Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 Applicant v. WAL-MART CANADA CORP. operating as WAL-MART, WAL-MART CANADA, SAM'S CLUB and SAM'S CLUB CANADA, Respondents

LRB File No. 055-04; April 19, 2004
Chairperson, James Seibel; Members: Brenda Cuthbert and Maurice Werezak

For the Applicant: Drew Plaxton
For the Respondent: John Beckman, Q.C. and Catherine Sloan
For Unidentified Employees: Michael Nolin

Certification – Practice and procedure – Statement of employment – Whether or not union requests to have representative present at taking of statement of employment, use of photocopied signatures not generally acceptable except where unreasonable for employer to obtain current employee signatures directly on statement of employment form – Board orders employer to take statement of employment with union representative present.

Practice and procedure – Subpoena – While relevance of documents sought is overarching consideration, Board is mindful of circumstances where most or all relevant documentation in knowledge and possession of one party – In such circumstances, Board may take more liberal view of scope of subpoena to expedite proceedings and foreclose delays once hearing underway.

Certification – Practice and procedure – Intervenor status – Board confirms and applies policy that employee who wishes to appear and give evidence at certification hearing with respect to union's organizing tactics must file reply to certification application and seek party status.

***The Trade Union Act*, ss. 5(a), 5(b), 5(c) and 18.**

***Regulations and Forms of the Labour Relations Board*, s. 21.**

REASONS FOR DECISION: PROCEDURAL MATTERS

Background:

[1] United and Food and Commercial Workers, Local 1400 (the "Union") filed an application with the Board on March 22, 2004, pursuant to ss. 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 proposed bargaining unit comprising all employees of Wal-Mart Canada Corp. operating as Wal-Mart, Wal-Mart Canada, Sam's Club and Sam's Club Canada in the City of North Battleford and the Town of Battleford (the "Employer") except department managers and those above the rank of department manager and employees in the pharmacy, portrait studio, tire and lube express and optical department and the office staff. The Union estimates that there are approximately 130 employees in the proposed bargaining unit. The Board Registrar scheduled the application for hearing on April 8, 2004.

[2] A copy of the application was forwarded by the Board Registrar by registered mail and delivered to then counsel for the Employer on March 25, 2004. On that same date, pursuant to s. 21(3) of the *Regulations and Forms of the Labour Relations Board*, S.R. 163/72 (the "Regulations"), the Union requested of then counsel for the Employer that the Union's representative be permitted to be present at the time when the specimen signatures of employees would be taken for the statement of employment required to be filed by the Employer.

[3] By letter dated March 30, 2004, present counsel for the Employer advised that it now represented the Employer and advised that it had already completed the statement of employment using signatures from income tax TD1 forms and could not comply with taking signatures in person because of the short time frame allowed by the Regulations for the filing of the statement of employment. A reply to the application and the statement of employment were filed on behalf of the Employer in Saskatoon on April 2, 2004.

[4] In the Employer's reply, it is alleged, *inter alia*, that: there are 126 employees in the proposed bargaining unit; that the proposed bargaining unit is not an appropriate unit and that a unit of all employees except the store manager and assistant manager is an appropriate unit; that department managers ought not to be excluded from an appropriate unit; and, that the Employer is not the employer of the persons working in the portrait studio.

[5] By letter dated April 7, 2004, Mr. Nolin provided notice to the Board Registrar that he represented a number of employees of the Employer who alleged that the Union engaged in improper organizing tactics and committed unfair labour practices.

[6] On April 7, 2004, counsel for the Union, Mr. Plaxton, obtained the issuance of a subpoena duces tecum returnable for the hearing the next day directed to John Binns the Employer's store manager. Mr. Beckman, of counsel for the Employer, advised that he intended to take issue with the subpoena duces tecum in whole or in part.

The Issues:

[7] At the hearing before the Board on April 8, 2004, the following issues and matters were raised by the representatives for the respective parties.

[8] The Union requested that:

(a) a statement of employment be made with the Union's representative present when the specimen signatures are taken;

(b) the documents listed in the subpoena duces tecum directed to Mr. Binns be produced;

(c) the hearing of the application be adjourned to accommodate the performance of items (a) and (b).

[9] Counsel on behalf of the unidentified employees requested that:

(a) the employees he represents be granted standing;

(b) the Board provide directions as to whether the unidentified employees need file a reply to the application and, if so, directions as to the form of same;

(c) the hearing of the application be adjourned to accommodate the performance of item (b).

[10] Counsel on behalf of the Employer:

(a) requested that no further or other statement of employment be taken;

(b) objected to the content and scope of the subpoena duces tecum directed to Mr. Binns and asked that it be quashed or limited;

(c) took no position with respect to the requests for adjournment of the hearing other than to say that the unidentified employees should be heard by the Board.

[11] Following the argument of the various matters and issues, the Board reserved decision and adjourned the hearing *sine die*.

