

**Labour Relations Board
Saskatchewan**

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO. 1400 , Applicant v. WAL-MART CANADA CORP. operating as WAL-MART, WAL-MART CANADA, SAM'S CLUB AND SAM'S CLUB CANADA, Respondent

LRB File No. 069-04; January 13, 2009

Chairperson, Kenneth G. Love Q.C. ; Members: Duane Siemens and Brenda Cuthbert

For the Applicant: Drew Plaxton
For the Respondent: Catherine Sloan and David Stack

Remedy – Interim Order – Criteria – Application for stay pending hearing of application for reconsideration of certification Order – While Board satisfied that arguable case exists, Board concludes that balance of labour relations convenience favours maintaining the *status quo* – Board allows application in part to maintain confidentiality of employees.

The Trade Union Act, ss. 5.3, 6 and 42

REASONS FOR DECISION

Background:

[1] In 2004, the United Food and Commercial Workers, Local No. 1400, (the “Union”) filed an application with the Board pursuant to Sections 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the “Act”) to be designated as the certified bargaining agent for a unit of employees of Wal-Mart Canada Corp. at its store at Weyburn, Saskatchewan (the “Employer”).

[2] After numerous procedural delays, the Board issued an Order for certification of a bargaining unit on December 4, 2008, as follows:

All employees of Wal-Mart Canada Corp. in Weyburn, Saskatchewan, except department managers, those above the rank of department manager, employees in the pharmacy and office staff.

[3] On December 15, 2008, the Employer filed an application for Reconsideration with the Board. On December 16, 2008, the Employer applied under s. 5.3 of the *Act* for an interim Order of the Board “staying the effect of the certification

Order made by the Board on December 4, 2008 pending the outcome of the Applicant's reconsideration application filed previously with the Board" (the "application for Interim Relief" or "Interim application"). A hearing with respect to the Employer's application for Interim Relief was heard by the Board on December 22, 2008 in Saskatoon. These Reasons for Decision relate only to that application.

Preliminary Objections:

[4] The Union raised a number of preliminary objections to the Employer's application for Interim Relief. These were as follows:

- (a) *THAT the application is an abuse and an obstruction of the Board's process;*
- (b) *THAT both the Employer's application for Reconsideration and the application for Interim Relief should be heard by the same panel of the Board that originally heard and determined the certification application;*
- (c) *THAT the application for Reconsideration was not brought in accordance with the Board's procedures insofar as the application was not a sworn document;*
- (d) *THAT the Board has no jurisdiction to order the relief sought by the Employer (i.e. a stay of the Board's certification Order); and*
- (e) *THAT the affidavit of Kimberly Jaeger filed by the Applicant in support of the interim application should be struck out in whole or in part insofar as it was based on information and belief.*

[5] With respect to the first preliminary objection, the Board notes that notwithstanding that the Applicant caused considerable delay in the original certification application as a result of numerous unsuccessful court challenges, that in and of itself does not disentitle the Applicant from seeking relief under s. 5.3 of the *Act*. As the Board has noted on many occasions, relief under s. 5.3 will be granted sparingly and there is

no “automatic” right to have a decision of the Board reconsidered unless the criteria set forth by the Board in its decisions has been met.

[6] In their argument, Drew Plaxton, on behalf of the Union, invited the Board to revisit the test to be applied on interim applications when the object of the application is to, in effect, have the Board stay a recently issued Order. He argued that the Board having recently considered the “hard” evidence of the case, that there should be a higher threshold for an application to review a recent decision of the Board where the object is to review or revise such a recent Order.

[7] The Board is of the opinion that it would not be in the best interests of the parties who appear before the Board to establish a higher threshold in such cases. To do so would be create undue hardship in many cases where review is justified and necessary. Examples of such situations are legion where the Board has used its power to review its decisions in the best interests of labour relations. While the threshold in cases before the Board is arguably lower than the threshold that exists in a court of law, that threshold has been effective in the past, and will remain so in the future.

[8] With respect to the second preliminary objection, the Board notes that the panel of the Board that heard and determined the certification application included Chairperson James Seibel, (as he then was). The Board further notes that, while it may be desirable as a matter of policy to have the original panel hear applications for reconsideration, doing so is not a requirement of the *Act*. See: *North West Company v. Tora Regina (Tower) Limited*, 2008 CanLII 47050 (SK L.R.B.), LRB File No. 026-04. As well, the participation of Mr. Seibel in rendering the decision in this case is one of the grounds on which the Applicant seeks to have the application reviewed.

[9] With respect to the third preliminary objection, the Board notes that there is no prescribed form in the Regulations to the *Act* for an application for interim relief. The Board further notes that neither the Regulations nor the Board’s *Practice Directive No. 1 – Interim Orders and Interlocutory Injunctions* requires that an application for interim relief be in the form of a sworn document. What *Practice Direction No. 1* does require is that applications for interim relief must, *inter alia*, be described with reasonable

particularity stating the grounds for the application, the relief being sought by the Applicant, and the sections of the *Act* being relied upon. The Board is satisfied that the Employer's application for Interim Relief complies with *Practice Directive No. 1*. Furthermore, the Board notes that s. 19 of the *Act* provides that "[No] proceedings before or by the Board shall be invalidated by reason or any irregularity or technical objection ...". The section goes on to authorize the Board to amend any defect or error in any proceeding before it if necessary for the purpose of determining the real question(s) at issue in the proceedings.

[10] With respect to the fourth preliminary objection, the Union stated that, while the Employer's Application for Interim Relief indicates that the Employer is seeking a stay of the Board's certification Order pending its application for Reconsideration, the Employer was *de facto* seeking to set aside the Board's certification Order pending an appeal. The Union provided that the Board had no authority to set aside a certification Order on an interim application on the basis that doing so would be to grant a remedial remedy, something beyond the Board's authority on an interim application. In this respect, the Union relied upon the decision of this Board in *Service Employees International Union, Locals 299, 333 & 336, et al v. Saskatchewan Association of Health Organizations, et al.*, [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06. The Board notes that there is nothing in s. 5.3 of the *Act* that restricts the nature of the Order issued by the Board on an application for interim relief. In appropriate circumstances, an Order staying a certification Order may well be in keeping with the Board's jurisprudence with respect to the preservative nature of an Order pursuant to s. 5.3.

[11] The final preliminary objection taken by the Union was that portions of the Affidavit of Kimberly Jaeger, the Personnel Manager of the Employer in Weyburn, Saskatchewan, were not based on personal information, but were based on "information and belief". Objections were provided to paragraphs 2-5 of the Affidavit.

[12] In this regard, the objection is well founded. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Watergroup Companies Inc.*, [1992] 1st Quarter Sask. Labour Rep. 68, LRB File No. 011-92, the Board says at p. 72:

3. *The application shall include a statutory declaration(s) or affidavit in support, which prove such facts as the deponent is, of his/her own knowledge, able to swear. Those portions of the affidavit which are not within the knowledge of the deponent will be excluded from the evidence to be considered; (see: Potash Corporation of Saskatchewan v. Todd et al (1987) 2 W.W.R. 481 at 498).*

[13] When the affidavit of Kimberly Jaeger is examined in light of this requirement, paragraph 2 of the affidavit appears to be outside the personal knowledge of the deponent. Similarly, the second sentence of paragraph 4 and the second sentence of paragraph 5 appear to be based on information given to the deponent by counsel and are therefore not within the deponents personal knowledge. Those portions of the affidavit are struck.

[14] Except as noted in paragraph 13 above, the Union's preliminary objections to the Employer's application for Interim Relief are dismissed.

Evidence:

[15] In support of its application for Interim Relief, the Employer filed the Affidavit of Kimberly Jaeger. In paragraph 3 of the Affidavit, the deponent outlines that at the date of the certification Order (December 4, 2008), that there were 106 employees at the Weyburn Store. That total included 17 department managers. In paragraph 5 of the Affidavit the deponent attests that of the persons employed at the Weyburn store as at December 4, 2008, only 27 of those were included on the Employer's statement of employment filed with the Board in respect of the original certification application. Of those 27 persons, only 13 of them are employees within the scope of the bargaining unit outlined in the Board's certification Order of December 4, 2007.

[16] The Union filed an affidavit of Paul Meinema, who was the President of Local 1400 from 2004 until recently when, on January 5, 2009, he became the Executive Assistant to the National President of United Food and Commercial Workers Canada.

[17] Mr. Meinema's Affidavit outlines the background of the application to certify the Weyburn location of the Employer, as well as some attempts at other locations of the Employer in Saskatchewan. His Affidavit however, specifically paragraph 13, 14, 15, 22, 23, 24, and 25, which while presented as facts, based on his personal experience, are nevertheless, opinion or matters of belief only. Mr. Meinema's Affidavit does, however also outline the steps which the Union has taken, based upon his review of the files of the Union to ensure compliance with s. 36 of the *Act* and to request that the Employer commence collective bargaining in accordance with s. 26.5.

[18] Also attached to the Affidavit of Paul Meinema, is a letter dated December 9, 2008 from Darren Kurmey, a collective bargaining representative of the Union, requesting information from the Employer the Union feels that it requires in order to properly conduct its bargaining with the Employer. That letter requested, *inter alia*, the following:

1. *Each employee's name, home address and phone number;*
2. *Each employee's department and/or work area, occupational classification, wage rate and date of hire;*
3. *A copy of any benefit plans currently in place and information about qualifying for such benefits, and the breakdown of the payment of premiums, and what percentage is paid by the employer and the employee;*
4. *Any wage progressions in place;*
5. *Any human resources or personnel policies that in any way impact on terms and conditions of employment; and*
6. *Any other relevant information regarding wages or economic compensation.*

[19] Also attached as an Exhibit to the Affidavit of Paul Meinema, was a copy of a letter from counsel for the Employer which advised that "our client is in the process of gathering the information requested by Mr. Kurney in his letter of December 9, 2008."

Arguments:

[20] At the outset of argument, the Board advised the parties that the grounds for this application appeared to be similar to the grounds advanced by counsel in an application previously heard by the Board, involving this same Union, being *United Food and Commercial Workers, Local 1400 v. Barrich Farms (1994) Ltd.*, 2008 CanLII 57253 (SK L.R.B.), LRB File No. 043-07. In the Board's decision in that case, dated December 4, 2008, the Board was satisfied that those grounds, which are virtually identical to the grounds on which the application is made here, demonstrated an arguable case for the Board's determination. Based on that precedent, the Board directed that the parties address only the issue of Labour Relations harm which is the second component of the test for interim relief. (See *Grain Services Union (ILWU – Canada v. Startek Canada Services Ltd.*, [2004] Sask L.R.B.R. 128, LRB File Nos. 115-04, 116-04 & 117-04).

[21] The Employer argued that greater labour relations harm would occur if the requested stay was not granted than if the *status quo* was maintained. The Employer argued that s. 26.5 of the *Act* required the parties to commence collective bargaining within twenty (20) days of the certification Order and that commencing collective bargaining pending a decision on the Employer's application for Reconsideration would create confusion and uncertainty in the workplace. Furthermore, the Employer argued that the commencement of collective bargaining could influence the outcome of a certification vote, if one was so directed by the Board. Finally, the Employer argued that collective bargaining could ultimately be unnecessary, depending on the outcome of the Employer's application for Reconsideration and the outcome of a certification vote (if one was ordered following reconsideration).

[22] The Employer's counsel also argued that the Union was seeking to have information which the Employees and the Employer considered to be confidential (*i.e.* the names, home address and home telephone number of the employees) as well as information which the Employer considered to be confidential concerning its wage and benefits structures.

[23] Counsel on behalf of the Union argued, in addition to the preliminary objections mentioned earlier, that the Board was correct in issuing a certification Order without a certification vote (as is now required by the *Act*). The Union argued that the

Board was correct in not applying the amendment to s. 6 to applications for Certification that were filed with the Board prior that change to the legislation coming into force. The Union argued that, prior to the change to the s. 6, workers had the right to be certified to a trade union by means of mere card support. In other words, prior to the change to the legislation, a certification vote was not required if sufficient support was evident from the card support filed with the Union's application for Certification. As a consequence, the Union took the position that the change to the legislation was not merely "procedural" but rather represented a substantive change in the law and should not be applied to proceedings commenced prior to the coming into force of the change. The Union also took the position that, for legislation to have a retroactive effect, express language is required to do so. In support of this position, the Union relied upon the decision of the Board in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. K.A.C.R. (A Joint Venture)*, [1983] Nov. Sask. Labour Rep. 56, LRB File No. 275-83.

[24] The Union took the position that the delay in concluding their application for Certification has already operated to the detriment of the Union and will inevitably have resulted in the erosion of the Union's support. In this regard, the Union argued that delays in applications generally operate to the detriment of unions, as do delays in obtaining collective agreements, which make it difficult for unions to demonstrate the benefits of union membership. Similarly, the Union argued, turnover of employees also has a detrimental effect on union support in that the original supporters may leave the unit and be replaced by new workers (workers who may have been hired by the Employer believing that they would be less likely to support the union). Simply put, the Union took the position that, if a stay of the certification Order was granted, the Union and its members would suffer further and potentially irreparable harm because the members would be deprived of the benefits of union representation and the support for the Union would be further eroded pending a final determination on the application for Reconsideration.

Statutory Provisions:

[25] Relevant provisions of the *Act* include the following:

5.3 *With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*

...

42 *The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Analysis and Decision:

[26] The test to be met on applications for interim relief has been well established by the Board, see *Startek, supra*.

[27] In applying the first part of the test for interim relief, that is, whether the Employer's application for Reconsideration reflects an arguable case, the Board finds that it does. As noted above, the Board recently considered a similar application in *Barrich Farms, supra*. As the issues raised in this case are similar, or nearly identical to the issues raised in that case, the Board adopts the reasoning and rationale from that decision in respect of the requirement for an arguable case.

[28] In applying the second part of the test for interim relief, that is, the balance of labour relations harm, the Board is not persuaded that the requested relief, being a complete stay of the certification order, would be appropriate in the current situation. As in the *Barrich Farms, supra*, the Board notes that little has transpired between the parties since the issuance of the certification Order by the Board other than transmittal of statutory notices by the Union (*i.e.* notice to bargain and union security clause). There has been no identification of the bargaining committees for the parties, nor have any dates been set for commencement of face to face bargaining. To date, the Board has not been presented with any evidence of mischief on the part of either the Employer or the Union. It is the Board's hope that that situation will continue and the

parties will conduct themselves in an appropriate manner while this issue is being determined.

[29] The Board was not satisfied that the commencement of collective bargaining, prior to a decision on the Employer's application for Reconsideration, would create such confusion and uncertainty in the workplace that the certification order should be stayed in its entirety. Even if it could be said that it would do so, the Board concluded that there was greater potential harm to the Union if the certification Order so recently issued by the Board was stayed in its entirety. Absent mischief in the workplace, the Employer's conclusion that collective bargaining would be disruptive in the workplace is not supportable. The parties to this dispute are both knowledgeable and capable. They both have sufficient resources to devote the necessary time and resources to collective bargaining even in the event the Board determines to reconsider the certification order. The Board was not satisfied that the energies expended in collective bargaining may ultimately prove to be unnecessary was sufficient on its own to warrant the requested stay. If such were the case, all applicants seeking reconsideration of the Board's decisions in a certification application would be almost automatically entitled to a stay.

[30] However, the Board is mindful of the mischief which occurred in another retail environment, when the Board initially refused to stay an application for certification. In *North West Company v. Tora Regina (Tower) Limited*, 2008 CanLII 47050 (SK L.R.B.), LRB File Nos. 026-04 & 041-08, the Board attempted to provide access to the Employees "for the purpose of attempting to demonstrate the benefits of union membership." In so doing, the Board, in the minds of many of the employees, disregarded their privacy rights insofar as they did not want their personal information made available to the Union, especially their home contact information during the period when the certification Order was under review by the Board. The Board wishes to avoid a repetition of this situation.

[31] The Employer's counsel offered that they would be available to argue the application for reconsideration early in the New Year and they argued that it would be of no disadvantage to the union if the matter were stayed during the short period over the Holiday season. What is more likely is that little would be accomplished in collective

bargaining during this period as those parties involved in the bargaining would not wish to disrupt their holiday plans for the purpose of bargaining. On the other hand, this is one of the busiest times for retail operations and it would be extremely disruptive during his period to the employer to have employees unhappy if their personal information were released to the Union at this time. As a result, the Board hereby orders:

1. Except to the extent set out in this Order, the certification Order of the Board dated December 4, 2008 shall remain in effect and be binding on the parties hereto;
2. That any employees who may be required to join the Union pursuant to s. 36 of *The Trade Union Act* shall have their applications for membership forwarded to counsel for the Applicant who shall hold such applications until further order of this Board;
3. That any dues which may be required to be remitted to the Union pursuant to s. 32 or 36 of the *Act* shall be remitted by the Employer to counsel for the Respondent, who shall hold such monies in his trust account until further order of this Board;
4. That the information requested by the Union by its letter of December 9, 2008 (or any similar request by the Union), shall be collected by the Employer, but need not be provided to the Union until further Order of this Board;
5. That the application for Reconsideration be heard on an expedited basis;
6. That a copy of this Order and the Reasons for Decision be posted in a conspicuous place on the Employer's premises within two (2) business days of its receipt by the Employer; and
7. That this panel of the Board shall be seized with any matters which may arise with respect to this interim application or this Order until the

hearing by the Board of the application for Reconsideration of the Order of the Board dated December 4, 2008.

DATED at Regina, Saskatchewan, this **13th** day of **January, 2009**.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson