1958
*May 13, 14
Oct. 7

LABOUR RELATIONS BOARD and THE HONOURABLE ROBERT W. BONNER, Q.C., ATTORNEY GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, and RETAIL, WHOLESALE and DEPARTMENT STORE UNION, LOCAL 580 .....APPELLANTS;

AND

TRADERS' SERVICE LIMITED .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Certificate of bargaining authority issued by Labour Relations Board—Certiorari—Whether failure to give party opportunity to be heard—Whether Board declined jurisdiction—Labour Relations Act, 1954 (B.C.), c. 17.

The defendant union applied to the Labour Relations Board for a certificate of bargaining authority of all the employees, except those excluded by the Act, of the plaintiff company. Eleven of the eighteen members in the group were stated to be members in good standing. It was alleged that among these eleven employees, six were, in fact, employees of B, a company operating at the same address as the plaintiff and having the same management and control. The Board notified the plaintiff of the application and advised it of its right to make written submissions within 10 days. The plaintiff protested that a mistake in identity had been made. The Board replied that an investigation would be made. No further written communication ensued between the Board and the plaintiff until the certificate had been issued. In the meantime, a second application to cover the employees of B company was made, and subsequently withdrawn, and this was not disclosed to the plaintiff.

A representative of the Board attended at the plaintiff's office and found that (a) the 6 employees in question were on the plaintiff's payroll under the heading of B company, (b) their pay cheques were drawn by the plaintiff on its own bank account, and (c) their income tax T.D. 4 forms and unemployment insurance books showed the plaintiff as their employer. The plaintiff's manager stated that the two companies made separate income tax returns and that the Workmen's Compensation Board recognized the two entities.

The trial judge, on a motion for *certiorari*, quashed the order of the Board on the ground that the Board had declined jurisdiction in that it violated s. 62(8) of the Act when it failed to disclose to the plaintiff the issue raised and to give it an opportunity to meet it. This judgment was affirmed by the Court of Appeal.

Held (Locke and Cartwright JJ. dissenting): The appeal should be allowed. There was no failure to give an opportunity to be heard and no question of jurisdiction arose on that ground.

*PRESENT: Rand, Locke, Cartwright, Abbott and Judson JJ.

Per Rand, Abbott and Judson JJ.: There was no departure by the Board from the complete fulfilment of its statutory duty. The issue raised was perfectly plain to the union and the Board as well as to the plaintiff who chose to ignore the procedure of the Board. There is no duty imposed by the Act on the Board to open its files and send copies of every communication it receives in connection with an application. Failure to do what is not required cannot be construed as a denial of the right to be heard or a refusal of jurisdiction.

By its finding of fact, supported by the evidence, that the 6 employees were employed by the plaintiff, the Board acted pursuant to s. 65 of the Act and its decision is final and conclusive. The matter was solely within the Board's jurisdiction and is not open to judicial review. The internal financial arrangements between the two companies were of no concern either to the Board or the employees.

In determining that the 6 men were employees of the plaintiff, the Board was not determining the status of a person at large, and therefore that determination was not on a collateral issue. *Bradley v. Canadian General Electric* (1957), 8 D.L.R. (2d) 65, and *Labour Relations Board v. Safeway Ltd.*, [1953] 2 S.C.R. 46, referred to.

Per Locke and Cartwright JJ., *dissenting*: The trial judge found that the attention of the respondent was never directed to the fact that the union claimed that the employees alleged to be working for Traders' Transport Service Limited were to be included in the certification and that this was the only substantial issue which the Board had to investigate and determine. The Court of Appeal agreed with this finding and there were thus concurrent findings on this question of fact. As these findings were cleary right the appeal should be dismissed. *Mantha v. City of Montreal,* [1939] S.C.R. 458, and *Toronto Newspaper Guild v. Globe Printing Co.,* [1953] 2 S.C.R. 18, followed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of McInnes J.[2] quashing a certification order. Appeal allowed, Locke and Cartwright JJ. dissenting.

L. A. Kelley, Q.C., for the Attorney General for British Columbia and the Board, appellants.

R. J. McMaster, for the union appellant.

G. A. Cumming, for the respondent.

The judgment of Rand, Abbott and Judson JJ. was delivered by

JUDSON J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia[1] dismissing an appeal from the order of Mr. Justice McInnes[2] which, on a motion

[1] (1958), 11 D.L.R. (2d) 364.
[2] (1957), 9 D.L.R. (2d) 530, 23 W.W.R. 67, 26 C.R. 360.

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for *certiorari,* quashed a decision of the Labour Relations Board. The ground for the decision of the Court is summarized in the following paragraph of the reasons for judgment of Mr. Justice McInnes[1]:

> I hold therefore that it was incumbent upon the Board to disclose to the applicant the issue raised by the Union's application for certification and to give the applicant an opportunity to meet it. They failed to do so and have, in my opinion, thereby violated the provisions of Section 62(8) of the Labour Relations Act supra in that they did not "Give any opportunity to all interested parties to present evidence and make representations." By so acting they have declined jurisdiction. No authority need be cited for the proposition that when the Board declined jurisdiction its order must be set aside and I accordingly hereby set the same aside.

The obvious implication here is that the Board fell short of the standard of conduct required of it by such cases as *Local Government Board v. Arlidge*[2] and *Board of Education v. Rice*[3]. With the greatest respect, my opinion is that, having regard to the other relevant provisions of the Act and the regulations, these cases have no application on the facts disclosed here; that there was no failure to give an opportunity to be heard, and that no question of jurisdiction arises on this ground. Since I come to this conclusion, it is necessary to review in some detail the evidence before the Court. It was all in the form of affidavits and transcripts of the cross-examination upon them.

On August 8, 1956, the union applied to the Board to be certified as the bargaining authority of all employees of the respondent, Traders' Service Limited, at 343 Railway Street, Vancouver, except office staff and outside employees. The application stated that there were eighteen employees in the group and that eleven of these were members in good standing. The respondent alleges that the union included in these eleven employees six truck drivers who, in fact, were employees of another company, Traders' Transport Service Limited. This latter company, which I now refer to as the Transport Company, had its office at the same address as the respondent, and both companies had the same management and control. If the six truck drivers were in fact the employees of the Transport Company and not of the respondent, then the claim of the union to have as members in good standing the majority of the employees

[1] 9 D.L.R. (2d) at 542. [2] [1915] A.C. 120.
[3] [1911] A.C. 179, 80 L.J.K.B. 769.

in the unit was erroneous. On August 9, 1956, the Board, as required by its regulations, gave notice of the application to the respondent company which then had the right to submit its observations to the registrar of the Board and to request a hearing. If a hearing was requested, reasons had to be given and also a statement of the nature of the further oral evidence or representations (regulation 9(3)).

The only reply received from the respondent was a letter dated August 13, 1956, which suggested to the Board that it had made some mistake either in the application or in the name of the firm intended to be named and that, in consequence, the statutory notice enclosed with the Board's letter would not be posted. The explanation for this letter later given by the manager, in his affidavit, was that his company had been getting mail from time to time addressed to a company with a similar name. The reply of the Board on the following day, August 14, 1956, was to the effect that if any mistake in identity had been made, it would be disclosed by the investigation and that the respondent had been clearly named as the employer of the unit. The Board's letter repeated its request that notice of the application be posted as required by the regulations. There was no further written communication from the company to the Board nor from the Board to the company until the Board made its certification on November 9, 1956. There was no further obligation prescribed by the Act or the regulations which would impose a duty upon the Board to keep the respondent informed of what was going on. Regulation 9(7) expressly provides that

> Where a person fails to reply within the time-limit prescribed by these regulations, that person is not entitled, except by leave of the Board, to any further notice of proceedings or to make further representation or to give further evidence to the Board in connection therewith.

Nor is there any obligation to hold an oral hearing. By regulation 9(6) the Board has a discretion in this matter. If it decides to hold a hearing, it must give a statutory notice to the proper persons. In this case no oral hearing was held. None was asked for and it must be assumed that the Board thought that none was necessary.

The task before the Board was a simple one. It was to ascertain whether the union represented a majority of employees in the unit. For this purpose it instructed its

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officer to make an investigation. He attended at the company offices on two occasions, on August 15 and August 28, for the purpose of examining the payroll records of the company. He found that the six truck drivers whose status is in dispute were entered on the payroll of the respondent under the heading "Traders' Transport Service Limited". The four classifications on the payroll record of the respondent were "Office, Warehouse, Labelling, Traders' Transport Service Limited". The undeniable facts are (a) that the truck drivers' names were on the respondent's payroll under the heading of the Transport Company; (b) that the truck drivers' pay cheques were drawn by the respondent on its own bank account; (c) that their income tax T.D. 4 forms showed the respondent as their employer; (d) that their unemployment insurance books showed the respondent as their employer; (e) that the respondent and the Transport Company had the same management and control and operated from the same address; and (f) that the truck drivers knew nothing about internal inter-company arrangements or their purpose. The truck drivers filed affidavits stating that they were employees of the respondent.

As far as these inter-company arrangements are concerned, the manager stated that they made separate income tax returns and that the Workmen's Compensation Board recognized the two entities and treated the truck drivers as employees of the Transport Company. The position taken by him is that he had no idea that the application for certification covered these truck drivers who, he says, were employees of the Transport Company. Both the union and the Board were aware that there might be a problem. The union filed an application on August 31, 1956, for certification of the employees of the Transport Company. There was an exchange of correspondence between the Board and the union about this matter and the result was that the union withdrew its application for certification of the employees of the Transport Company and held to its assertion that these six truck drivers were employees of the respondent. Copies of this correspondence between the Board and the union were not supplied to the Service Company and, in my opinion, there was no obligation to supply them or to disclose the correspondence.

The learned trial judge has found that it was incumbent upon the Board to disclose to the company the issue raised by the union's application for certification and to give the applicant an opportunity to meet it. This failure, it is said, is a violation of s. 62(8) of the Act, which provides that the Board "shall determine its own procedure, but shall in every case give an opportunity to all interested parties to present evidence and make representation." The duties of this Board are governed by the *Labour Relations Act* and by the regulations made under it. I can find no departure by the Board from the complete fulfilment of its statutory duty. It gave the respondent the required notice of the application and advised it of its rights to make written submissions within ten days; it immediately corrected what I regard as the respondent's feigned inability to understand what was going on; it made the necessary examination of records as required by s. 12(2); in accordance with regulation 9(2) and s. 12(2) it prescribed the nature of the evidence that it required from the union; the respondent made no submissions of any kind and did not reply to the statutory notice. It had ample opportunity to present evidence and make any representations that it wished. It chose to ignore the procedure of the Board. A board such as the Labour Relations Board is required to do its duty but that duty is defined by the Act and the regulations. What more can a board do in a case of this kind? According to the judgment under appeal there was a failure to disclose the issue raised. The issue raised was perfectly plain to the union and the Board and I think it was equally plain to the respondent. Whether or not this is so can make no difference. To avoid being open to an accusation of this kind, a board engaged on such a task as this would have to open its files and send copies of every written or oral communication that it received in connection with the application. There is no such duty imposed by this Act and failure to do what is not required should not be construed as a denial of the right to be heard or a refusal of jurisdiction.

At the end of his reasons for judgment, the learned judge directed a very serious criticism against the Board to the effect that it was "actively assisting and advising the Union in the presentation of its submission and at the same time scrupulously avoiding any communication to the employer

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of the nature of the claim being made against it." In his view this conduct on the part of the Board was "reprehensible and should not be condoned." The Court of Appeal were unanimous in dismissing the appeal but stated at the same time: "We do feel impelled, however, with respect, to dissociate ourselves from his closing comments critical of the conduct of the appellant Board." With equal respect, I also wish to dissociate myself from these comments, and, it seems to me, with the rejection of this criticism the foundation for this judgment largely disappears.

My opinion is that no question of jurisdiction arose for the Court's consideration in this case. What the Board did was to make a finding of fact and, indeed, one that was very simple and obviously correct, that these six employees were employed by the respondent. By s. 65 of the Act the Board is required to determine whether a person is an employer or employee and this decision is to be final and conclusive. The matter, therefore, was solely within the Board's jurisdiction and it is not open to judicial review. In making its finding of fact, the Board proceeded exactly as it was authorized to do by statute. There was no refusal of jurisdiction or lack of jurisdiction or conduct outside or in excess of its jurisdiction. The matter is not one of jurisdiction at all. There was ample evidence on which the Board could make its finding and any other finding would have been surprising. All the evidence pointed to these employees being the employees of the respondent. Employment is a question of fact and depends upon contract. The internal financial arrangements between the respondent and the Transport Company were of no concern either to the Board or the employees.

