

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

TERCON CONTRACTORS LTD. AND TERCON SERVICES LTD.

(the "Employer")

-and-

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,  
IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND  
HELPERS, LODGE 359

(the "Boilermakers")

-and-

CHRISTIAN LABOUR ASSOCIATION OF CANADA, LOCAL NO. 68

("CLAC")

PANEL:	Brent Mullin, Vice-Chair
COUNSEL:	Peter A. Gall, for the Employer Gerard F. Culhane, for the Boilermakers Alan C. Favell, for CLAC
CASE NO.:	28848
DATE OF DECISION:	March 13, 1996

## DECISION OF THE BOARD

### I. NATURE OF APPLICATION

1           As set forth in the previous decision in this matter, BCLRB No. B9/96, the  
Boilermakers have applied to the Board for certification of a bargaining unit of  
“employees in British Columbia except office staff”. The Employer and CLAC have  
opposed the application on two bases. The first objection was that the application is  
untimely as a result of existing collective agreements. That objection was dismissed in  
BCLRB No. B9/96.

2           The second objection is that the Boilermakers do not have sufficient membership  
support for certification. That objection is based upon the assertion that there is a long-  
term, core group of employees, whom, it is argued, have already chosen to be  
represented by CLAC and should have a say in regard to the Boilermakers’ application.  
Both the Employer and CLAC maintain that the Boilermakers’ application is a raid and  
that BCLRB No. B9/96 is wrong on that account. They also say that the Board’s  
approach to membership support for certification applications in the construction  
industry in *B.A.T. Construction Ltd. et al.*, BCLRB No. B44/94 (Reconsideration of Nos.  
B102/93 and B178/93), (1994), 25 CLRBR (2d) 1 (“*B.A.T.*”), should be modified or  
adjusted to suit the raid context, essentially because access to collective bargaining has  
already been attained.

3           The Employer and CLAC also specifically address the *B.A.T.* requirements in  
relation to the Boilermakers’ application. They say that eight of the long-term, core  
employees have or will have worked in both the 30 days prior to the Boilermakers’  
application and the 30 days subsequent to the application. They say that these  
employees thus satisfy the *B.A.T.* 30/30 rule and should be included in the membership  
count in relation to the certification application.

4           Subsequent to the conclusion of argument in the present matter, the Board  
interpreted and applied the *B.A.T.* 30/30 rule in *MJB Hookups Electrical Contractor Ltd.*,  
BCLRB No. B58/96 (“*MJB Hookups*”). The parties were apprised of this decision and  
given an opportunity to make submissions in respect to it.

### II. ISSUE

5           The issue is whether the *B.A.T.* requirements have been met by the eight  
employees re-employed by the Employer within the 30 days after the Boilermakers’  
certification application.

III. FACTS

6 The general background to the certification application was set forth in BCLRB No. B9/96 as follows:

The two, predecessor companies of the Employer were held to be a common employer by the Board in August 1985. As a result, the previous certification held by CLAC for one of those companies was held to apply to the new, common employer.

In 1995, the corporate names of the companies comprising the common employer were changed to the current names, Tercon Contractors Ltd. and Tercon Services Ltd. The Employer and CLAC advise that at that time separate collective agreements were executed between CLAC and the respective corporate entities in the common employer. Those collective agreements have different duration dates. The collective agreement for Tercon Contractors Ltd. runs from June 1, 1995 to May 31, 1998. The collective agreement for Tercon Services Ltd. has a term from October 1, 1995 to September 30, 1998. There is no explanation provided as to why the single, common employer executed two, separate collective agreements with different duration periods.

The Boilermakers' certification application arises in respect to a construction project the Employer is engaged in at Trail, B.C. It is not contested that there are five employees working for the Employer on that project. However, both CLAC and the Employer say that these employees are not representative of the Employer's usual employees, which consists of a core group of employees who are on temporary layoff. In its December 21 submission, the Employer says that these 25, long-term employees were laid off "within the last month" and will likely be recalled in January 1996. There were no assertions of any specific recall rights of these laid off employees under the above collective agreements between CLAC and the Employer. (paras. 2 to 4)

As already noted, the Employer's and CLAC's raid period arguments were not accepted in BCLRB No. B9/96.

7 The Employer is a construction contractor. It is involved primarily in highway construction and excavation work, and to a lesser extent in industrial construction. It does any where from \$10 to \$25 million of work per year or, on average, approximately \$15 million work per year. The Cominco Trail job giving rise to the Boilermakers' application is a small job for the Employer, being only about \$250,000.

8 Four of the five employees at the Trail job are, as required by Cominco, local hires. These local hires stand in contrast to the long-term group of core employees referred to by both the Employer and CLAC. That assertion was established through the evidence of the two hourly employees who testified, Gordon Kretchmar and Tyril

Summers. Their testimony was that there are “10 to 15” or “a dozen or more” long-term, core, regular employees. Kretchmar has worked regularly for the Employer since 1986, Summers since 1988. On the basis of their evidence, and the portions of the documents which were accepted into evidence, I accept that there is a long-term, core group of regular employees of the Employer. The exact number (largely as a result of efforts to complete the case in one day) remains indefinite. The eight individuals specifically at issue will be dealt with below. However, in this context, long-term core employee means an individual who looks to the Employer for his or her primary employment and has worked regularly for the Employer for a significant number of years (for instance, like Summers since 1988). That employment also typically includes a period of winter “layoff” or non-employment with the Employer. At times that has been primarily around the Christmas period; in other cases it has been a number of months in duration.

9           The Employer’s work has for the most part been in British Columbia, but there has also been work in Alberta, the Yukon, the North West Territories, and even Russia (actually Khurdistan). The work in Russia appears to be an anomaly; while the Alberta work is not claimed by the Employer to be relevant to its position regarding the core group of employees. That position is argued upon the basis of the collective agreement with CLAC, which in geography and scope covers British Columbia, the Yukon, and the North West Territories. All of the eight individuals at issue in this decision worked in the Yukon in the 30-day period prior to the Boilermakers’ application. However, the evidence indicated that generally their work was on projects in British Columbia.

10           The individuals at issue in the present matter all reside in British Columbia. When the Employer is successful in obtaining work, the employees travel to the project site and work there. They typically are away from home and work long hours while working on a project. Within that pattern of work, it is customary for the employees to want, and be given, a significant break from work at Christmas in order to be with their families. The construction work is also subject to weather and typical winter shutdowns.

11           There are eight individuals put forward by the Employer in terms of satisfying the *B.A.T.* 30/30 rule. They are Kretchmar, Summers, J. Magoon, J. McLeod, B. Nelmes, K. Ware, T. Ballard, and K. Overton. For the purpose of describing their work, they can be considered in the following groups:

1.       Kretchmar and Summers

12           There is no dispute that Kretchmar and Summers are long-term, regular employees (as described above). There is also no dispute that they worked within the 30-day period prior to the Boilermakers’ certification application (though in the Yukon). It is the nature of their re-employment in the 30-day period after the certification application which is primarily at issue.

13           The Boilermakers’ certification application was filed with the Board on December 18, 1995. Kretchmar and Summers, along with four others (Magoon, McLeod, Nelmes, and Ware) were re-employed by the Employer in early January. Summers testified that

he was phoned between Christmas and New Year's in that regard. The six employees as a group commenced work in a warehouse owned by the Employer in Kamloops (where the Employer also has its head office). The work included organizing and cleaning the warehouse, and constructing iron shelving which the Employer had purchased for tools it planned to return from Alberta.

14 In the second week in January 1996, and within seven days of their re-employment, Kretchmar and Summers have since performed some grader work for M Con Services Ltd. ("M Con"). M Con is a highway maintenance contractor. It has contracts from the provincial government for three areas: Merritt, Vernon/Salmon Arm, and Grand Forks. It is described by the principal of the Employer as being a "related" company, in that it is 50% owned by that principal's holding company. He further explained that normally in the summer the Employer has its "own work going on", so it does not need to do this kind of work for M Con. However, apparently M Con, which also has a core group of employees, had this further grader work to be done which could not be done by its own employees. The Employer had employees whom it had "laid off" before Christmas and therefore undertook to do this further grader work for M Con. Although the evidence was not altogether clear on this point, I understand that the contract was between the Employer and M Con, with Kretchmar and Summers being employed by the Employer while they were doing the grader work.

15 The grading work done by Kretchmar and Summers was further to M Con's highway maintenance contract. It was also further to a distributor offering a new grader to be tested. It was that grader that Kretchmar and Summers were operating. Kretchmar testified that he had done grader work before for the Employer over a number of different years. He estimated it amounted to 500 to 1,000 hours of work. He performed it whenever it was required, including sometimes in January.

16 Summers testified that he had done carpentry work for the Employer before. He also described the Employer as "my basic employer". He said the Employer is the best company he has worked for and he has even gone so far as to quit current employment with other employers three times in order to return to work for the Employer.

17 The Manager of the Industrial Division of the Employer testified that warehouse clean-up work had been previously done by the Employer, for instance in March or April of 1995. He resisted the suggestion in cross-examination that there was no particular reason that people would be employed to tidy up the Kamloops warehouse, answering that it was for the tools to be returned from Alberta. However, he did agree that, in obvious reference to the Boilermakers' certification application, there were "good reasons in labour relations" for these individuals to be re-hired in early January.

18 Both Kretchmar and Summers testified that when they were "laid off" before Christmas, they expected to be recalled to employment with the Employer when it had work available for them. In cross-examination, Summers explained that his expectation was that he would be recalled to work in the spring after the end of the freeze-up, "unless I got something else". I found both Kretchmar and Summers to be credible witnesses.

19 Kretchmar and Summers further testified that they felt strongly that in fairness as part of the regular group of employees of the Employer, they should have a say in who represents them. Kretchmar noted as well that the Boilermakers' application comes at a time when typically there are not any of the long-term, regular group of core employees working for the Employer. He felt that it would be unfair if those employees are not given a say in the matter. Both Kretchmar and Summers added that they had talked to a number of the other core employees, who felt the same way. (I add that this last portion of the evidence is clearly hearsay, while the evidence of Kretchmar's and Summers' views is more in the nature of argument than testimony on facts. However, I believe it is understandable and could be anticipated that a group of long-term, regular or core employees would want their interests and concerns raised, as here. Equally, in the interest of holding and completing the hearing in a timely way, it was understandable that the evidence was led, and not objected to, in the manner it was.)

2. Magoon and McLeod

20 Kretchmar and Summers were the only hourly employees to testify. The evidence in respect to the other individuals at issue was thus purely objective. In respect to Magoon and McLeod, it revealed that they were part of the six individuals re-employed by the Employer in early January to work in the warehouse. From there, they went on to do some driving work, again in relation to M Con and its highway maintenance work. The evidence of the principal of the Employer was that it has been a heavy year for sanding and salting the highways. As a result, certain locations had run out of sand and salt. Magoon and McLeod were engaged in hauling sand and salt which needed to be moved from one place to another in the Merritt area.

21 McLeod is one of the long-term, core group of employees. He has worked for the Employer for significant periods virtually every year since 1982. Magoon has worked for the Employer since 1994.

3. Nelmes and Ware

22 As already noted, Nelmes and Ware also commenced re-employment with the Employer in early January in order to work in the Kamloops warehouse. From there, they went on to do carpentry work (building shelving) for M Con in its shop in Lytton. Again, although the evidence was not entirely certain on this point, I understand that the contract was between the Employer and M Con and thus Nelmes and Ware, like Kretchmar and Summers, were employed by the Employer while doing this work for M Con.

23 There is also similar work for Nelmes and Ware in regard to an M Con shop in Merritt. They were described by the principal of the Employer as "carpenters". He also explained that the work which Nelmes and Ware are doing is similar to work done on the Stein River Intake project in 1995. He added that, in relation to work done for M Con, the Employer does not seek to make a profit, but merely to cover its costs. That is because of the related nature of the companies.

24 Nelmes and Ware have thus worked for the Employer in both the 30-day period prior to the Boilermakers' application and in the subsequent 30-day period. Nelmes has worked for the Employer since the spring of 1994. Ware since the summer of 1995.

4. Ballard and Overton

25 Ballard and Overton are mechanics. The principal of the Employer describes them as "our best two mechanics". He further says that they are the Employer's first choice in terms of working on its machinery. This winter, the Employer has them working on its machinery in the Yukon. The employees, as usual, were given time off at Christmas to return home to their families. However, at the time of the hearing, both Ballard and Overton were either on their way or commencing to return to the Yukon to again work on the machinery. There is a full winter's worth of overhauling work to be done. Ballard and Overton thus both worked in the 30-day period prior to the Boilermakers' application and will work in the subsequent 30-day period. In both cases, their work for the Employer is in the Yukon. Ballard has worked regularly for the Employer since 1986 (with the exception of 1993); Overton since 1987.

IV. POSITIONS OF THE PARTIES

1. The Employer

26 The Employer says that the Boilermakers' application is a raid, thus the policy concern of access to collective bargaining is less of a factor than in a certification application *per se*. As well, the policy concern of timeliness is less urgent. Lastly, in a raid, the *B.A.T.* policy should not be applied in a mechanical way.

27 Turning to the substantive issues under *B.A.T.* presented by the facts (given the determination in BCLRB No. B9/96 that the Boilermakers' application is a certification application, not a raid), the Employer first addresses the question of the Yukon work of the eight employees. The work of Ballard and Overton will be in the Yukon for both of the 30-day periods under the *B.A.T.* rule. For the other six employees, their work was in the Yukon for the 30-day period prior to the certification application. However, for all eight employees their work history with the Employer has been primarily in B.C. and will continue to be primarily in B.C. That contrasts with the Alberta employees, who are not working in B.C., have not worked in B.C., and will not work in B.C. There is thus no connection between those employees and the Employer's B.C. construction work and they are not employees under the Code.

28 Addressing the eight employees at issue, however, the guiding principle should be to look at their work history and see if it constitutes a sufficient, continuing tie with the Employer in the province such that they should be given a say in the certification application. Even though the specific rule is set forth in *B.A.T.*, because these employees have worked outside the province, we must go back to the general sufficient, continuing interest test.

29 The Employer turns next to the question of the nature of the work performed by the six employees in the province in respect to the second 30-day period and requirement. The Employer says that we should go back to basic principles. Those principles suggest that there should be a “bright line test” and that these employees “as part of the long-term, core group of regular employees” should have a say in the application. The exception to the bright line test would be if there was a fraud on the Board, in the sense of the work having been created by the Employer in order to defeat the application. Absent that, and the Employer says the facts in the present matter fall short of meeting that exception to the bright line test, the Board should include for the purpose of membership count all those employees who have worked for the Employer in both 30-day periods. That would meet the Board’s policy desire for more certainty and objectivity in the processing of construction industry certification applications.

30 The Employer also says that the work history of these employees cannot be ignored regarding their expectation of recall, given the continuing interest they have with the Employer. The certification application is, in fact, of more profound significance to them than for the employees working temporarily on the project in Trail. Under the 30/30 rule, these long-term, core employees are the type of employees who for policy reasons should have a say in the application. The Employer says that the Board should keep the objective in mind, which is to try to protect the wishes of everyone who has a legitimate stake in a company. The *B.A.T.* panel did not make the test rigid. It left room for an exception and noted that the policy would be monitored.

31 The Employer cites the subsequent decision in *Bourke Bros. Mechanical Inc.*, Letter Decision BCLRB No. B410/95 (“*Bourke Bros.*”). It says that any more strict application of *B.A.T.* than in that case, would effectively cut off the second arm of the test.

32 In summary, the Employer says that the 30/30 determination should be made on the basis of the evidence available at the time. In the present matter, that includes the eight employees, along with the five at Trail. The eight employees include Ballard and Overton, who will have worked in the Yukon in both periods. The Employer says that they have a sufficient continuing tie to the Employer over the course of their employment history and most of that work has been and will continue to be within B.C. In the alternative, the Employer says that the *B.A.T.* test is not rigid and these long-term, core employees who have been recalled in the 30-day period are a quintessential case for exercising the flexibility in *B.A.T.* as an exception to the rule.

33 In respect to the subsequent *MJB Hookups* decision, the Employer does not disagree with viewing the individual’s expectation of recall as of the date of the certification application. However, that does not mean that simply because as of that date an employer does not have any further work, that there can be no reasonable expectation of recall within the following 30-day period. Where, as in the present matter, it was reasonably likely such work would come along, that meets the reasonable expectation of recall test.

34 The Employer also says that it would not make either common or labour relations sense for the contested individuals in the present matter to not be considered employees of the Employer in respect to the certification application. In contrast to the majority of the employees working on the Trail project, which is now over, the contested individuals will continue to work for the Employer into the foreseeable future. As well, if the Boilermakers are granted certification but do not have the support of a majority of the people continuing to work for the Employer, that would only lead to labour relations problems.

## 2. CLAC

35 CLAC agrees with the Employer's submissions regarding the *B.A.T.* 30/30 rule. It adds that the employees in the present matter have not been unrepresented employees. It would be a legal fiction to suggest that the present application is a certification application *simpliciter*. The reality is that the employees have been represented for a number of years by CLAC. This is an important point when interpreting the *B.A.T.* case. The focus should not be merely on the rules set forth at the end of the case, rather the case should be read in total in order to understand the policy reasons for it and to have it make sense.

36 CLAC notes that its representation of the employees for a number of years is consistent with a number of fundamental purposes in the Code noted in *B.A.T.* They include the employees' choice of union representation (p. 24), the nature of employment with open shop contractors (p. 25), the different circumstances and considerations in respect to a raid (p. 28), and the issue of seasonal layoffs in the context of the greater emphasis in the British Columbia jurisprudence on an individual's rights (p. 30). CLAC says that these kinds of policy considerations were in the back of the Board's mind in *B.A.T.*

37 The *B.A.T.* rule itself can either be interpreted and applied mechanically or by recognizing the subjectivity in the "reasonable expectation of being re-employed" (p. 35) test for the second 30-day period. In the former, and with the simple facts that an individual has worked in both 30-day periods, the onus would be on the party opposing the right of that individual to be counted. In the latter, the highly subjective test (in terms of what the employee thinks) could be tempered by the reasonableness of the expectation of further employment in light of the surrounding facts and the employment history overall.

38 The concern for disenfranchisement in *B.A.T.* is less in the present matter because the employees have been represented by CLAC for many years. Accordingly, in this situation the Board should err on the side of allowing more employees to vote, rather than less. That is to ensure that their rights are not lost in respect to their basic, fundamental choice under the Code. If this had been a true certification case *simpliciter*, the primary policy concern would be access. However, in the present matter, the primary concern should be the choice of the employees in respect of who represents them, just as was heard from the two hourly employees who gave evidence [Kretchmar and Summers].

39 In respect to the potential question of whether the work performed by the employees in the second 30-day period is legitimate, CLAC says that short of fraud, that is irrelevant. To adopt a lesser test would be a slippery slope for the Board in terms of trying to achieve the policy goals of “increased objectivity and predictability” (pp. 34-35) and lessening litigation.

40 In the facts of the present matter, the work performed was not a fraud, it was legitimate. The employment was not merely a concoction to defeat the Boilermakers’ application. CLAC says that the only evidence in the hearing regarding the legitimacy of the work was Kretchmar’s evidence that he had done grading work before, for hundreds of hours, and in January of previous years. As well, Summers said that the work he was performing was the same as the kind of work he had done before for the Employer.

41 In respect to the *MJB Hookups* decision, CLAC essentially says two things. The first is that the decision may have overstated the principles in *B.A.T.* when, at page 6, it compares the reasonable expectation of recall within 30 days requirement to “an expectation of re-employment at some indefinite point in the future”. CLAC says that there is a middle ground, which is found in the circumstances of some of the employees at issue. Their projects were scheduled to resume in March and April 1996, which is neither the 30 days nor an indefinite point in the future. The 30-day period should “not be treated as written in stone”, in CLAC’s view; rather, the true test is the “reasonable expectation of re-employment”, which is met in the present circumstances.

42 Secondly, CLAC says that the six employees recalled in early January 1996 are not affected by the *MJB Hookups* case, because of their expectation of recall and actual recall. The fact that they simply did not have a recall date within the 30 days at the time of their layoff should not suggest that there is no expectation of re-employment. As well, the fact that they have worked since and will continue to do so, should be considered.

### 3. The Boilermakers

43 In addressing the *B.A.T.* 30/30 rule, the Boilermakers say that the first part of the test is mechanical, but the second part is subjective. The rule was designed to create less litigation, but the option of making it entirely mechanical, as in Ontario, was rejected. Thus, the Boilermakers say, it looks like the Board has taken a little bit from two worlds. The first part is the first 30 days which, is simply mechanical. However, the second part looks forward in the sense of being a “reasonable expectation”. That cannot be an objective, mechanical test. An expectation is subjective. It is something that has not happened, and is a thought or belief in the mind of an individual. That thought or belief, however, must be “reasonable”, i.e., not just any belief.

44 In respect to the second part of the 30/30 rule, it is not adequate to simply establish that the individual was hired and worked. The specific requirements in *B.A.T.* for being an “employee” are defined specifically for this purpose of constituency and

membership count in construction industry representational matters, not any others under the Code.

45 As well, the reality of the construction industry is such that a company may have no employees one month and a hundred employees the next. This variable nature of employment in the industry is the outstanding form or feature of the industry. Any argument otherwise does not help the Board in understanding the construction industry. In terms of the employment histories of the individuals at issue in this matter, they all include gaps of months. That reflects the exact nature of the construction industry. If an employer calls, an individual will go work for that employer. That is what the business is like.

46 In respect to the evidence of the two hourly employees [Kretchmar and Summers], the Boilermakers say that there is not a chance that they had a reasonable expectation of being re-employed by the Employer within 30 days of the Boilermakers' certification application. They did have an expectation of re-employment, but it was not within 30 days following the certification application. That was proven by the kind of work for which they were re-employed. The Boilermakers say it is not necessary to establish a fraud. An industrial relations purpose to the re-hiring of the individuals is sufficient. The Manager of the Industrial Division of the Employer conceded that the re-employment of all of these individuals did satisfy that labour relations purpose. Further evidence of this is that the work which they performed was work within the Employer (and its related company, M Con) itself. The work was not on a project.

47 There is no need to prove a fraud, one need simply to go back to the requirements of a "reasonable expectation of being re-employed" (p. 35). On the facts, these individuals did not have an expectation to be re-employed in the 30-day period. Secondly, if they did have such an expectation, it would not have been reasonable in the circumstances. For the expectation to exist and be reasonable, one would expect evidence that the Employer had bid on a contract, obtained it, and it was to start on a date within the 30-day period.

48 The Boilermakers say that the Board should not consider as "employees" those individuals who work outside of B.C. in both 30-day periods. In respect to the six individuals in the present matter who worked in the Yukon in the first 30-day period and then in B.C. in the second 30-day period, the Boilermakers say that the Board probably has the right to consider them employees, but it would not be a sensible thing to do. Alternatively, if the Board was going to entertain the employee status of these individuals, at most it should accept four of them [Kretchmar, Summers, Magoon, and McLeod], on the basis of the grading and driving work performed by them.

49 In regard to the *MJB Hookups* decision, the Boilermakers say that none of the persons at issue in the present matter meet the requirements. The key points are, first, that none of these persons worked on the date of the application. Second, in respect to the prior 30-day period they worked outside the jurisdiction of British Columbia and in respect to the subsequent 30-day period though they had an expectation of re-employment, it was at some indefinite point in the future, not within 30 days. Third, the

policy in the *MJB Hookups* decision is intended in part to discourage delay and manipulation of the unit by an employer. In the present case, the self-created, non-project nature of the warehouse work and the arranged (and unprofitable) work for a related company both raise such concerns. Accordingly, these persons do not satisfy the 30/30 rule.

V. ANALYSIS

50 The Board's new approach to the issue of bargaining unit constituency for the purposes of membership support in certifications in the construction industry is set forth in *B.A.T.* The approach is summarized as follows:

This rule will be as follows: a person will meet the definition of employee if they are working in the bargaining unit on the date of application for certification; second, should a person not be at work on the date of the application for certification but have worked at any time during the 30-days preceding the application, and further, have a reasonable expectation of being re-employed during the 30-days following the date of application, they will qualify as an employee. Both of these conditions must be met if an individual is not working on the date of the application for certification.(p. 35)

This passage sets forth the 30/30 rule. As it must be applied in this case in facts which are equivocal and difficult, it is important to note as well the policy bases in *B.A.T.* for arriving at this approach.

51 One of those policy bases is succinctly summarized towards the conclusion of the decision as follows:

Thus, in order to limit delays, the test for determining who is an employee should be sufficiently objective and predictable in its outcome that the parties themselves are able to determine the bargaining unit constituency without the necessity of time consuming and costly litigation. (pp. 37-38)

The "objective and predictable" nature of the test, with its desire to avoid (or minimize) the delay and costs of litigation, is key. This need to avoid the delay and cost of litigation in certifications in the construction industry by having a "sufficiently objective and predictable" test was set forth in strong terms earlier in the decision as well (pp. 24-25). The Board's general test of a "sufficient continuing interest" had proven to be "less effective in resolving disputes over the issue of who is an employee" in the construction industry (p. 32). As well, and "perhaps more importantly, it [the sufficient, continuing interest test] has not achieved a consistent balance between individual rights and access to collective bargaining" (*ibid.*). The balance to be achieved is "of three factors: access to collective bargaining, individual rights, and the timeliness of the certification or decertification process" (p. 31).

52 In setting forth the 30/30 rule, the Board in *B.A.T.* allows for two specific exceptions and a further, final area of residual discretion. There are thus four categories of employees set forth in *B.A.T.* in relation to certifications in the construction industry, and a residual discretion which can be exercised. The four categories are:

1. those individuals working in the bargaining unit on the date of application for certification;
2. those individuals meeting the requirements of both 30-day periods (i.e., having “worked at any time during the 30-days preceding the application, and further, hav[ing] a reasonable expectation of being re-employed during the 30-days following the date of application” (p. 35);
3. *bona fide* “new hires” under Section 39 of the Code; and
4. “individuals who are on days off, vacation, illnesses, accident, etc.” (p. 35).

The area of residual discretion arises from the Board’s concluding comment:

The rule is not rigid and there may be individuals who fall outside the rule but who the Board would nonetheless find to be an employee. However, there will be a substantial onus on the party who wishes to establish that a person who falls outside the 30/30-day rule is, in fact, an employee. (pp. 38-39)

The present matter was for the most part argued under category 2 in respect to what meaning and practical import should be given to the requirement that an individual “have a reasonable expectation of being re-employed during the 30-days following the date of application” (p. 35).

53 Before turning to that issue, however, it should be noted that the variety and evolving (or evolved) nature of the employment relationships in the construction industry were specifically noted and considered by the panel in *B.A.T.* In that respect, the Employer in the present matter is what is referred to in the decision as an open shop construction company and “hybrid employer”; i.e., one which has “a mix of some core employees and some intermittent employees” (p. 36). The panel had the following to say on this point:

We have considered the ICBA [the Independent Contractors and Businesses Association of British Columbia] submission that the majority of open shop construction companies have employment policies which reflect less the traditional pattern of intermittent hires and more the industrial pattern of retaining a core group of employees. However, a fair reading of ICBA’s submission is that most, if not all, open shop contractors are “hybrid employers” - a mix of some core employees and some intermittent employees. The employment scheme of both core and intermittent employees in the open shop sector remains under the

exclusive control of the employer (as was the case in Oviatt and BAT). Individuals have no legally enforceable right of re-employment from one season to the next. However, in devising the 30/30 rule, we have given consideration to this hybrid employer situation. (p. 36)

The relation of the *B.A.T.* policy considerations and rule to such hybrid employers is specifically noted in the first (the above quote), fourth, and fifth reasons for the policy choice in the decision (pp. 36-38).

54 I will turn now to the issue in the present matter. It is what meaning and practical application is to be given to the requirement for the second 30-day period that the individual “have a reasonable expectation of being re-employed during the 30 days following the date of application” (p. 35)? In firstly considering the meaning of that statement, in general I agree with counsel for the Boilermakers that the specific words chosen by the *B.A.T.* panel for the test should be carefully considered. Although the words are not statutory, and thus need not be given that rigour of interpretive approach, they are the carefully chosen words of a panel of the Board headed by the Chair in a policy decision. The policy decision in *B.A.T.*, in fact, changed the Board’s approach to the matter and set forth a new approach and test. The specific words chosen thus must be given careful consideration, along with the policy bases and thrust of the decision.

55 Looking at the words themselves, firstly I find that they undoubtedly import a subjective basis for the test to be applied. As counsel for the Boilermakers further noted, an expectation is something which has not happened; it is a thought or belief in the mind of an individual. In short, it is subjective. However, the full test of a “reasonable expectation”, also requires that it not be just any thought or belief; i.e., the expectation must be “reasonable”. Reasonableness is an objective determination. Thus, the subjective “expectation” is defined and limited by the objective requirement that it be “reasonable”.

56 The subjective basis or portion of the “reasonable expectation” requirement could seem to be in tension with the general policy thrust in the *B.A.T.* decision. That policy thrust is the already noted desire to move the Board’s approach in this matter to a more “objective and predictable” test, which will decrease the need for litigation, with all of its expense and delay. However, on reflection, that tension is likely a result and part of the balancing of the three factors or policy concerns at the root of the decision:

1. access to collective bargaining,
2. individual rights, and
3. the timelines of the certification or decertification process. (p.31)

57 Considering the tension in the “reasonable expectation” test in relation to these policy factors, I take the subjective portion of the “reasonable expectation” requirement to be in support and protective of the policy concern for “individual rights”. The requirement that the expectation be objectively “reasonable”, along with the defined 30-

day periods themselves, I see as furthering the policy concerns of protecting “access to collective bargaining...and the timeliness of the certification or decertification process”.

58 Turning now to give the test, and the policy concerns behind it, some practical import and application, I find that the *MJB Hookups, supra*, decision does so in a manner which is consistent with what is set forth in *B.A.T.* In particular, the focus in *MJB Hookups* on the date of the certification application for determining whether there was a reasonable expectation of re-employment. (see paras. 26 and 28 of *MJB Hookups*) is consistent with the test and policy concerns in *B.A.T.* As already noted, a major policy thrust in *B.A.T.* is to create a test which is “sufficiently objective and predictable” such that it will lessen the need for time consuming and costly litigation: pp. 37-38. The focus in *MJB Hookups* upon the date of the certification application is intended to “discourage delay and manipulation of the bargaining unit constituency after application” (para. 25), which is consistent with the just noted, policy thrust in *B.A.T.*

59 Turning to the facts in the present matter, they test the policy tension in the Board’s approach to the second 30-day requirement on several bases. Firstly, some of the individuals at issue are strong examples of “individual rights”, being long-term, regular employees with a direct interest in the representational choice. As well, in some instances these individuals have previously performed the kind of work for which they were re-hired by the Employer within the second 30-day period.

60 However, as a counterpoint, one has to wonder whether there will not always be such work as warehouses to clean, shelving to build, tools to clean and relocate, etc. in the construction context. This raises the concerns in *MJB Hookups* regarding “delay and manipulation of the bargaining unit constituency after application” (para. 25). If, for instance, there is constant litigation in respect to this kind of work in the second 30-day period, both policy concerns in *B.A.T.* of access to collective bargaining and predictability and objectivity (i.e., less litigation) will be defeated or at least seriously prejudiced. As well, the use of a related company to provide work produces the same sort of concerns; as may the issue of individuals working outside the jurisdiction, yet claiming to be employees within the rule for the purposes of certification within the jurisdiction.

61 Nonetheless, I would also add that the seasonal and Christmas “layoffs” of a hybrid employer in the construction industry, such as in the present matter, raise concerns in respect to whether the Board has accurately captured the issue regarding these employers and employees at page 36 in *B.A.T.* (quoted above in para. 53) and later when it says:

If the Employer is a “hybrid employer”, as many are, the representative employee pool will be adjusted only to reflect those intermittent employees. Thus, this format does not exclude core employees. (p. 38)

What if the “core employees”, as a result of a typical Christmas or winter “layoff”, do not in fact work within one of the 30-day periods? Is the requirement that in order to be

members of a regularly employed, core group of employees with a right to a say in the representational choice, they must in fact be employed virtually steadily year-round? It would seem that might perhaps be workable in relation to the Lower Mainland and Vancouver Island, where construction can proceed year-round, but not in the other areas of British Columbia, where construction regularly has to stop due to winter weather conditions. It may also not be fairly applicable in respect to a regular Christmas layoff period for employees who typically work for long periods (and long hours) on projects away from home, but who then regularly (i.e., over the course of a significant number of years) are given an extended Christmas period in which to be with their families. Are not these individuals in the equivalent situation of employees on “days off” or “vacation” (p. 35), though technically they await “re-employment” within the project pattern of employment in the construction industry?

62 With these concerns in mind, turning to the specific employees at issue, I will deal with them in the groups set forth in the facts:

1. Kretchmar and Summers

63 I will deal later in these reasons with the Yukon location of the work of Kretchmar and Summers (and the others) in the first 30-day period. At this point, the issue which will be considered is whether Kretchmar and Summers had a reasonable expectation of being re-employed during the 30-days following the date of the Boilermakers’ certification application. I will deal firstly with the question of their “expectation” and then with the issue of whether that expectation was “reasonable”. These determinations will be addressed with the policy concerns identified in *B.A.T.* in mind.

64 Kretchmar’s and Summers’ expectations were quite accurately summarized by Summers in his evidence. He said that when he was “laid off” before Christmas (and the Boilermakers’ certification application), he expected to be recalled (technically re-employed) in the spring after the end of freeze-up, or whenever there was work. On the basis of that evidence, I find that they expected that their re-employment with the Employer would likely be in the spring. Though less likely, they also expected it may occur before then if the Employer had work for them to do. On the facts, I would characterize their expectation regarding the spring as one of likely re-employment, while re-employment before then was merely possible.

65 Consistent with the interpretation and application of *B.A.T.* in *MJB Hookups*, I do not think that an expectation of merely possible re-employment within 30 days of the date of the certification application is sufficient. The expectation of re-employment as of the date of the certification application must be more certain; it should at least be of likely re-employment. To be accepted as satisfying the subjective component of the test, it must also be based on the kind of evidence focused upon in *MJB Hookups* to establish the reasonableness of that likelihood:

More useful evidence [than simply who actually worked in the second 30-day period] will be found in such factors as mutual agreements regarding re-employment, regular and predictable patterns of employment prior to the date of application, and work

that the Employer has scheduled as of the date of application.  
(para. 25)

66 In the facts of the present matter, Kretchmar's and Summers' expectations were that it was not likely that they would be re-employed within the 30 days following the certification application. Thus, their expectation does not satisfy the subjective component of the reasonable expectation test. (As will be seen below, their expectation of merely possible re-employment before the spring was also the reasonable expectation in the circumstances.)

67 Strictly speaking, the above determination answers the reasonable expectation test. As of the date of the certification application, neither Kretchmar nor Summers expected that they would likely be re-employed within the 30 days following the application. With the focus being on the expectation as of the date of the certification application (*MJB Hookups*), the fact of their subsequent re-employment within the following 30 days should be irrelevant. However, in the event that is wrong, I will consider the reasonableness of the expectation as well.

68 Turning to whether Kretchmar's and Summers' expectation was "reasonable", there was, firstly, nothing in the evidence to suggest that the Employer had already obtained the work for them prior to the date of the certification application or knew as of the date of the certification application that this work was likely to be available and obtained. Thus their re-employment both arose and commenced after the certification application.

69 I have considered the position put forward by the Employer (supported by CLAC) on this point. It will be recalled that the Employer advocates a "bright line test" in which, absent fraud, employees actually working for an employer during the second 30-day period would be counted in terms of the membership support issue. That position may have the advantage of meeting the policy objective in *B.A.T.* of having an "objective and predictable" test, as fraud is a very difficult standard in the law to meet. Somewhat perversely, litigation may ultimately thus be lessened under such a test simply because of the difficulty of meeting the standard in law for establishing fraud. However, that may be at expense of undercutting the policy concern in *B.A.T.* for access to collective bargaining. It would allow a situation in which an employer would be allowed (subject to fraud being established) to create work and employment in the second 30-day period which would affect the membership support question in regard to a certification application. In my view, that concern and its potential adverse impact outweighs the advantage of objectivity and predictability in the "bright line" test.

70 To recall again one of the key passages from *MJB Hookups*, the panel there explained that:

More useful evidence [than simply who actually worked in the second 30-day period] will be found in such factors as mutual agreements regarding re-employment, regular and predictable patterns of employment prior to the date of application, and work

that the Employer has scheduled as of the date of application.  
(para. 25)

The second stated factor may be relevant in the present matter; namely, in that the work performed by Kretchmar and Summers was of a nature that they had performed before. Kretchmar, for instance, gave evidence of having done a large amount of grading work, including in the month of January. Equally, Summers established that he had done carpentry work for the Employer before, such as that he was doing in the warehouse in Kamloops.

71           Nonetheless, there remains a real concern with the nature of that work and the ability of an employer in this kind of circumstance to manipulate the employment, and thus the constituency list, through “make work” employment. As already noted, there may always be such work as warehouses to clean and shelves to build. As well, I believe the Board would be justified in adopting a skepticism on a policy basis in respect to work for a related company. All of this sort of work is simply too easy to manufacture for the purpose of its effect on the certification application. Thus, I believe it is also necessary to address the *bona fides* of the work.

72           By addressing the *bona fides* of the work, the Board will be seeking to preserve the integrity of the policy concern for access to collective bargaining. As this may impinge on the policy concern for an objective and predictable test and outcome (lessening litigation), the Board should try to be as specific and directive as possible in respect to its approach to this question. In that regard, I believe that the Board should use a “but for” test in assessing the *bona fides* of the employment. The question would thus be: would the individual(s) have been re-employed at this particular time but for, or absent, the certification application? In applying that test, again I think that on a policy basis, in light of the policy concerns identified in *B.A.T.*, the Board should adopt a reasonable skepticism regarding such employment, based on the ability of an employer to create such work. The Board should also focus on what was known as of the date of the certification application, as in *MJB Hookups* (para. 25).

73           That is particularly apt in the present circumstances. There will, if not always, often be the ability to re-employ individuals to clean warehouses, clean and relocate tools, build shelves, etc. As well, work for a related company may be equally as convenient and available. In both circumstances, and in the particular circumstances of the present matter, from the policy perspective outlined in *B.A.T.* the Board should not accept such employment as a basis for satisfying the second 30-day requirement in the 30/30 rule. To do otherwise may seriously undermine access to collective bargaining and generate litigation.

74           As a result, on balance and in light of the policy factors set forth in *B.A.T.*, the work performed by Kretchmar and Summers in the 30 days after the Boilermakers’ certification application does not satisfy the test of being further to a “reasonable

expectation of being re-employed during the 30-days following the date of application” (p.35).

75 That determination is reinforced in the present matter by the admission in the evidence of a representative of the Employer that there was a labour relations purpose to the re-employment of these individuals in January 1996. That labour relations purpose was obviously in respect to the employee constituency regarding the Boilermakers’ certification application. Such evidence, or such an inference or conclusion drawn from the evidence, is also independently sufficient to not include the employment for the purpose of satisfying the second 30-day requirement in the 30/30 rule.

2. Magoon and McLeod

76 There is no real basis upon which to differentiate Magoon and McLeod from the above analysis regarding Kretchmar and Summers. As a result, the same conclusion applies. Their employment in January 1996 similarly does not satisfy the reasonable expectation of re-employment test for the second 30-day period in the 30/30 rule.

3. Nelmes and Ware

77 There is also no basis upon which to differentiate Nelmes and Ware from the analysis and conclusion regarding Kretchmar and Summers. Thus, likewise, their employment in January 1996 does not satisfy the *B.A.T.* test for the second 30-day period.

4. Ballard and Overton

78 Both Ballard and Overton are part of the core group of regular, long-term employees of the Employer. Ballard has regularly worked for the Employer since 1986; Overton since 1987. I also accept that Ballard and Overton, as mechanics, are legitimately engaged in mechanical work on the Employer’s machinery in the Yukon. However, that work places them outside the jurisdiction of British Columbia (i.e., in the Yukon) for both 30-day periods in the *B.A.T.* 30/30 rule. I will thus now deal with the question earlier reserved upon in respect to Kretchmar and Summers; namely, the location of the work being performed being outside the jurisdiction of British Columbia.

79 I do not believe that such work necessarily presents a jurisdictional problem. Individuals can in general be employees of an employer under the Code, even though temporarily their current work for the employer may take them outside the province of British Columbia. That may be the case with Ballard and Overton, for instance. In general, the evidence in the present matter was that the Employer’s work is primarily in British Columbia. Thus if Ballard’s and Overton’s work falls within that general pattern, they could be employees of the Employer under the Code, though at times working in the Yukon. (As an aside, no party raised a question as to the constitutional jurisdiction of the Employer being federal, as opposed to provincial; nor was there, in my view,

sufficient evidence in the hearing of interjurisdictional work for the Board to insist on determining the issue).

80           Nonetheless, while the question does not necessarily present a jurisdictional problem, I believe it does raise a policy concern in terms of the policy factors outlined in *B.A.T.* It will be recalled that those policy factors are three-fold: access to collective bargaining, individual rights, and the timeliness of the Board's certification process (p. 31). In terms of those policy factors, including Ballard and Overton within the bargaining unit constituency in the present matter can be argued to further individual rights. However, as with the warehouse work, again I believe it can be more strongly argued that it would hinder the policy objectives of access to collective bargaining and having a timely, more certain process. Both of these latter concerns arise from the obvious, basic difficulties of, firstly, knowing about and then, secondly, organizing alleged employees who are outside the jurisdiction. In the extreme example, which could have been raised in the present matter if the application had been brought at a different time, what if those alleged long-term, core employees are working on a project for the employer in Russia? From a practical perspective that could easily defeat the union's and the intra-jurisdictional employees' ability to organize. Thus, access to collective bargaining would be defeated. As well, if the Board is to consider and accept the employees on a Russian project in certain circumstances, it is not hard to foresee how that renders the certification process uncertain in the extreme, thus engendering litigation.

81           On balance, I therefore find that these policy concerns regarding access to collective bargaining and timeliness and certainty of the Board's certification processes outweigh the policy concern for individual rights in the circumstance of alleged long-term, core employees who, though they regularly work for the Employer within British Columbia, are working outside of the jurisdiction of British Columbia in both of the 30-day periods in *B.A.T.* As a result, Ballard and Overton will not be considered to be employees within the bargaining unit constituency relevant to the Boilermakers' certification application.

82           Given the earlier determinations regarding the other individuals at issue, it need not be determined if the fact that they had worked for the Employer outside of British Columbia in the first 30-day period would also disqualify them as "employees".

83           Having reached the above determination in respect to what I believe is a proper interpretation and application of the *B.A.T.* 30/30 test consistent with the policy factors identified in the decision, I nonetheless believe that I may not have adequately dealt with the circumstances and legitimate concerns ("individual rights") of the long-term, core group of regular employees of the Employer (such as Kretchmar and Summers) in this matter. For instance, though based on the policy concerns in *B.A.T.*, the above is what could be considered a strict application of the 30/30 rule. In its written materials submitted at the hearing, the Employer took the following position regarding such a strict application:

Finally, we submit that the employees who were laid off within 30-days of the application and who will return to work for the Companies in March or April 1996, when the projects in the Yukon and Northwest Territories recommence, should also be treated as employees for the purposes of the Boilermakers' raid application. While these employees do not fall within the strict application of the 30/30 policy, it is our respectful submission that because of the pattern of work of the companies, that is, the fact that the Companies generally do not perform major projects during the winter months, the regular employees of the Companies who can reasonably expect to work for the Companies when their projects recommence in 1996 also have a sufficient continuing tie with the Companies to be considered employees of the Companies, particularly since the employees who are working for the Companies at the time of the raid application will have no continuing tie with the Companies after their brief project is completed (see, for example, Bourke Bros. Mechanical, BCLRB No. B410/95 and BAT, BCLRB No. B444/94 at pp. 40-41). [pp. 37-39 of the Report of the Decision]

As can be seen by referring back to the positions of the parties, it was also part of CLAC's position that the *B.A.T.* rule is not rigid and there are special circumstances in the present matter which require that the long-term, core group of regular employees should have a say in respect to the certification application.

84           The issue is whether the residual discretion in *B.A.T.* is applicable and should be exercised in respect to the individuals in dispute. It will be recalled that at the conclusion of its decision, the *B.A.T.* panel stated that the "rule is not rigid and there may be individuals that fall outside the rule but who the Board would nonetheless find to be an employee" (p. 38). The panel went on to say that there would be "a substantial onus on the party who wishes to establish that a person who falls outside the 30/30 rule is, in fact, an employee" (p. 39). Does, however, as the Employer and CLAC submit, the present matter constitute the special kind of circumstances in which this "substantial onus" is met?

85           For instance, it may be hard to conceive of individuals who should be more entitled to exercise their franchise in a representational choice under the Code than individuals such as Kretchmar, Summers, McLeod, Ballard, and Overton. With some exceptions (which were not dealt with in the evidence and argument at the hearing), these individuals have regularly worked for the Employer eight or more years. That employment history has typically excluded the Christmas and/or a winter, seasonal layoff - which is the very period within which the current certification application is brought. As well, since 1985 the employees of the Employer have effectively made a representational choice under the Code and have chosen to be represented by CLAC. Although in BCLRB No. B9/96 the current collective agreements between CLAC and the Employer were ruled invalid in respect to the current application, as CLAC says the fact of that representation and representational choice through that period remains. All of these circumstances lead one to consider in the facts in the present matter some of

the other comments in *B.A.T.* in light of the direction in the decision that the Board “will monitor the policy experience of this new rule” (p. 38).

86 Those passages are the quote from page 36 of the decision (in para. 53 above) and the conclusion that:

...those employers (as the ICBA argues) who no longer hire on a project-by-project basis but are rather organized along industrial lines (thus keeping a core group of employees) will, in the main, not be affected by this rule. ... If the employer is a “hybrid employer” as many are, the representative employee pool will be adjusted only to reflect those additional intermittent employees. Thus, this formula does not exclude core employees. (p. 38)

However, in the circumstances of this case that latter consequence may occur if the core group of employees, who are on a seasonal “layoff”, are not entitled to participate in the certification application. They will be excluded even though they have regularly worked for the Employer over an extended period of time as a part of the long-term, core group of regular employees.

87 If the residual discretion retained in *B.A.T.* extends that far, I would likely find that Kretchmar and Summers (and any others in similar circumstances) are employees under the Code in respect to the present application. In general, in the circumstances of the present matter, I believe that they should be entitled to the franchise under the Code. After all, they have been regular employees of the Employer, within its seasonal pattern of work, for eight or more years and the individual right to the franchise is the “fundamental premise” of the Code: then Chair Weiler in *Forano Limited*, BCLRB No. 2/74, [1974] 1 Can LRBR 13, at 17. (There would remain to be considered the Yukon location of their work in the first 30-day period.)

88 The problem with that conclusion, however, is that it was the very proposition which was rejected by the reconsideration panel in *B.A.T.* With one exception, all of the factors which would lead me to consider Kretchmar and Summers employees were considered and rejected in *B.A.T.* in favour of the 30/30 rule. For instance, the long-term nature of employment with an employer was considered in the circumstance of an employee named Campbell in the *B.A.T.* case (see the quotation from page 8 of the original *B.A.T.* decision, at page 5 of the reconsideration decision). As well, the regular nature of that employment within a quasi-industrial organization of the workforce was noted and considered at several points in the decision (pp. 16, 36, and 38). The same is true in respect to the seasonal nature of the employment, including the possibility of a winter “layoff” (pp. 16, 36, and 38). Those factors and concerns were considered and dealt with in the context of the nature of employment in the industry as a whole and the three policy concerns of access to collective bargaining, individual rights, and the certainty and timeliness of the Board’s processes.

89 The one factor in exception might be that the employees in the *B.A.T.* and *Oviatt* cases (dealt with in the *B.A.T.* reconsideration decision) had not already chosen representation for collective bargaining purposes. In contrast, in the present matter the

core group of regular employees have been represented by CLAC since 1985. However, on reflection I believe that is a distinction which does not make a difference. As noted in *B.A.T.* itself, the franchise in the Code implicitly contains the freedom to not choose to join a union, as well as to unionize: *McCallum Motors Ltd.*, [1979] 1 Can LRBR 557 (BCLRB No. 16/79), cited at page 24 of *B.A.T.* As a result, this potential exception to the specific circumstances considered in *B.A.T.* in the end should not make a difference. With the exception of the express requirements in the Code regarding raids, individuals should receive the same consideration whether they have chosen to be represented by a union or not.

90 Therefore, I conclude that the scope of the residual discretion noted near the end of the *B.A.T.* decision does not go so far as to allow Kretchmar and Summers, for instance, to be considered employees in the circumstances of the present matter. In essence, the kinds of matters that would lead to that exercise of discretion in their situations were considered by the *B.A.T.* reconsideration panel and built into the 30/30 rule. Thus, to allow Kretchmar and Summers the franchise in the present circumstances would be contrary to the *B.A.T.* reconsideration decision, as opposed to being a legitimate exercise of discretion within it. In the interests of certainty and consistency in the law and policy of the Board, unless the *B.A.T.* policy is revisited in these kinds of circumstances, I believe that original panels of the Board should follow it. As a consequence, Kretchmar and Summers, and others like them, in the circumstances in the present matter cannot be found to be employees of the Employer under either the 30/30 rule or the residual discretion noted at the end of the decision.

VI. DECISION

91 In light of the above, the Employer's and CLAC's objections to the Boilermakers' certification application are dismissed. As that application is otherwise in order and satisfies the requirements in the Code, certification is granted.

LABOUR RELATIONS BOARD

BRENT MULLIN  
VICE-CHAIR