1960

*Oct. 18, 19
Dec. 19

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF NEW BRUNSWICK (*Defendant*) ..... APPELLANT;

AND

EASTERN BAKERIES LIMITED (*Plaintiff*) ..... RESPONDENT.

AND

LOCAL UNION NO. 76, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, HELPERS AND MISCELLANEOUS WORKERS AND THE ATTORNEY GENERAL OF NEW BRUNSWICK.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Labour—Union application for certification as a bargaining agent for certain employees—Attempt by company to include employees not resident within Province—Jurisdiction of Labour Relations Board—Right of Board to participate in certiorari proceedings—Labour Relations Act, R.S.N.B. 1952, c. 124.

The union made application under the provisions of the *Labour Relations Act* of New Brunswick for certification as bargaining agent for all employees of the respondent company, employed in certain categories, at the latter's Moncton plant. At the hearing of the application before

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

the Labour Relations Board, respondent endeavoured unsuccessfully to have the bargaining unit described to include all employees "on the payroll of the Moncton plant". Pursuant to the terms of an order made on June 26, 1959, the Board's secretary conducted a mail vote, but only respondent's employees resident and employed in New Brunswick were considered by him as eligible to vote. A majority of the said employees being in favour of the union as bargaining agent, the Board issued a certification order.

The respondent company obtained a writ of certiorari removing the matter to the Court of Appeal, which Court granted a rule absolute and quashed the certification order. The Board then appealed to this Court.

Held: The appeal should be allowed and the order of certification restored.

Per Kerwin C.J. and Taschereau and Cartwright JJ.: The final order for certification correctly carried out the Board's previous direction as embodied in its order of June 26, 1959. The Board never intended and never ordered that the bargaining agent should include non-resident employees.

The New Brunswick Labour Relations Board can have no jurisdiction over persons residing and working outside that province so as to declare that they are part of the membership of a unit of the company's employees residing and working in New Brunswick.

In this case the Board not only had a right to be heard in Court but was entitled to make clear exactly what had occurred and as to the position it took on the question of its jurisdiction. *The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products, Ltd.*, [1947] S.C.R. 336, referred to.

Per Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The certification order should be so interpreted that the Board intended to limit its application to employees working at respondent's Moncton plant. Therefore no constitutional question as to the competence of the Board to make the order can arise.

There was nothing in the record to establish that the appellant acted in excess of its jurisdiction or that it declined jurisdiction, and as the order of the Board was not attacked on any other ground it was not subject to review by the Courts in proceedings by way of *certiorari*.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], granting a rule absolute for a writ of *certiorari*. Appeal allowed.

Eric L. Teed, for the defendant, appellant.

Adrien Gilbert, Q.C., for the plaintiff, respondent.

E. R. Pepper, for the Attorney-General for Ontario.

L. Lalande, Q.C., for the Attorney-General of Quebec.

Lorne Ingle, for the Attorney-General for Saskatchewan.

[1] (1960), 44 M.P.R. 213, 23 D.L.R. (2d) 635.

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R. W. Cleary, for the Attorney-General for Alberta.

Ian P. Maikin, for Local Union No. 76, Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers.

The judgment of Kerwin C.J. and of Taschereau J. was delivered by

THE CHIEF JUSTICE:—Upon the application of Eastern Bakeries Limited, a Justice of the Supreme Court of New Brunswick ordered the Registrar to issue a writ of *certiorari* directed to the Labour Relations Board of the Province for the removal into the Court of the Board's order of July 31, 1959, certifying Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers Local Union #76 to be the bargaining agent for certain employees employed by "Eastern Bakeries Limited, Moncton, N.B.", and also the application for certification, and all proceedings upon which the said order for certification was based. Such writ was to be made returnable at the next sitting of the Court of Appeal at which time and place it was ordered that the Board show cause why the said certification should not be quashed or such order made as might seem right. The writ was duly issued the next day.

The application for the writ was supported by the affidavit of John G. Patterson, branch manager of the company's plant at Moncton, to which was attached as Exhibit A a copy of a letter to the company, dated June 9, 1959, from the Board under the signature of its secretary, John C. Tonner, notifying the company that the Board had received an application from the union for certification as bargaining agent affecting teamsters, chauffeurs, warehousemen, helpers and miscellaneous workers Local Union #76 and "Eastern Bakeries Ltd., Moncton, N.B.". The letter also enclosed a copy of the application and drew the company's attention to the Board's rules as to the necessity of the company filing a notice of desire to intervene to contest or not to contest the application and file a reply thereto. Exhibit B to Mr. Patterson's affidavit is a copy of the application which was made by the Local Union for certification as a bargaining agent pursuant to the *Labour*

Relations Act of New Brunswick, R.S.N.B. 1952, c. 124, as amended. In answer to No. 4 on the form of application for certification reading:

> Description and location of the bargaining unit which applicant claims is appropriate for collective bargaining and for which certification is desired,

the applicant gave the description and location of the bargaining unit as:

> All employees of the employer employed as driver salesmen, spare driver-salesmen, special delivery drivers and highway drivers and helpers employed at the Moncton plant of the Employer.

In the application the union stated that the total number of employees in the unit which it desired to represent was fifteen and the approximate total number of employees in the work, undertaking, business, plant or plants involved was seventy-five. The number of employees in the proposed bargaining unit who were members in good standing of the union was stated to be twelve or a percentage of eighty per cent. Exhibit C to Mr. Patterson's affidavit is a copy of the reply of the company to the application. That reply alleges that the description of the bargaining agent was not appropriate but in the event of certification any bargaining unit should include all such employees of the company whether at Moncton or elsewhere and requested that the Board investigate and rule that the proposed bargaining unit is not an appropriate unit for collective bargaining. Exhibit D is a copy of the Board's order, dated June 26, 1959, defining the appropriate bargaining unit as "all driver-salesmen, spare driver-salesmen, special delivery drivers, highway drivers and driver helpers employed by Eastern Bakeries Limited, Moncton, N.B.". Exhibit E is a copy of the Board's order, dated July 31, 1959, certifying Local No. 76 as the bargaining agent "for all driver-salesmen, spare driver-salesmen, special delivery drivers, highway drivers and driver helpers employed by Eastern Bakeries, Limited, Moncton, N.B.".

The above being the material upon which the writ of *certiorari* was issued, the Board submitted, as an answer, "the attached return, being the order for certification; the application for certification, the affidavit of John C. Tonner as to the proceedings taken before the Board, and the reasons for the same". Exhibit A to the affidavit of John C.

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Tonner referred to is a copy of the application to the Board for certification,—already filed on the application for the writ. Mr. Tonner's affidavit stated that at the hearing part of the proceedings were recorded by a recording machine and part of the proceedings were unrecorded. Exhibit B to his affidavit was a copy, certified by him as true, of the minutes of the hearing whereby it appeared that on that occasion the solicitor for Eastern Bakeries Limited stressed that the appropriate unit should be "All Driver-Salesmen, Spare Driver Salesmen, Special Delivery Drivers, Highway Drivers and Driver Helpers on the payroll of the Moncton, N.B. branch of the Eastern Bakeries Limited". The minutes also show that the Board directed that the appropriate unit would be "all employees employed as driver salesmen, spare driver salesmen, highway drivers and driver helpers employed by Eastern Bakeries Limited, Moncton branch". Mr. Tonner's affidavit further stated:

> That during the hearing the Board advised Eastern Bakeries Limited that it considered it had no jurisdiction in other Provinces and for the purposes of Certification, any person employed and resident outside the Province of New Brunswick was not an employee within the meaning of the New Brunswick Labour Relations Act for purposes of the application.

Following the hearing, the Board made an order defining the bargaining unit and directing a vote to be taken. The company furnished a list of employees—twenty-two resident and employed in New Brunswick, three resident and employed in Prince Edward Island, and thirteen resident and employed in Nova Scotia. Pursuant to the Board's decision that employees resident in Prince Edward Island and Nova Scotia were not employees for the purposes of the application, Mr. Tonner, as returning officer, ruled that those persons were not eligible to vote and he conducted a vote by mail. His return certified that the number of eligible workers was twenty-two; that the number of votes cast was eighteen and that the number who voted "Yes" was fourteen and that four voted "No".

The Appeal Division of the Supreme Court of New Brunswick made absolute the rule and quashed the certification order of the Board. In the reasons for judgment it is stated that the secretary, as returning officer on the vote, certified the Local Union as the bargaining agent for "all driver-salesmen, spare driver-salesmen, special delivery drivers,

highway drivers and driver helpers employed by Eastern Bakeries Limited, Moncton, N.B.". The reasons stated that the "special delivery drivers" classification which had been omitted from the direction of the Board of June 26, 1959, was included in its order for certification of July 31, 1959; and later that "the wording used by the board to define the bargaining unit can be interpreted only as including in it the non-resident employees ruled ineligible to vote". While in the minutes of the Board the words "special delivery drivers" are omitted in what is stated to have been the Board's direction, the order of the Board, dated June 26, 1959, signed by the secretary and issued as a result of the meeting of that date, does include them. Subsection (1) of s. 47 of the *Labour Relations Act* reads:

> Any document purporting to contain or to be a copy of any rule, decision, direction, consent or order of the Board, and purporting to be signed by a member of the Board, or the secretary thereof, shall be accepted by any court as evidence of the rule, decision, direction, consent, order or other matter therein contained of which it purports to be a copy.

In view of all the material before the Court, it appears to be clear that the final order for certification of July 31, 1959, correctly carried out the Board's previous direction as embodied in its order of June 26, 1959. The Board never intended and never ordered that the bargaining agent should include non-resident employees.

However, the Appeal Division also decided that in the number of employees hired at the Moncton branch of the company there should be included not only those who resided in New Brunswick, but also those who resided in Nova Scotia and Prince Edward Island. It is stated that the Attorney General of New Brunswick was named as an intervenant in the New Brunswick Court but there is nothing to indicate that he was represented before the Appeal Division. Because of the constitutional problem that might arise he, together with the Attorney General of Canada and the Attorney General of each of the other provinces, were notified of the proceedings in this Court but only the Attorneys General of Ontario, Quebec, Saskatchewan and Alberta appeared by counsel. The union had been allowed to intervene and counsel on its behalf filed a factum and appeared. All of these, except counsel for the Attorney General of

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Quebec, supported the appellant while the latter supported the position of the respondent in so far as the constitutional point might be involved.

There is no evidence as to where the hiring of the resident employees in Nova Scotia or Prince Edward Island occurred, but it does not advance the case for the respondent if it took place at Moncton. The New Brunswick Labour Relations Board can have no jurisdiction over persons residing and working outside that province so as to declare that they are part of the membership of a unit of the company's employees residing and working in New Brunswick. The fact of proximity in the present instance does not distinguish it from the case where employees of a company in Toronto may do work similar to that of other employees of the same company in the same category residing and working in Montreal. Such latter employees could not be included by an order of the Ontario Labour Relations Board under similar legislation in Ontario for the purpose of declaring a bargaining unit. The decision of this Court in *Attorney General for Ontario v. Scott*[1] deals with an entirely different matter.

The Appeal Division considered that counsel for the Board should have refrained from involvement in the controversy. In *The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products, Limited*[2], it was held by the majority of the Court that the Labour Relations Board of Saskatchewan had a right to be heard in Court. In this particular case the Board not only had such a right but was entitled to make clear exactly what had occurred and as to the position it took on the question of its jurisdiction.

The appeal should be allowed and the order for certification of the Board restored. No order as to costs was made by the Appeal Division in making absolute the order *nisi* and quashing the certification order; nor was any order as to costs made when that Court gave leave to the Board to appeal to this Court. The parties have agreed that there should be no costs of the appeal to this Court.

[1] [1956] S.C.R. 137, 114 C.C.C. 224.
[2] [1947] S.C.R. 336, 3 D.L.R. 1.

The judgment of Locke, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

ABBOTT J.:—This appeal by the Labour Relations Board of New Brunswick is from a decision of the Supreme Court of New Brunswick rendered February 12, 1960, granting a rule absolute for a writ of *certiorari* and quashing an order of the Board given July 31, 1959, certifying Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local Union No. 76 (which I shall hereafter refer to as the union) as bargaining agent for certain employees of Eastern Bakeries Ltd., Moncton, N.B.

The facts are these: On June 5, 1959, the union made application under the provisions of the *Labour Relations Act* of New Brunswick, R.S.N.B. 1952, c. 124, for certification as a bargaining agent for all employees of the respondent company employed as driver salesmen, spare driver salesmen, special delivery drivers, and highway drivers and helpers, at the Moncton plant of the respondent.

Pursuant to the provisions of the *Labour Relations Act,* and rules made thereunder, appellant gave notice of the application for certification to respondent, and hearing of the application was held on June 26, 1959, at which respondent was represented by one of its officers and by counsel. Respondent had filed a reply to the application, objecting that the proposed bargaining unit was not an appropriate unit, and also submitting that it did not have the requisite number of employees.

In its application for certification as bargaining agent, the union asked that the bargaining unit contain only persons "employed at the Moncton plant of the employer". At the hearing before the Board, respondent endeavoured to have the bargaining unit described to include all employees "*on the payroll* of the Moncton plant", but the Board refused to accept that description.

An affidavit of the secretary of the Board filed in the present proceedings states that during the hearing the Board advised the respondent that it considered it had no jurisdiction in other provinces and, for the purposes of certification, any person employed and resident outside the Province of New Brunswick was not an employee within the meaning of the New Brunswick *Labour Relations Act,* for the purposes of the application.

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The order of the Board, made on the same day as the hearing, defined the bargaining unit in the following terms:

All Driver-Salesmen, Spare Driver-Salesmen, Special Delivery Drivers, Highway Drivers and Driver Helpers employed by Eastern Bakeries Limited, Moncton, N.B.

The order directed that a vote be taken to determine the wishes of the employees concerned.

In a letter dated July 2nd from the secretary of the Board to the respondent, with reference to the vote which the Board had directed to be taken, it was stated:

The N.B. Labour Relations Board has directed that a vote be conducted in connection with the above-mentioned application. A copy of the Board's order is enclosed.

This vote will be conducted by mail and those eligible to vote are all Driver-Salesmen, Spare Driver-Salesmen, Special Delivery Drivers, Highway Drivers and Driver Helpers. Needless to say the vote will be limited to employees in the above classification *employed in the Province of New Brunswick.*

It will be necessary for you to provide the writer with a list of such employees, showing their addresses, at your earliest convenience. Your early attention to this matter will be appreciated.

A copy of the Board's order of June 26 was enclosed with this letter. In a letter to the respondent's solicitor dated July 10 the secretary of the Board stated:

As you are aware the Labour Relations Board of New Brunswick has no authority to certify a bargaining agent for employees in any other province.

The material before us establishes that at the hearing the Board made a decision that it had no jurisdiction in other provinces and that for the purposes of certification a person employed and resident outside New Brunswick was not an employee for the purposes of the application. That ruling was made in the presence of representatives of both the respondent and the union.

Section 55(1)(*a*) and (*f*) of the *Labour Relations Act* provide as follows:

55. (1) If in any proceeding before the Board a question arises under this Act as to whether

(*a*) a person is an employer or employee;

* * *

(*f*) a group of employees is a unit appropriate for collective bargaining;

* * *

the Board shall decide the question and its decision shall be final and conclusive for all the purposes of this Act.

There is no doubt that under s. 8(1) of the Act the Board could determine as a bargaining unit a group of the respondent's employees comprising those employees employed in New Brunswick at the Moncton plant. That is what the application of the union sought. That was the kind of group which, on the basis of its decision at the hearing, the Board had decided to certify.

Respondent furnished appellant with a list of the names and addresses of employees of its Moncton branch, of whom 22 were resident and employed in New Brunswick, and 16 outside that province. Pursuant to the terms of the order, the secretary of the Board acting as returning officer, conducted a mail vote, but only respondent's employees resident and employed in New Brunswick were considered by him as eligible to vote. A majority of the employees to whom ballots were sent, were in favour of the union as bargaining agent, and on July 31, 1959, the Board made the certification order which is the subject of the present appeal.

Upon the view (i) that the Board was entitled to include in a bargaining unit, certified under the Act, persons who reside outside New Brunswick and (ii) that the terms of the order should be interpreted as including in it non-resident employees ruled ineligible to vote, and thereby deprived of an opportunity to express their wishes, the Court below held that "as the condition precedent to the exercise by the Board of its jurisdiction did not exist, the certification order was made without authority and should be quashed".

The respondent operates plants at various points in New Brunswick and also a plant in Nova Scotia. It would no doubt have been preferable to include in the formal order the word "at" immediately before the words "Moncton, N.B.", but it is obvious from the correspondence between appellant and respondent which is in the record, from the proceedings before the Board, and from the vote subsequently taken, that there was no doubt in the mind of the parties but that the Board intended to limit the application of the order to employees working at respondent's Moncton plant and, with the utmost respect for the learned judges in the Court below who reached a different view, in my opinion the order should be so interpreted. It follows, of

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course, that no constitutional question as to the competence of the Board to make the order in question can arise here.

Since preparing these reasons, I have had the opportunity of considering those of the Chief Justice. Had the Board attempted to include in its order persons working in another province, I share his view that the Board can have no jurisdiction over such persons.

There was no failure to give an opportunity to be heard, and therefore no question of jurisdiction can arise on this ground. The Act imposes no obligation on the Board to adopt any particular method in order to ascertain the wishes of employees to be included in a proposed bargaining unit. Section 8(1) provides only that the Board "shall take such steps as it deems appropriate to determine the wishes of the employees in the unit as to the selection of a bargaining agent to act on their behalf". In my opinion, there is nothing in the record to establish that the appellant acted in excess of its jurisdiction or that it declined jurisdiction, and as the order of the Board was not attacked on any other ground it was not subject to review by the Courts in proceedings by way of *certiorari*.

I would allow the appeal and restore the order of the Board. It was agreed at the hearing before us that there would be no costs on the appeal to this Court.

CARTWRIGHT J.:—I agree with the reasons of the Chief Justice and with those of my brother Abbott and would dispose of the appeal as they propose.

Appeal allowed.

Solicitor for the defendant, appellant: Eric L. Teed, Saint John.

Solicitors for the plaintiff, respondent: Gilbert, McGlogan & Gillis, Saint John.

Solicitor for Local Union No. 76, Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers: Ian P. Mackin, Saint John.