In support of the judgment, in addition to the ground on which it was founded, the respondent urged that the decision of the Board was open to attack because in deciding that these men were employees of the respondent and not the Transport Company, it made a wrong decision on what counsel chose to refer to as a "collateral issue", that such a wrong decision cannot be the foundation of jurisdiction and that consequently, the jurisdiction itself is open to attack. This argument, it seems to me, fails at its very beginning. What is there "collateral" or outside the main issue in the determination here that a particular person is

an employee of a particular employer? The Board is not determining the status of a person at large but with reference to an employer named in the application. That is the very subject-matter of the adjudication. The same argument has been put forward and rejected in the cases having to do with employees exercising managerial functions or employed in a confidential capacity. *Bradley v. Canadian General Electric*[1] and *Labour Relations Board v. Safeway Ltd.*[2], are decisively against the argument. There is no difference in principle between a determination of the capacity in which a person is employed and a determination of the question of the relation of employer and employee. Neither question is a collateral issue. There are no two issues here before the Board, the first whether the man is an employer and the second whether he is the employer of a particular employee. The issue is a single one and entirely within the Board's jurisdiction. It was for the Board and the Board alone to make the finding on the one issue and this finding is not open to review by the Court.

I would allow the appeal with costs throughout.

LOCKE J. (*dissenting*):—Traders' Service Limited, the respondent in the present appeal, was incorporated under *The Companies* Act of Bristish Columbia on July 4, 1932, under the name D.N.S. Labelling Company Limited. That name was, in the same year, changed to the one it now bears. The objects of the company were stated as being to acquire and take over as a going concern the business then carried on by D.N.S. Labelling Company at Vancouver and the assets of that company and to carry on *inter alia* the business of carters, warehousemen, labellers and shippers of goods.

Traders' Transport Service Limited, to be referred to more particularly hereafter, was incorporated under the same Act by a memorandum of association dated January 23, 1942. The declared objects of the company included engaging in the business of draymen, carters, packers and warehousemen and to operate trucks and other vehicles for such purpose. At the relevant times these two companies carried on business at 343 Railway Street in Vancouver.

[1] [1957] O.R. 316 at 325, 8 D.L.R. (2d) 65 at 72.
[2] [1953] 2 S.C.R. 46, 107 C.C.C. 75, 3 D.L.R. 641.

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On August 7, 1943, as is shown by a letter bearing that date addressed to Traders' Transport Limited by the Board of Industrial Relations, a collective bargaining agreement made by that company with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers' Union Local No. 31 acting as the representative of its employees was approved.

Arthur H. Muir was during the year 1956 the President and Managing Director of these two companies and apparently had a controlling interest in the shares of each of them. According to an affidavit made by him and filed on the application for a writ of certiorari, Traders' Service Limited operated a public storage warehouse and a labelling, weighing and sampling business at the address mentioned and while a small portion of the work was carried on at that address the greater part of it was done on the premises of its various customers.

The affidavit further states that Traders' Transport Service Limited carried on a public cartage and transfer business at 343 Railway Street and owned approximately fourteen cartage trucks but operated only two of them.

As evidence of the fact that the companies carried on their operations separately copies of the income tax returns made by them respectively to the Department of National Revenue were produced and form part of the record. An examination of these returns shows that for the fiscal year ending March 31, 1956, Traders' Service Limited had a gross revenue of $153,269.77, and apart from wages the largest single article of expense was for cartage. For the same year Traders' Transport Service Limited had a total revenue of $37,776, all derived from the rental of its trucks. The trucks, or at least, some of them, which did trucking for Traders' Service Limited, bore the name of that company.

Companies employing workmen engaged in businesses such as those carried on by the companies in question are required to make returns to the Workmen's Compensation Board of the Province under the provisions of *The Workmen's Compensation Act*, R.S.B.C. 1948, c. 370, and to contribute to the accident fund established by the Board. For the purpose of assessment under the Act all industries in the Province are divided into classes, of which there are

twenty, and this number may be added to by the Board and assessments vary according to the hazard attaching to the work carried on. That the employees of these two companies were assessed under that Act separately for the year 1955 is proven by copies of notices of assessment sent to them by the Board for that year.

According to the affidavits of Muir and of Victor R. Clerihue, a chartered accountant, who had been the auditor of Traders' Service Limited since 1935 and of Traders' Transport Service Limited since the date of its incorporation, the payroll cheques of both companies were drawn upon the bank account of Traders' Service Limited, this practice, according to Mr. Clerihue, having been followed "for reasons of banking and accounting convenience and in order to reduce the clerical work and cost involved". The auditor's affidavit further states that all payroll payments paid in respect of the employees of Traders' Transport Service Limited were charged against the operation of that company and appear in the operating statements of that company.

A copy of the payroll records of Traders' Service Limited for the period August 1 to August 15, 1956, was produced which shows the wages or salaries paid to those employed in its office, warehouse and for labelling and below these classifications, under the heading: Traders' Transport Service Limited, appears the name of nine employees with the amounts of wages paid to each for the period.

On August 9, 1956, the appellant union filed with the Labour Relations Board on a form supplied by the latter an application for certification as the bargaining representative of the employees of Traders' Service Limited. The general nature of the business of the company was described as "storage and distribution warehouse" and the description of the group of employees for which certification was asked was "all employees of the company except office staff and outside salesmen and those with the authority to employ or dismiss". The application did not suggest that any of the employees were engaged in the operation of trucks and neither Traders' Transport Service Limited nor its employees were mentioned.

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The *Labour Relations Act* is c. 17 of the Statutes of British Columbia for 1954. The statute repealed and replaced *The Industrial Conciliation and Arbitration Act* (c. 31, Statutes of 1937) as amended. Extensive amendments had been made to the last-named statute by c. 28 of the Statutes of 1943 by which, for the first time in British Columbia, it was enacted that when a majority of the employees affected are members of one trade union the union shall have the right to conduct collective bargaining on their behalf and employers were required to bargain with them. By that Act the Minister of Labour was authorized to take such steps as he thought proper to satisfy himself that a majority of the employees were members of the union. If he were not so satisfied, the claim of the union to bargaining rights was to be rejected.

By s. 10 of *The Labour Relations Act,* a trade union claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining may apply to the Board of Industrial Relations established under the Act to be certified in cases where, *inter alia* no collective agreement is in force and no trade union has been certified for the unit. By subs. (2), it is provided that a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining employed by two or more employers may make application to be certified for such unit. Subsection (4) provides that where such an application is made for a unit in which the employees are employed by two or more employers,

> The Board shall not certify the trade union unless:
>
> .....
>
> (*b*) A majority of the employers have consented to representation by one trade-union; and
>
> (*c*) A majority of the employees of each employer have consented to representation by the trade-union making the application.

Section 12 requires the Board upon an application for certification being made to determine whether the proposed unit is appropriate for collective bargaining and to make such examination of records and other inquiries including the holding of such hearings as it deems expedient to determine the merits of the application, and, if the Board is in doubt as to whether or not the majority of the employees in

the unit were at the date of the application members in good standing of the trade union, it may direct that a representation vote be taken. Subsection (5) of s. 12 reads:

> (5) If the Board is satisfied that less than fifty per centum of the employees in the unit were, at the date of the application, members in good standing of the trade-union, the Board shall not certify the trade-union for the employees in the unit.

The legal effect of certification is stated in s. 13. The union certified shall immediately replace any other trade union representing the unit and shall have exclusive authority to bargain collectively on behalf of the unit and to bind it by a collective agreement until the certification is revoked. Section 62, subs. (8) reads:

> (8) The Board shall determine its own procedure, but shall in every case give an opportunity to all interested parties to present evidence and make representation.

Section 65 authorizes the Board, in certain circumstances, to reconsider any order made by it under the Act and to vary or revoke it.

Upon receipt of the application for certification the Labour Relations Board, on August 9, 1956, wrote to Traders' Service Limited advising that company that the appellant union had applied to be certified for a unit of its employees stating that an officer of the Department of Labour would investigate the merits of the application and saying that written submissions concerning the application would be considered by the Board if received within ten days of the date of the notice. Enclosed with the letter was a form of notice to be posted up in the establishment of the company advising the employees that the union had applied for certification and that written submissions concerning it would be considered if received by the Registrar of the Board within ten days.

It is to be noted that the letter did not mention Traders' Transport Service Limited or its employees or otherwise suggest to the respondent that certification was asked for the employees of that company. It is clear that if the proposed unit included the employees of the latter company the Board was without jurisdiction to certify the trade union since the consent of the two employers had not been asked or given.

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The respondent wrote in reply to the Board on August 13, 1956, saying that it was felt that there must be "some mistake in this application or in the name of the firm intended to be named" and saying that apparently the staff had not been approached by the union. To this the Board replied on August 14 asking that the notice be posted and if there was a mistake in identity it would be disclosed by the investigation.

Muir, in the second affidavit made by him in support of the application, said that there had been confusion in the delivery of mail intended for another company named Traders' Sales Ltd. and it was this that he had in mind when suggesting a mistake in identity.

On August 15, 1956, Alexander Titmus, an Industrial Relations Officer of the Department of Labour, went to the premises of the respondent and had a discussion either with Muir or with his accountant. Muir says that he had no discussion with Titmus at this time having turned him over to the accountant. Titmus says his discussion was with Muir. While Titmus made an affidavit on March 6, 1957, which was filed on behalf of the Board, it was limited to saying that he had discussed with Muir "the subject of my investigation and the matter of my business with the said Traders' Service Ltd." and that he had again had a discussion with him on October 29, 1956, before the Order of Certification was made.

No further particulars of the information obtained by Titmus were given and when cross-examined upon his affidavit, upon advice of counsel for the Board, he refused to give any further particulars.

Section 71 of *The Labour Relations Act* provides *inter alia* that the information obtained for the purpose of the Act in the course of his duties by an employee of the Department of Labour shall not be open to inspection by the public or any court, and the employee shall not be required to give evidence relative thereto. Subsection (2) provides that no such employee shall be required to give testimony in any civil case respecting information obtained for the purpose of the Act.

Titmus when cross-examined said that when he went to the respondent's premises in August his purpose was to inspect the payroll records of the company and it is proved

by the evidence of Muir that he was shown the payroll records which were kept in the manner above described. Whether the payroll for the two-week period ending August 15 had been made up at the time Titmus was there on that date is not made clear but previous payrolls were prepared in the same manner. An examination of the payroll produced shows that excluding the office staff, Traders' Service Limited employed fourteen men and Traders' Transport Service Limited the nine men above referred to.

The respondent company did not make any written representations to the Board within the ten-day period and indeed if a majority of those who were employed by it according to its written records were members in good standing of the appellant union, representations by the company would have been pointless.

After Titmus left the premises of the respondent on August 15 there was no further communication between the appellant Board and anyone representing the Department of Labour until October 29 when, as stated, Titmus again returned and made some further inquiries. During the interval, however, the Registrar of the Board had carried on a correspondence with the appellant union and copies of the letters exchanged were filed on the hearing of the application.

On August 9, the Registrar wrote Gerald C. Emary, the Western Area Director of the union, acknowledging the application for certification. On August 24, Emary wrote the Chief Executive Officer of the Labour Relations Branch of the Department of Labour referring to the application, saying that when it was filed the union were of the opinion that all of the employees were employees of Traders' Service Limited but that it appeared that there were two companies:

> The parent company being Traders' Service Ltd. and the subsidiary company located at the same address and heretofore an inactive company which as far as we were concerned at the time existed in name only.

The letter continued by saying that the union had reason to believe that included in the group of employees it wished to represent were certain employees considered as being employees of Traders' Transport Service Limited and asked that the application for certification be amended so as to include that company. On August 27, the Registrar wrote

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Emary answering his letters and saying that, if the application was to be amended, the consents required by s. 10(4)(*b*) of the Act and by the Regulations should be filed. On August 30, 1956, Emary again wrote the Chief Executive Officer asking that his letter of August 24 be disregarded and enclosing a separate application for certification as bargaining representative of certain of the employees of Traders' Transport Service Limited. The business of the company was stated in this application as being "storage and distribution warehouse" and the group of employees described as "all employees except office employees, outside salesmen and those with authority to employ or dismiss".

