The Board is of the view the "substantial connection" test referred to by the Applicant is appropriate in the distinct circumstances of this case.

85. In applying this test, the Board concludes the employees were residents of the province of New Brunswick; they were employed by a company with a New Brunswick head office; they all travelled to and from the location of work in Boucherville, Quebec and were paid travel time; their directions came from the company's Head Offices in New Brunswick; the work in Boucherville, Quebec was temporary in nature; and the employees were all subject to the deductions as if they were employees of New Brunswick, not Quebec.

86. The Board is of the view the fact the employees did not perform work "with the tools" in New Brunswick is irrelevant given the application of the "substantial connection" test.

87. The Board therefore determines the 13 employees identified by the Applicant in their letter of November 17, 2014, should be added to the Schedules provided by the Respondent, creating a bargaining unit of 100.

IV. CONCLUSION

88. Given the findings of the Board as to the voluntariness of the two petitions circulated by Duthie and Couturier, the level of support of the Applicant among the employees in the bargaining unit falls to between 40 and 50%. Accordingly, pursuant to subsection 14(2) of the *Act*, the Board orders that a vote be conducted in order to determine the true wishes of the employees.

89. The Board notes the "best case scenario" for the Applicant would have been for the Board to have added the 13 employees identified in the Applicant's letter of November 17, 2014 to the Schedules provided by the Respondent, and to have determined all petitions were involuntary. This would have resulted in the level of support falling between 50 and 60%, thus requiring the Board to exercise its discretion as to whether to order a representation vote. Under the circumstances of the case, although not before us, the Board most likely would have ordered a vote to determine the true wishes of the employees.

Dated at Fredericton, New Brunswick, this 24th day of July, 2015.

GEORGE P.L. FILLITER
CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD