BRITISH COLUMBIA LABOUR RELATIONS BOARD

SURERUS PIPELINE INC.

(the "Employer")

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL NO. 115

(the "Operating Engineers")

-and-

CANADIAN IRON, STEEL AND INDUSTRIAL WORKERS' UNION,
LOCAL #1

("CISIWU")

PANEL: Laura Parkinson, Vice-Chair

COUNSEL: Peter A. Gall and Andrea Zwack, for the Employer
Timothy G. Charron, for CISIWU
Michael E. Walton, for Operating Engineers

CASE NO.: 32834

DATE OF HEARING: February 10, 1998

DATE OF DECISION: June 5, 1998

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Operating Engineers apply under Section 19 to raid a unit represented by CISIWU. In the alternative, the Operating Engineers ask the Board to treat its application as a Section 18 application for an uncertified unit. It takes that position on the basis that its challenge to CISIWU's status as an employer dominated organization under Section 31 puts in question the status of the collective agreement between CISIWU and the Employer.

2 There are a number of other outstanding issues raised by this application. Among them are the questions of whether this application, if it is a raid, is untimely given the varying collective agreements that exist; and whether the Operating Engineers have sufficient membership support for the application to proceed. At a case management meeting, the parties agreed to deal first with the issue of whether certain individuals should be included in the employee constituency for the purposes of the threshold requirements for the application and the vote.

3 The preliminary issue for adjudication at this stage is whether individuals working in a construction project in Alberta should be considered as employees for purposes of a raid application. The parties raise arguments about the jurisdiction of the Board to regulate employment outside of the boundaries of the province, the applicability of collective agreement provisions to individuals working in Alberta, and the relevance of the 30/30 rule in *B.A.T. Construction Ltd.*, BCLRB No. B444/94, (Leave for Reconsideration of BCLRB Nos. B102/93 and B178/93), (1995), 25 CLRBR (2d) 1 ("*B.A.T.*").

4 Initially, the parties agreed that the issue of the status of the Alberta employees could be determined without an evidentiary hearing. However, during argument, when disputes arose over the assertions of counsel over the payment of dues to CISIWU and the scope of coverage of the collective agreement to individuals working in Alberta, I directed that statutory declarations be filed to support those disputed assertions of fact. Statutory declarations were received after the hearing from representatives of CISIWU and the Employer; accompanying those statutory declarations were submissions of counsel which gave explanations of some discrepancies in the documents. As those assertions were not supported by the statutory declarations, I have given them no weight in my deliberations on the issue of the status of the Alberta employees. On the other outstanding matters, I leave aside the issue of any administrative errors in the exclusion of individuals from other projects in the preparation of remittance lists for future argument based on evidence or statutory declarations confirming those assertions.

5 I also leave aside for the time being the new issue raised by the Operating Engineers of the status of two additional individuals, Rob Knezarek and Kevin McLeod,

not previously disclosed by the Employer as Alberta employees, but whose names appeared on the dues remittance sheets attached to the statutory declaration of CISIWU filed after the hearing. Based on the remittance list for March 1997, the Operating Engineers take the position that it appears as if these two individuals were working in Alberta on the date of application, and would have been challenged earlier had disclosure of that fact been made in response to the request for particulars. As the Employer and CISIWU have not had an opportunity to respond to this new issue, I will defer ruling on the status of those two individuals. The parties may consider the circumstances of those individuals against my ruling on this issue to determine if the Operating Engineers should be permitted to raise a challenge to their status at this stage, and whether the reasoning in this ruling should apply to them.

6 Upon receiving the statutory declarations, the Operating Engineers raised another new issue. The Operating Engineers sought to challenge a list of 82 individuals who appear on the Tentative Voters List, but according to the records disclosed in the statutory declaration, did not pay dues to CISIWU and were not covered by the collective agreement. Again, I leave aside that challenge by the Operating Engineers to employees who are not dues paying members of CISIWU for further argument and evidence, if necessary, after the ruling on this preliminary issue.

II. FACTS

7 The Employer's operations are based in Fort St. John. According to the Employer, the vast majority of its projects are in B.C., and it only rarely has projects in Alberta. It had no projects in Alberta in 1995, four projects there in 1996 and only the one project at Zama Lake, Alberta in 1997.

8 CISIWU was certified to represent employees working on the Employer's construction projects in May 1990. On March 21, 1997 the Operating Engineers applied to represent a unit of employees of the Employer described as "employees in British Columbia".

9 The initial investigation of the Employer's payroll records done in the spring of 1997 revealed that there were 424 employees in the unit, and the Operating Engineers did not have sufficient membership support for the application to proceed.

10 At a case management meeting, the Operating Engineers raised an issue about whether some of the 424 individuals on the Tentative Voter's List actually worked with associated companies of the Employer, Surerus Construction & Development Ltd. and Key Pile Construction Ltd. As a result of that issue and others, a supplementary investigation by an Officer of the Board was ordered. That investigation completed in the fall of 1997 revealed that the list of employees, applying certain defined criteria, was 357.

11 After that revised list of 357 employees was circulated, the Operating Engineers sought production of particulars of the names of any employees on that list who had worked on the Employer's worksite in Alberta. The Employer initially provided a list of

51 individuals working on the Alberta project. Some, but not all, of those 51 individuals' names appeared on the list of 357 employees prepared by the Officer.

12 That construction project, the Nova Gas Clearinghouse Project at Zama Lake, Alberta, Job #9707, spanned approximately nine weeks from February 25 to April 30, 1997.

13 Some of the employees who went to work at the Zama Lake project had been previously working for the Employer on its B.C. Nova Gas Clearinghouse Project, Job #9620. Most of them ended their work for the Employer in B.C. around the end of February; however, some of them remained in B.C. until around March 13, eight days before the certification application. One of them, Tom Krahn, had not worked for the Employer at all in 1997, although he had worked for the Employer in earlier years. Most of these workers worked the day before in B.C., and then began working the next day or the following day in Alberta. Seven of the workers had a gap of a few weeks to a month between leaving work in B.C. and starting work in Alberta: Corey Dool; Jordie Staton; Travis Millions; Tyler Wheaton; Jim Greyeyes; Glen (also known as David) Peters; and Tanya Stewart.

14 The Operating Engineers advanced a challenge to 41 of the 51 Alberta employees whose names appeared on the Tentative Voter's list.

15 The Employer later acknowledged that a number of individuals on its list of 51 names for the Alberta project should not be considered to be employees in the bargaining unit for purposes of the raid application since many of them had worked only for a couple of days, and none of them had ever worked for the Employer in British Columbia prior to the Alberta project. The parties thus agreed that the following individuals should not be on the Tentative Voters list and their names should be removed:

Dan Powley
Jim Hoschajew
Lars Strang
Clark Hooten
Mathew Moorman
Alan Clement
Leon Poirier
Roxanne Kelly
Grace Krahn
Jamie Baldwin

16 Two of the individuals the Employer agreed to exclude, Grace Krahn and Jamie Baldwin, started work with the Employer on the Alberta project and later worked for the Employer in B.C. in the summer of 1997.

17 At the commencement of the hearing, the Operating Engineers clarified that it intended to lodge challenges to both Richard Hawthorne and Sean Hawthorne, and had

neglected to do so because of confusion over names. Both of these individuals were on the Employer's list of 51 individuals working on the Alberta project. CISIWU and the Employer did not challenge the Operating Engineers' right to pursue this challenge. The Operating Engineers also withdrew its challenge to the inclusion of Eugene Pelletier on the list after being provided with particulars showing that he was at work in B.C. on the date of application.

18 None of the remaining individuals challenged by the Operating Engineers were at work in B.C. on the date of the application. All of them were working on the Employer's Alberta project on that date. Some of those individuals had not worked in B.C. for the first 30-day period before the date of application under the *B.A.T.* rule: Corey Dool, David Peters (also referred to as Glen Peters), Jordie Staton, Tanya Stewart and Tom Krahn. None of them worked in B.C. in the second 30-day period between March 22 and April 20, 1997.

