BCLRB No. B362/93

BRITISH COLUMBIA LABOUR RELATIONS BOARD

NAZKO RESOURCE MANAGEMENT LTD.

(the "Company")

-and-

NAZKO INDIAN BAND

(the "Band")

-and-

IWA-CANADA, CLC, LOCAL UNION NUMBER 1-424

(the "Union")

PANEL: Maria Giardini, Vice-Chair

COUNSEL: Gary Catherwood, for the Band
Robert B. Blasina, for the Union

CASE NO.: 16396

DATE OF HEARING: September 21, 1993

DATE OF DECISION: November 5, 1993

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

The Union applies for certification of employees employed in logging except office and managerial staff of Nazko Resource Management Ltd. (the "Company"). It has sufficient membership support for an automatic certification. The Company says that although an entity known as Nazko Resource Management Ltd. exists, the employees in question are not employed by it--they are employed by the Nazko Indian Band (the "Band"). Consequently, the application should be dismissed because the Union named the wrong employer and sought no amendment. Alternatively, if an amendment were sought and granted, the date of the amendment should be considered the date of application for certification. If this later date governs, it is significant because the Board received a number of revocations on September 21, 1993 which could affect the Union's entitlement to automatic certification.

II. FACTS

The Union applied for certification on September 13, 1993. The initial application described the unit applied for as "all employees of Nazko Resource Management Ltd., excluding supervisors and office staff". The Board sent a notice to the parties on September 14, 1993. That same day, counsel for the Company wrote to the Board and advised that the Company was a shelf company which had no employees, business or money. The letter advised that the individuals covered by the Union's application were employees of, or under contract to, the Band.

On September 15, 1993 the Board received a submission from the Union. The Union acknowledged receiving the Company's letter of September 14, 1993 but maintained that it had

correctly named the employer as Nazko Resource Management Ltd. At the same time, the Union asked the Board "to grant us the option of amending our application on Tuesday to name the employer as the Nazko Indian Band if necessary." The Union said that in substance, it made little difference if either or both names were used to identify the employer. The Union also requested that the bargaining unit description be amended to clarify that the application was not for "all employees" but for all employees employed "in logging".

On September 16, 1993 the Board issued an amended notice which contained the corrected unit description. On September 17, 1993 the parties were provided with a copy of the Investigating Officer's ("IRO") report which set out the Band's position that the Company was a shelf company and that the employees in question were receiving their pay from the Band.

The certification hearing was held on September 21, 1993 at the Board's offices in Vancouver. The Union attended with counsel as did the Band and its counsel. Counsel for the Band made it clear that he acted only for the Band and not for the Company. No one attended on behalf of the Company.

Chief Dan Boyd testified for the Band. He said that the Band operates a number of business ventures, one of which is contract logging for Quesnel Forest Products. Another business involves operating a lumber remanufacturing plant. He explained that the logging venture has been active for approximately eight years and the individuals involved in it are employed by the Band.

The Company named in the Union's application (Nazko Resource Management Ltd.) was incorporated in July 1993. Chief Boyd said the Company has no assets or business and employs no one. The Company was set up to satisfy the Ministry of Forests because the Band was bidding on a small business licence for logging and remanufacturing and incorporation of a limited company was seen as an advantage. The shares of the Company are held by three counsellors of the Band who hold them in trust for the Band.

Boyd conceded that: the manager of the remanufacturing plant has a business card bearing the name of Nazko Resource Management Ltd.; the name Nazko Resource Management Ltd. is stencilled on a wall at an office in Quesnel and on the door of a red, Ford, one-ton truck. However, he said the truck is owned by the Band and the office in Quesnel (which is a mailing

address only) also has a large sign with the name of the Nazko Indian Band on it. A business card has been printed bearing the name of the Company, and and managers of the plant and the Band but the remanufacturing plant is owned by the Band not the Company.

The Union business agent, Fred Arnold, testified for the Union. He was responsible for the application for certification but did not conduct the organizing campaign. Although he was not present when the employees signed the membership cards, he has seen them and they show "Nazko Resources" as the employer.

III. POSITIONS OF THE PARTIES

The Union argues that it has made out a *prima facie* case that Nazko Resource Management Ltd. is the employer. The employees who signed up listed the Company as their employer. The Company exists, the Company has a business card with the name of the Band manager and the remanufacturing plant manager on it, and the name of the Company is on a truck.

The Union submits that the Company is controlled by the Band and is essentially the same employer. The Band and the Company are one and the same and the distinction drawn by the Band is really only a matter of semantics.

The Union submits that it correctly named the employer as Nazko Resource Management Ltd. However, it argues that if it is wrong, changing the name to Nazko Indian Band is not a substantive change to the original application because the Band owns the Company. While the Union does not apply to amend its application, it says it does not object if the name on the application is changed to Nazko Resource Management Ltd./Nazko Indian Band. The Union argues that if the name of the employer is changed, the application should be not be treated as a new one. As a matter of policy, this would set a poor precedent and would only reward the employer for ambiguity.

Counsel for the Band argues that the only direct evidence regarding who the true employer is came from Chief Boyd. He testified that the Company has no employees and that the employees covered by the Union's application are employed by the Band. That evidence was not

seriously challenged.

The Band further argues that the Board has previously dealt with situations where a trade union is not certain which of two entities if the true employer: *Quinsam Coal Limited*, IRC No. C97/89; *Union Pipeline Contractors Ltd.*, IRC No. C168/90 (reconsidered in IRC No. C20/91). The Band points out, however, that the Union in this case has never named the Band, nor has it applied to amend its certification application.

The Band argues that it is a separate entity from the Company. Moreover, it says that the Union has not made an application to treat the Band and the Company as one employer pursuant to Section 38 of the Code. The Band submits that the wrong employer has been named. The Union was advised of this but chose not to take any steps to name the true employer.

The Band argues that the Board cannot substitute the name of the true employer because to do so is not a mere administrative change but a substantive amendment. Hence, it submits the Union's application must be dismissed because it named the wrong employer and made no application to amend.

IV. ANALYSIS

The issue is whether the Union has sought certification of the correct employer.

The Company has an office and its name appears on a business card and on the door of a truck. These facts, however, do not establish that the Company has employees. When employees signed membership cards they named "Nazko Resources" as their employer. This is evidence of what the employees thought; it is not reliable evidence of the identity of true Employer. Chief Boyd's testimony that the individuals covered by the certification are employees of the Band is the only direct evidence before me. That evidence was not shaken in cross-examination. I prefer Chief Boyd's direct *viva voce* testimony to the evidence of what the employees believed when they signed the membership cards. I therefore find the Band is the employer and not the Company.

In its submission to the Board dated September 14, 1993 the Union asked for the option to

seek an amendment at the hearing if necessary. However, at the hearing, even after hearing Chief Boyd's evidence, the Union did not ask to amend its application. In argument, the Union stated it would not object if the name on the application were changed to Nazko Resource Management Ltd./Nazko Indian Band, but it did not request such an amendment.

The Union was aware well in advance of the hearing that it may have named the wrong employer, yet it did not apply to amend. It may well be that it wanted to test the information it was given by counsel for the Company. However, even after it heard evidence under oath from Chief Boyd, it still made no application to amend. In these circumstances, it is inappropriate for the Board, on its own motion, to amend the Union's application to name the true employer. A party has the responsibility to ensure that the relevant aspects of its application are correct. There may be circumstances where errors are made. However, when that is the case, active steps should be taken to initiate a correction.

The Union also argued that the Company is controlled by the Band, that the Company and the Band are one and the same, and that drawing a distinction between the two is really only semantics. However, I find that the Company and the Band are two different legal entities; the distinction is not simply a legal technicality. The very purpose of incorporating a limited company is to create a separate legal entity. In this case a separate legal entity was created with its own board of directors. While the members of the board are members of the Band, I am not prepared to find that the Company and the Band are one and the same. The Company was set up for a distinct purpose to bid on projects as a separate legal entity. The Band itself carried on logging projects long before the Company was incorporated.

The common employer provision in Section 38 of the Code provides a mechanism whereby two or more entities can be treated as one employer for purposes of the *Code*. An application under that section can be brought in conjunction with an application for certification as was done in *Granville Island Hotel,* BCLRB No. 253/83. In this case, that was not done; nor did the Union ask me at the hearing to exercise my discretion under Section 38 and treat the two entities as one. As there is no application properly before me it is not appropriate to make a common employer finding based on comments made in passing during argument.

V. CONCLUSION

The Company is not the employer of the employees covered by the Union's application for certification. On the evidence the true employer is the Band. The Union was told it had named the wrong employer, yet is chose to pursue its application for certification as originally framed. The Union's application is dismissed because it named the wrong employer and did not apply to amend its application.

LABOUR RELATIONS BOARD

MARIA GIARDINI
VICE-CHAIR