Arguments, Analyses and Decisions:

The Statement of Employment

[12] Pursuant to s. 21(3) of the Regulations, the Union is entitled to have its representative present when the signatures of the employees in the proposed bargaining unit are taken for the purposes of the statement of employment. Whether or not a union exercises its discretion to make a request to have its representative present, the use of photocopied signatures is not generally acceptable except in circumstances where it is unreasonable for the Employer to obtain the current signatures of employees directly on the statement of employment form (see, *Service Employees' International Union, Local 299 v. Vision security and Investigation Inc.*, [2000] Sask. L.R.B.R. 121, LRB File No. 228-99). In the present case, no sanction is made against the Employer only because of the peculiar manner in which the request by the Union to be present at the taking of the statement of employment was miscommunicated and the filing of the documents occurred consequent upon some apparent confusion occasioned by the change in

counsel for the Employer. The Board's present disposition should not be taken as approval of the process that occurred here in any future case.

[13] In any event, we order that a statement of employment shall be taken at which a representative of the Union may be present, supervised by an agent appointed by the Board.

The Subpoena Duces Tecum

[14] The subpoena duces tecum directed to Mr. Binns, the Employer's North Battleford store manager, was issued on April 7, 2004 by Board Member Caudle. It directs Mr. Binns to attend at the hearing by the Board and to bring the following documents of the Employer respecting employees at the North Battleford store:

(a) payroll records and copies of all remittances for Employment Insurance, Canada Customs and Revenue Agency and Workers' Compensation from January 15 to March 22, 2004, inclusive;

(b) scheduling and other information indicating the location or department for all employees for the same period;

(c) job descriptions and other documents concerning the job functions and duties of the department managers and any other employees that the Employer seeks to add to a proposed bargaining unit;

(d) contracts, correspondence and other memoranda with third parties evidencing agreements concerning the operation, franchising, licensing or other arrangements relating to the pharmacy, lube and tire express and optical departments;

(e) documentation concerning leaves of absence of any employees at the date of the application (March 22, 2004).

[15] Mr. Beckman, of counsel for the Employer, filed a written brief, which we have reviewed, with respect to the objection that the scope of the subpoena was too broad and that it ought to be quashed or limited. Pointing out that, in light of the decision in *Pyramid Corporation v. International Brotherhood of Electrical Workers, Local 529* (2001), 208 Sask. R. 118 (Sask. Q.B.), upheld on appeal at (2002), 223 Sask. R. 70 (Sask. C.A.), the Board does not have the jurisdiction to order disclosure and production of documents prior to hearing and the Board's processes do not allow for pre-hearing examinations, Mr. Beckman argued that the burden is on the party requesting a subpoena to establish that the evidence sought to be adduced is relevant and not merely a so-called "fishing expedition." In support of this position counsel referred to the following cases: *R. v. Harris* (1994), 93 C.C.C. (3d) 478 (Ont. C.A.); *Re Dalgleish and Basu* (1974), 51 D.L.R. (3d) 309 (Sask. Q.B.); *Construction and General Workers' Union, Local 180 v. Con-Force Structures Limited*, [1993] 3rd Quarter Sask. Labour Rep. 156, LRB File Nos. 166-93, 179-93 and 207-93; *Canadian Union of Public Employees, Local 1949 v. Saskatchewan Legal Aid Commission*, LRB File No. 264-01 (Sask. L.R.B., unreported, April 17, 2002).

[16] Mr. Beckman argued that the only relevant information sought to be produced by the subpoena in the present case were the job descriptions of those employees who the Employer alleges ought to be included in the proposed bargaining unit.

[17] Mr. Plaxton, counsel for the Union, argued that one of the fundamental issues of the case is the accuracy of the impugned statement of employment filed on behalf of the Employer indicating who was and was not an employee on the date the application was filed. Another major issue is whether certain departments ought to be included within the scope of the bargaining unit; the Union requires the production sought to confirm whether or not the employees in those departments are in fact employees of the Employer or of some other entity. Counsel asserted that the use of subpoenas is extremely important to the Board's hearing process given that there is no pre-hearing production or examinations.

[18] We are of the opinion that the subpoena duces tecum in question should be and is hereby confirmed by the Board.

[19] The Board's statutory jurisdiction does not admit to requiring either the production of documents prior to the commencement of a hearing or for pre-hearing examinations or interrogatories. And, while the Board attempts to promote the expeditious hearing of disputes, it does not encourage or countenance "trial by ambush." Some parties are inclined to take advantage of the Board's attempt to balance, as best it can, its inability to order pre-hearing production with the timely conduct of hearings, to hinder, delay and obfuscate the proceedings by being generally unco-operative and refusing to voluntarily produce relevant documents and information. As required by *Pyramid Corporation*, *supra*, the only recourse for a party requiring production is the subpoena process, which entails the setting of a hearing date and often then a further adjournment, which, of course, works against the attempt to expedite the resolution of disputes. In the case of certain kinds of applications, such as applications for certification, the delay that is occasioned can undermine the organizing union's support, damage its credibility and expose its supporters to unwarranted pressure from those with opposing views.