19 Full particulars of the subsequent employment history of all the individuals in dispute were not available. The Employer's submissions indicate that twenty of the Alberta employees in dispute did no work in B.C. for this Employer in the eight-month period after the date of application for which information was supplied. The Employer asserted that those that had not returned to B.C. within the eight-month period after the date of application would return the next season (although at the time of that prediction the Employer did not have any firm jobs lined up for the next season). Fifteen of them did eventually return to work in B.C. within that period. Of the fifteen that returned to B.C., the earliest any of them returned to work in B.C. was roughly three months after the date of application. Of the eight individuals who returned three months later, one worked "part-time", one worked for two weeks and two of the others worked between two and three weeks. The seven other individuals returned to B.C. within four and five months after the date of application, although some only worked for a couple of weeks or on an occasional basis.

20 The question of which collective agreement was in place for purposes of assessing the timeliness of this application remains in dispute. An agreement with an express term of September 1, 1993 to August 31, 1995, and containing a continuation clause, was filed with the Board on June 11, 1993. An agreement entered into March 7, 1994 with an express term of October 10, 1993 to October 9, 1996 was not filed with the Board. An agreement entered into July 18, 1996 with a term of October 10, 1996 to October 9, 1999 bears the stamp on it of the Employment Standards Tribunal of April 1, 1997.

21 Although there is a continuing dispute over which collective agreement between CISIWU and the Employer applies, all versions of the collective agreement contain the same language in the scope clause, Article 2.01 and the recall provision, Article 9.01.

22 Article 2.01 defines the scope of the bargaining unit in these terms:

2.01 The Company recognizes the Union as the sole bargaining agent for all employees, including general foremen but excluding superintendents of the Company.

23 Article 9:0l reads:

Article 9 Re-Engagement

9.01 The Company will make a reasonable effort to re-engage those employees on layoff who have previously been employed by the Company for more than sixty (60) working days by either a telephone call to their last known telephone number or by a registered letter to their last known place of residence, on the records of the Company. Where the Company requires employees within seven (7) days, it will not be required to follow the provision of the previous sentence.

9.02 A right to re-engagement under Article 9.01 shall be automatically terminated if the employee:

(a) quits; or

(b) is discharged, and not reinstated in accordance with the provisions of this Agreement; or

(c) is absent from work for three (3) or more consecutive days without notifying the Company, unless he gives reasons satisfactory to the Company for his failure to so notify; or

(d) is absent from work due to illness or injury for a period of twenty-six (26) weeks or less without providing a medical certificate from a qualified medical practitioner upon his return to work...

(e) is laid off for a period in excess of six (6) months; or

(f) is absent due to illness or injury for a period in excess of twenty-six (26) weeks; or

(g) fails to return to work within two (2) days after being given notice of recall; or

(h) works for another employer while absent from his employment with the Company, except while on layoff; or

(i) uses an authorized leave of absence for a purpose other than that for which the leave is granted; or

(j) fails to return to work upon the expiration of an authorized leave of absence or vacation unless a reason satisfactory to the Company is given; or

(k) failure to perform to the expectations of the Company.

24 According to a statutory declaration filed by the Employer, the Employer's interpretation of the collective agreement, and the practice of the parties, is that all employees who have worked at any time in the past with the Employer retain recall rights for a period of six months from the date of any layoff, and during that six-month period have priority to recall from layoff over any individuals who have not worked for the Employer in the past.

25 Thirty individuals on the Employer's list of 51 Alberta workers qualified for recall by the time they finished working on the BC Nova Gas Clearinghouse Project, Job #9620 and went to the Alberta project in February and March 1997. Six of the Alberta workers the Employer says should be eligible as employees did not meet the requirement of the recall provisions: Tyler Wheaton; Tom Krahn; Corey Dool; Jordie Staton; Tanya Stewart; and Clint Hommy.

26 Article 3.02 of the collective agreement provides that dues are 1 and 1/4 of an hour's wages provided an employee works 40 or more hours in the month.

27 In its earlier written submission, the Employer stated that all persons working on the Alberta project were treated as employees in the bargaining unit for purposes of application of the collective agreement and those who qualified in terms of hours had dues deducted. At the hearing, CISIWU asserted that only those individuals who moved from B.C. to Alberta paid dues. CISIWU maintained that local hires were not covered by the collective agreement and did not pay dues. When that assertion was questioned by the Operating Engineers, I ordered statutory declarations to be filed on this point.

28 CISIWU's statutory declaration stated that: "dues are regularly remitted to this Union on behalf of employees of Surerus who have been employed in B.C. and who subsequently are employed on construction projects in Alberta". The statutory declaration was silent on the issue of whether local hires paid dues. The Employer did not file a statutory declaration on the issue of payment of dues.

29 A review of the dues remittance sheets attached to CISIWU's statutory declaration shows that some, but not all, of the Alberta employees, including local hires, paid dues. The March 1997 remittance sheets indicate that 20 challenged individuals on the Employer's list of Alberta workers paid dues; the other 15 or so did not. The April 1997 remittance sheets show dues checkoff for 10 individuals on the Employer's list; there were no dues checkoff in April for the other 25 or so remaining individuals in dispute. Seven of the 10 individuals the Employer agreed should be off the list as local hires had dues deducted in March 1997: Roxanne Kelly; Grace Krahn; Dan Powley; Clark Hooten; Mathew Moorman; Alan Clement and Leon Poirier.

III. POSITIONS OF PARTIES

A. Operating Engineers

30 The Operating Engineers argue that the Alberta employees were working on the date of application on another project with a life of its own in another jurisdiction. The Operating Engineers maintain that the individuals in dispute are not employees for purposes of the Code because they were not working for the Employer in the province of B.C. on the date of application: *Labour Relations Board (N.B.) v. Eastern Bakeries Ltd.*, (1961) 26 D.L.R. 332, 61 C.L.L.C. 15,342 (S.C.C.); *Boless Inc.*, (1989) O.L.R.D. No. 2185, File No. 1943-89-R; and *Mustang Engineering and Construction Ltd.*, IRC No. C105/90.

31 In reply to the arguments of the Employer and CISIWU on the applicability of the recall provisions in the collective agreement, the Operating Engineers submit that these employees cannot be considered to be on layoff as they were working in Alberta on the date of application. The employees who went to work in Alberta may still be employees of the Employer, but they are employees subject to regulation under Alberta law.

32 The Operating Engineers argue that if the Board finds the Alberta employees are not employees under the Code, then they should not be counted as employees for purposes of calculating the threshold support. If the Board determines that individuals working in Alberta are employees under the Code, then the *B.A.T.* test is irrelevant. Only to the extent that the Employer maintains that Alberta employees have a sufficient continuing interest in a B.C. bargaining agent do the Operating Engineers rely on the *B.A.T.* rule.

33 As an alternative position to its primary position on jurisdiction, the Operating Engineers maintain that any individual not working in B.C. on the date of application must meet the 30/30 rule in *B.A.T.* As none of the disputed individuals worked in B.C. in the 30 days following the date of application, and as no exceptional circumstances are present which would warrant invoking the Board's residual discretion, all of them fail the *B.A.T.* test and should be removed from the list.

34 The Operating Engineers note the inherent contradictions in the Employer's position that some of the workers employed in Alberta are not included for purposes of the Code, but others are. There would be two groups of people working side by side - some who would be subject to regulation under B.C. law, and the others, the local hires, would have no rights under the B.C. Code. The exclusion of the local hires in Alberta would mean that they are potentially subject to Alberta regulation with the possibility of employees from B.C. working under one B.C. collective agreement, and the local hires under another subject to Alberta regulation.

35 The Operating Engineers raise the issue of how B.C. legislation on strikes, lockout and picketing would apply to work performed in Alberta in the event of a dispute. The Operating Engineers question the applicability of the replacement worker provision, Section 68, to that work, and query whether those workers could be assigned to perform work in B.C. during a dispute.

B. <u>Employer</u>

36 The Employer argues that its employees from B.C. were only temporarily transferred to Alberta. A temporary transfer out of the jurisdiction does not mean someone ceases to be an employee: *Tercon Contractors Ltd.,* BCLRB No. B83/96. The Employer argues that the B.C. employees transferred to Alberta remain employees in the bargaining unit, and the Board retains jurisdiction over them. If an employee covered by a collective agreement is sent temporarily to a job outside the province, that individual does not cease to be an employee for purposes of the Code, and should have the right to vote on the question of union representation for the Employer in B.C.

37 The Employer takes the position that the 30/30 rule does not apply since this application is a raid and the collective agreement with the incumbent union contains recall rights: *B.A.T., supra,* at p. 34. The Employer submits that the issue of employee status is determined by the collective agreement with the incumbent union. That bargaining unit scope may be more expansive than the unit defined by the certificate. The raiding union must take the unit as it finds it: *Western Canada Steel*, BCLRB No. 79/75, [1976] 1 Can LRBR 25; *Downie Street Sawmills Ltd.*, BCLRB No. 21/83; *Simon Fraser University*, IRC No C197/89; *Okanagan Valley Transport Ltd.*, BCLRB No. B108/96; and *M & J Woodcrafts Ltd.*, BCLRB No. B366/96.

38 Even if the *B.A.T.* test applies, the Employer argues that it should not be applied in such a way to override the right of long-term employees of an employer to participate in the choice of union representation. In this case, where the employees were actually working in B.C. during the 30 days prior to the application, and continued to work for the Employer throughout the second 30-day period, the fact that the second project happens to be outside the province should not operate to mean that these employees do not satisfy the *B.A.T.* test for employee status.

C. CISIWU

39 CISIWU argues that the individuals working in Alberta who formerly worked in B.C. should be considered as employees for purposes of the Code. To illustrate its point, CISIWU gives as an example employees covered by a collective agreement who are sent by their employer to another province for a business trip. There is no doubt those individuals would still be considered to be employees. CISIWU points out the potential abuse resulting from the Operating Engineers' argument on the status of employees working in another province. The possibility for gerrymandering exists as an employer could move employees around from construction projects from one province to another if union organizing was suspected.

40 CISIWU argues that the *B.A.T.* rule does not apply at all since there are recall rights in its collective agreement. CISIWU maintains that as this is a raid application, the Operating Engineers have to take the unit as it exists. CISIWU asserts that the employees who moved from BC to Alberta to work were subject to the collective agreement.

41 Even if the *B.A.T.* rule applies, CISIWU argues that as long as an individual works one of the two 30-day periods in B.C., the *Tercon* decision inferentially suggests

that work history is sufficient to meet the *B.A.T.* test. CISIWU argues there is no impediment to the Operating Engineers organizing these employees as they were in B.C. in the first 30 days before the application was filed.

IV. ANALYSIS AND DECISION

42 The Employer and CISIWU essentially take the position that all of the employees who transferred to the Alberta project from other work in B.C. should be found to be employees in the bargaining unit for purposes of the raid application. The Operating Engineers say that only those who were at work in B.C. on the date of application should be considered as employees. Those submissions raise the issue of whether B.C. law governs the employment relationship of those workers when they were performing work in Alberta at the time of application.

43 I do not need to decide for all purposes of the Code the general issue of the eligibility of workers who cross provincial boundaries to perform some work. I approach this preliminary issue only in the context of the construction industry which has been recognized as being unique in some respects. As has been acknowledged, the test for determining who is an employee should be responsive to the particular industry in question: *B.A.T.*, *supra*, at p. 27. Whatever may be the case in the typical industrial setting, I need answer only the question of the employee status of individuals working on a construction project in another province at the time of application.

44 Before determining the issue of the limits of provincial jurisdiction as a matter of legislative competence, I turn to consider the argument advanced by both CISIWU and the Employer that the raiding union is bound by the unit agreed to in the collective agreement. That issue raises the question of whether the collective agreement between the Employer and CISIWU applies to work outside of the province. (For purposes of this decision, I leave aside the problem that this argument assumes the validity of the collective agreement with CISIWU, which is at issue given the Operating Engineer's challenge to the trade union status of CISIWU. I will decide this issue of the status of the Alberta employees assuming that one of the collective agreements at issue is valid.)

45 I agree that, in the usual case, the scope of the unit which is the subject of a raid application is determined by the collective agreement entered into between the parties. The raiding union must take the bargaining unit as it finds it: *Cradley Enterprise Ltd.*, BCLRB No. B62/94. However, I do not think the answer is found in every case in the collective agreement; what the parties have agreed to cannot bind the Board at least where a jurisdictional issue is raised over the authority of the Board to regulate employment relations in another province. Quite clearly, the parties' agreement cannot confer or define what jurisdiction the Board has.

46 For the Board's purposes, the relations between an employer and the employees must exist within provincial boundaries: *Mustang*, *supra*. Just as the definition of "employer" in the Code must be confined in its scope to employers whose relations with their employees are within the legislative jurisdiction of the province, so should the

definition of "employee" be confined to those workers within the province: *Western Stevedoring Co. Ltd. v. P.P.W.C.*, (1975), 61 D.L.R. (3d) 701 (B.C.C.A.), at pp. 707-8.

47 The test applied by labour tribunals for determining legislative competence over workers with a presence in another province focuses on the frequency and degree of work performed elsewhere. If the bulk of work is performed in the province, and only a limited amount of work is done outside the province, the territorial competence of that provincial tribunal to regulate the employment relations is not in question. However that tribunal may not have jurisdiction over individuals who work out of the province for extended periods of time: *McLean's Magazine*, (1983), 1 CLRBR (NS) 289.

48 Applying that test, I find these workers were not employees in B.C. on the date of application. In reaching that conclusion, I have considered the argument advanced that the home base of at least some of these disputed individuals appears to be B.C., but I do not consider that residency is a determining factor. More important is the length of time the employees worked in Alberta relative to the nature of the work performed.

49 The Employer attempts to characterize the movement of these workers to Alberta as a temporary transfer out of the province. That submission as to the "temporary" nature of the assignment may be more persuasive in industries other than the construction industry. The composition of the workforce of an employer in the construction industry may vary continuously because the work at any one construction site may be of limited duration. It is a fact of life in the construction industry that projects are often of short duration; the length of jobs in this industry tends to be measured in days or weeks rather than months or years: *B.A.T.*, *supra*, at p. 26. In relative terms, a nine week project in the construction industry spanning roughly two months could hardly be described as a temporary assignment. This is not a case where an employee's temporary absence out of the province is for a matter of days or even weeks on a sporadic basis: cf. *Tercon*, *supra*, at para. 79.

50 On the information made available by the Employer in its submissions, the work of these individuals on this project was approximately 63 days, roughly equivalent to the combined 60-day period the Board uses to determine eligibility to work in the construction industry under the 30/30 rule. The nine-week period for that Alberta project coincides with the period of time the Board uses as a yardstick in its 30/30 rule to determine eligibility to vote.

51 As recognized in *B.A.T.*, the Alberta Board adopts an even shorter time period than this Board to assess employee status in the construction industry. Its 14-day rule is even more abridged than our 30/30 rule in apparent recognition of the short-term nature of employment in the construction industry: *B.A.T.*, *supra*, at p. 29. Considering the nature and length of this employment, the workers on the Alberta project might well be found by the Alberta Board to be employees subject to its jurisdiction if an application for certification were filed before it.

52 Although the question of the application of the 30/30 rule in the face of recall rights in the collective agreement was argued before me, I do not see it necessary to

decide these issues given my determination on the primary jurisdictional question. In any event, I add that as I do not consider these individuals are laid off, I thus do not see it necessary to consider the recall provisions or their enforceability given the issue raised as to the status of the collective agreement. Whatever rights of recall are granted by Article 9, those rights are only triggered by a "layoff". I do not characterize these individuals as being on a layoff, not even in a notional sense since they were all at work in Alberta on the date of the application and continued to work there for some period. Even if I were to consider these employees as transferred to Alberta, their employment would still be continuous, although they were nonetheless not employed as an "employee" for purposes of the B.C. Code at the relevant time, the date of application.

53 While not on layoff at the time of application, these employees do have a previous work history with this Employer which may confer on some of them the right to recall when they finished working in Alberta. However, in these circumstances, I consider my finding on the jurisdictional issue overrides any ongoing relationship that these individuals may have with this Employer in B.C. for purposes of B.C. law.

54 I also add that were it necessary to go further in the analysis and consider the issue of the application of the 30/30 rule, I would not find these individuals to qualify. Five of them - Dool, Peters, Staton, Stewart and Krahn - would be disqualified by their failure to work at all for this Employer within the first 30-day period. The *B.A.T.* rule requires individuals to be at work on at least one occasion within both 30-day periods. As for the others, while the requirement for work within the first 30 days would be met, all of them remained in Alberta for the second 30-day period, and for some time thereafter. Notwithstanding the seasonal nature of this pipeline construction work and the past association of some of these workers with the Employer, I do not find that on the inadequate factual basis put before me that I can predict which, if any, of these workers would, in fact, have returned next season. As experience proved, many of them had not actually returned to work in B.C., even within an eight-month period following the date of application. The others returned within three to five months after that. While the reasonableness of the expectation of re-employment must be determined as of the date of application, I consider that the actual experience of subsequent events reinforces my conclusion that, at the time of the date of application, there was no reasonable expectation of re-employment within B.C. during the 30 days following the date of application: *MJB Hookups*, BCLRB No. B58/96. Since these individuals were not working in B.C. on the date of application and, as of the date of application they had no reasonable expectation of returning to work in B.C. within the 30-day period, I find they would not qualify as employees.

55 Even if I were prepared under the residual discretion the Board retains to extend the 30-day period to consider their return to employment within B.C., I would not find it appropriate to exercise that discretion in these circumstances. A substantial onus rests on the party who seeks the exercise of the Board's discretion to establish that a person who falls outside the 30/30 rule is, in fact, an employee: *B.A.T.*, *supra*, at p. 41. I do not find that onus to be met in this case. I also do not consider an extension of the *B.A.T.* rule in these circumstances to be consistent with the purpose of the *B.A.T.* rule

which is to provide an objective and predictable measure to minimize uncertainty. While there is some risk of disenfranchising employees with some attachment to an employer by a strict application of that rule, on balance, the certainty of the rule has its virtues in eliminating costly and time consuming litigation: *Pacific Painting & Sandblasting*, BCLRB No. B94/97 and *Tercon*, *supra*.

56 Lastly, while it is unnecessary for me to rule definitely on this issue, I note the contradiction in the arguments of the Employer and CISIWU on the effect of the collective agreement. They argue that the question of employee status should be defined by the collective agreement, yet they take the position that some of the individuals who were covered by the collective agreement and who had dues deducted should not be on the list. As the documents attached to CISIWU's statutory declaration confirm, local hires on some occasions did pay dues under the collective agreement when they worked sufficient hours. Although apparently caught by the terms of the collective agreement, the Employer concedes that local hires should be excluded from the constituency of the bargaining unit for the purposes of the application. I find the logic behind that position to be inherently contradictory. If the position of the Employer and CISIWU on the effect of the collective agreement were to prevail, then local hires as well as those with a previous employment history in B.C. should be considered employees. However, as I have concluded on other grounds that the workers who formerly worked in B.C. but who were working in Alberta were not employees for purposes of B.C. law on the date of application, I do not need to consider the potential implications of the inconsistency of two different regulatory regimes applying to two groups of employees working on the same project, and apparently covered by the same collective agreement.

V. CONCLUSION

57 I find the individuals challenged by the Union that were working on the Alberta project were not employees employed by the Employer within B.C. at the time of application. Their place of employment at the time of this application was Alberta. As a consequence, the names of those remaining individuals challenged by the Operating Engineers working on the Alberta project should be removed from the Tentative Voter's List. I leave aside the status of the two individuals, Knezarek and McLeod, raised by the Operating Engineers after the hearing for the consideration of the parties to determine if the reasoning in this ruling applies to their circumstances. The parties will be contacted shortly for a conference call to determine how to proceed with the remaining issues.

LABOUR RELATIONS BOARD

LAURA PARKINSON
VICE-CHAIR