No notice was given to the respondent company by the Labour Relations Board of this correspondence and no notice was given to Traders' Transport Service Limited of this application.

On September 13, 1956, Emary wrote to the Board referring to the application for certification for the employees of Traders' Transport Service Limited filed on August 31, saying:

> The latter application for certification resulting (sic) from information conveyed to us by your Department that the employees on whose behalf we were seeking certification in our application of August 8th were employed by two companies i.e. Traders' Service Ltd. and Traders' Transport Service Ltd.

The letter continued by asking that the second application be disregarded as the union were satisfied that there were no employees of Traders' Transport Service Limited and that "it exists merely as a company in name only". Further correspondence ensued between the Registrar and Emary in which the latter contended that there were no employees of Traders' Transport Service Limited and sent copies of certain pay cheques issued to certain of the men whose names it was shown appeared on the payroll above mentioned as employees of Traders' Transport Service Limited, which cheques were drawn by Traders' Service Limited. In addition statutory declarations of five men employed as truck drivers at 343 Railway Street were enclosed, all of which were made on or immediately prior to October 15, 1956, which stated that they were employed by Traders' Service Limited and not by Traders' Transport Service Limited.

In addition to the admitted fact, as proven by the affidavits of Muir and Clerihue, that the employees of both companies had been paid by the cheques of the respondent, it was shown that a document referred to as an income tax slip said by Emary to have been received by one Kalish from the respondent company showed the amount of his remuneration from that company and the amounts deducted for income tax.

Upon this information the Labour Relations Board, on November 8, 1956, wrote to the respondent company enclosing a certificate which stated that the Labour Relations Board had determined that the employees of Traders' Service Limited, except those excluded by the Act, were a unit appropriate for collective bargaining and that the Retail, Wholesale and Department Store Union Local 560 was certified as a union to represent all the employees in the unit.

Following this the union presented a collective agreement assuming to represent not only those persons who, according to Muir, were employed by the respondent, but also all those employed as truck drivers by Traders' Transport Service Limited. Correspondence then ensued between the respondent's solicitors and the Board in which it was pointed out that the time for appeal from the Order of Certification had expired. On January 9, 1957, the Registrar wrote to say that the Board was willing to receive and consider a submission that the time for appeal should be extended. To this letter no reply was given and the application for the writ made.

The important duty imposed upon the Labour Relations Board under the statute in question does not differ in any material respect from that imposed under the Ontario statute which was considered by this Court in *Toronto Newspaper Guild v. Globe Printing Co.*[1]

The duty which had been cast upon the Minister of Labour by the 1943 amendment to *The Industrial Conciliation and Arbitration Act* of 1937 was transferred by the present Act to the Board. The question to be decided is of grave importance to the employees concerned since the effect of it in every case is that bargaining rights as between

[1] [1953] 2 S.C.R. 18, 106 C.C.C. 225, 3 D.L.R. 561.

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the employees and their employers may be given to a union on behalf of a minority of the members who may not wish it to represent them so long as that minority is less than fifty per cent of those sought to be included in the unit. The duty cast upon the Board is administrative in my opinion, but in determining the question it must act only in the manner in which it is authorized by the statute.

While the Board is permitted to determine its own procedure, it is required by subs. (8) of s. 62 as well as by the common law to give an opportunity to all interested parties to present evidence and make representations upon the point to be decided. I do not think the provisions of subs. (8) add anything to the obligation cast by law upon the Board. The judgment of the Lord Chancellor in *Board of Education v. Rice*[1] states the applicable law in language which has been adopted on more than one occasion by this Court. Lord Loreburn there said:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. .....
> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. .....
> The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

The nature of the obligation cast upon such a Board so expressed was adopted by Sir Lyman Duff C.J., in delivering the judgment of the majority of this Court in *Mantha v. City of Montreal*[2] and by Kellock J. in the *Toronto Newspaper Guild*[3].

[1] [1911] A.C. 179 at 182, 80 L.J.K.B. 769.
[2] [1939] S.C.R. 458, 467, 4 D.L.R. 425.
[3] [1953] 2 S.C.R. 18 at 32.

While it is true the certificate issued to the appellant union said that it applied to the employees of Traders' Service Limited, the course of the correspondence between the union and the Board, the actions taken by the union following the issuing of the certificate and the arguments addressed to this Court on behalf of the appellants all show that in determining that the union represented a majority of the employees, those men whom the respondent contended were employees of Traders' Transport Service Limited were included. Muir swore that Haines, a business agent of the union, had told him that without the men whom Muir contended were employed by the Transport Company the union did not have a majority in the unit.

The only material question which the Board was required to determine in the present matter was as to whether a majority of the employees affected were at the date of the application members in good standing of the union. Whether in determining that question the Board complied with the requirements of subs. (8) of s. 62 and of the duty cast upon it at common law is a question of fact and not of law.

McInnes J., by whom the application was heard, said in part[1]:

> It will be seen at once that the attention of Traders' Service Limited was never directed to the fact that it was the intention of the Union to claim that employees who were allegedly working for Traders' Transport Service Limited were to be included in the certification. This, of course, was the only substantial issue which the Board had to investigate and determine and in my view it was imperative that the attention of Traders' Service Limited should have been directed to that issue.

The Court of Appeal[2] agreed with this finding of fact and dismissed the appeal. We are invited by the appellants to reverse these concurrent findings: for my part I decline to do so. I would add that, after carefully examining all the available evidence, I entirely agree with that finding.

It is impossible to suggest that the letter addressed by the Registrar to the company on August 8, 1956, or any other letter written on behalf of the Board to the respondent up to the time the certificate was issued gave any

[1] (1957), 9 D.L.R. (2d) 530 at 538.
[2] (1958), 11 D.L.R. (2d) 364.

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indication to the respondent that the union contended, as the correspondence demonstrates it did, that Traders' Transport Service Limited employed none of the men. Other than to ask Muir or his accountant whether the eight men whose names were listed in the payroll sheet under the heading Traders' Transport Service Limited, were paid by Traders' Service Limited, there was nothing in what transpired between Titmus and Muir to suggest to the respondent that any such claim was made by the union. On the record as it is it appears clear that the Board did not know the facts as to the separate incorporation of these two companies, of the varying nature of the business carried on by them respectively or the reason why the Transport Company's employees were paid by cheques of the respondent company and the question was determined by the Board in ignorance of these facts. According to Emary, Traders' Transport Service Limited was "a company in name only" whatever that may mean: if it was intended to mean that that company did not function separately, the evidence of Muir and Clerihue, if believed, proved the contrary.

It is not our function to determine what was in fact the truth as to the identity of the employer of the men whom the payroll records indicated were employees of Traders' Transport Service Limited. If two employers were concerned, the Board was without jurisdiction to certify the union as the bargaining agent without the consent of the employer by reason of the provisions of subs. (4) of s. 10 of the Act. If, as the evidence on the face of it would indicate, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers' Union Local 31 continued to be authorized to bargain on behalf of the employees of the Transport Company, the Board was equally without jurisdiction by reason of the provisions of subs. (1)(*b*) of s. 10, and, unless the Board complied with its duty to afford both sides full opportunity to be heard, the Order made was beyond its powers.

I would dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises and the contentions of the parties are sufficiently stated in the reasons of other members of the Court.

It appears to me that the only controversial issue which the Labour Relations Board, hereinafter referred to as "the Board", had to decide in order to dispose of the application for certification made by the appellant union was whether certain six truck-drivers were employees of the respondent or of another company, Traders' Transport Service Limited. The correspondence between officials of the Board and of the union, quoted in the reasons of McInnes J., makes it abundantly clear that the Board was made aware by the union that it asserted and that the respondent denied that these truck-drivers were employed by the respondent.

In these circumstances the authorities referred to in the reasons of my brother Locke and in those of McInnes J. appear to me to establish that, at the least, the duty of the Board was, in the words of McInnes J.,

> to disclose to the respondent the issue raised by the union's application for certification and to give the applicant an opportunity to meet it.

I agree with my brother Locke that the question whether or not this duty of disclosure was fulfilled is one of fact; and upon it there are concurrent and unanimous findings in the Courts below. Under the long established practice of this Court we ought not to disturb these findings unless satisfied that they are clearly wrong; a perusal of the whole record brings me to the conclusion that they are right.

I would dismiss the appeal with costs.

Appeal allowed with costs, LOCKE *and* CARTWRIGHT JJ. *dissenting.*

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