[20] Given the importance and efficacy of the subpoena duces tecum to the Board's process in these circumstances, the decisions of the superior courts regarding the scope of same in civil proceedings where there is pre-trial discovery and mandatory document production and in criminal proceedings where there is mandatory disclosure by the Crown, are of limited application to the issue in the context of the Board's proceedings. While relevance of the documents sought to be disclosed is the overarching consideration in determining whether and in what form to issue a subpoena duces tecum, the Board is mindful of those circumstances where most, if not all, of the documentary information relevant to the issues is in the knowledge and possession of only one of the parties and the other party has no ability to access same prior to the hearing. In such circumstances, the Board may take a more liberal view of the scope of the subpoena in order to expedite the proceedings and foreclose further delays once the hearing is finally under way. Of course, the disclosing party may raise objections to the entering in evidence of any of the documents produced.

[21] In the present case, the crux of the issues between the Union and the Employer are the content of the statement of employment and the status of the putative

employees in certain store departments and whether they are in fact employees of the Employer. The documentary evidence relevant to such issues is almost completely in the possession of the Employer alone. We do not consider the subpoena duces tecum, in the form in which it issued, to be overly broad nor the quest by the Union for the information contained therein to be a fishing expedition.

[22] To the extent that the decision in *Pyramid Corporation*, *supra*, may require that such a subpoena be directed to the corporate respondent rather than an individual, the subpoena is deemed to bear the substitution of the Employer's name for that of Mr. Binns; the Employer can send whomever it wishes to the hearing with the documents. Of course, the Employer is encouraged to make voluntary production of the information prior to the hearing in order to preclude further delay.

The Unidentified Employees – Intervention and Reply

[23] Mr. Nolin, counsel for certain unidentified employees, requested direction from the Board with respect to his clients' desire to intervene in the proceedings to advance the issue of alleged improper organizing tactics by the Union.

[24] In the recent decision in *United Food and Commercial Workers, Local 1400, v. Tora Regina (Tower) Limited o/a Giant Tiger and Certain Unidentified Employees*, [2004] Sask. L.R.B.R. ---, LRB File No. 026-04 (March 17, 2004) the Executive Officer of the Board confirmed the Board's policy earlier enunciated in *United Food and Commercial Workers, Local 1400 v. Prairie Lube Ltd. (Mr. Lube)*, [1994] 4th Quarter Sask. Labour Rep., LRB File No.147-94, that an employee who wishes to appear and give evidence at a certification hearing with respect to a union's organizing tactics must file a reply to the certification application and seek party status.

[25] In *Prairie Lube*, *supra*, the Board stated, at 92-93, that acceptance of letters of revocation of support for the union prior to the filing of a certification application was an "exception to the general rule" and that:

> *anyone who wishes to present evidence or make submissions on an application, should apply for party status and file a reply.*

> *Accepting these revocation letters is, however, the extent of the exception to the rule that only parties can present evidence. It does not make an employee who files a letter of revocation, timely or untimely, a party to the proceedings for any other purpose or entitled to notice of the hearing. If the employee wishes to participate in the hearing in any other way, for example, to allege improper conduct by the union or even to argue with the Board's policy regarding the cut off date for revocation letters, he has an obligation to make that known to the Board and follow the more formal process of securing party status under Section 1 9(3)(a) of the Act and filing a reply.*
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> *The Board does make an effort, of course, to accommodate persons who are not familiar with our proceedings and who have no legal training. We are sympathetic to legitimate requests for opportunities to make representations to the Board and we are prepared to give generous consideration to various procedural mechanisms through which these requests may be granted. The Board does not accept, however, that employees have the right to bypass procedural requirements of any kind, and simply show up on the day set for hearing an uncontested application and raise serious or contentious issues that completely alter the nature of the case that was set down for hearing. Neither do we accept the view expressed by Counsel for the Employer that it is incumbent on the Board to second guess employees with respect to the possible concerns which might lie behind a letter of revocation, or to speculate about possible allegations which have not been put before us.*
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> *If any of the employees of Prairie Lube Ltd. had wished to make allegations to the effect that this Union has used improper methods to gather employee support for this application, the appropriate course would have been to apply for party status in a timely fashion and then file a Reply which would give the Union details of the charges made against it. Those employees would then get notice of hearing as parties to the proceedings. If an employee simply files a letter of revocation and does nothing more, then the Board will conclude that he is not interested in participating other than to have his letter noted by the Board according to its usual policy.*

[26] Accordingly, in the present case, if the unidentified employees wish to advance their case, they must file a reply in the form of the statutory declaration required by the Regulations and seek party status. Being that it is alleged that there are several employees in the group and it is impractical for each to file a separate reply, a single reply may be filed on behalf of all of them by one of their number. However, such composite reply shall identify each of the employees applying for party status; the Board

shall hear the application for party status at the next hearing date. In order to preclude the necessity of further delay, the reply shall also contain sufficient particulars of the event or events complained of by each of the employees – including dates, times, locations, the identity of participants and a description of the relevant conversation or conduct – such that the Union may determine the nature of the case it must meet.

[27] The reply or replies by the unidentified employees shall be filed within fourteen (14) days of the date of these Reasons for Decision.

[28] Any further procedural matters or other directions may be heard and determined by the Executive Officer of the Board prior to the date for hearing, pursuant to s. 4(12) of the *Act*.

DATED at Regina, Saskatchewan this **19th** day of **April, 2004**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson