

**Labour Relations Board
Saskatchewan**

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. WAL-MART CANADA CORP. o/a WAL-MART, WAL-MART CANADA, SAM'S CLUB and SAM'S CLUB CANADA, Respondent

LRB File No. 172-04; December 3, 2004

Chairperson, James Seibel; Members: Mike Carr and John McCormick

For the Applicant: Drew Plaxton

For the Respondent: John Beckman, Q.C. and Catherine Sloan

Practice and procedure – Reply – To be ensured of receiving notice of hearing of application and being allowed to participate fully in hearing, party otherwise entitled to respond to application must file reply to application within time limited by regulations or any extension thereof – Consequences to person entitled to reply who elects not to do so within discretion of Board.

***The Trade Union Act*, ss. 18 and 42.
Saskatchewan Regulations 163/72, ss. 6, 18 and 22.**

REASONS FOR DECISION: PROCEDURAL RULING

Background and Facts:

[1] On June 10, 2004, United Food and Commercial Workers, Local 1400 (the "Union") filed an application with the Board alleging that Wal-Mart Canada Corp. ("Wal-Mart"), committed unfair labour practices in violation of ss. 11(1)(a) and (e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[2] A third party corporation provides services to Wal-Mart at Wal-Mart's store in Weyburn, Saskatchewan. The Union alleges that in April, 2004 the services of an individual employed under contract to the third party to provide its services to Wal-Mart were terminated by the third party at the request of Wal-Mart. At the time, the Union was involved in an organizing drive at the Weyburn Wal-Mart and had filed an application for certification with the Board. The individual in question is a member of the Union by reason of her employment by a fourth party corporate competitor of Wal-Mart.

The Union alleges that the intention or effect of Wal-Mart's actions was to interfere with, intimidate, threaten or coerce employees in the exercise of rights under the *Act*.

[3] No reply to the unfair labour practice application was filed on behalf of Wal-Mart. Before the unfair labour practice application was assigned a date for hearing by the Board, Wal-Mart applied to the Saskatchewan Court of Queen's Bench, by Notice of Motion dated July 5, 2004, for an order prohibiting the Board from hearing the unfair labour practice application on the ground that the Board lacked jurisdiction as the matter did not fall within the purview of the *Act*. The application for prohibition was dismissed on August 24, 2004. The Fiat of the Court of Queen's Bench in *Wal-Mart Canada Corp. v. United Food and Commercial Workers, Local 1400 and Saskatchewan Labour Relations Board*, [2004] Sask. L.R.B.R. ---, LRB File No. 172-04 (not yet reported) included a finding that the matter of jurisdiction ought properly to be raised with and determined by the Board before prevailing upon the supervisory jurisdiction of the Court.

[4] On September 8, 2004 the Board set the hearing of the unfair labour practice application for November 9, 2004. In a letter to the Board dated September 27, 2004, the solicitors for Wal-Mart advised the Board and the solicitors for the Union that it intended to make a preliminary application to the Board to dismiss the Union's unfair labour practice application on the ground that the Board lacks jurisdiction to hear the unfair labour practice application as its subject matter does not fall within the parameters of the *Act*.

[5] By letter to the Board dated November 4, 2004, the solicitors for the Union provided notice to the Board and to the solicitors for Wal-Mart that if Wal-Mart failed or refused file a reply to the unfair labour practice application prior to the hearing by the Board, it intended to raise an objection that Wal-Mart did not have status to participate in the hearing of the unfair labour practice application.

[6] The unfair labour practice application came on for hearing by the Board on November 9, 2004. No reply to the unfair labour practice application was filed on behalf of Wal-Mart prior to the hearing. At the hearing, the solicitors for Wal-Mart sought to argue the jurisdictional issue as a preliminary matter, presuming that the Board would hear the preliminary matter and rule before continuing with the hearing. The Union

objected to the status of Wal-Mart to make the preliminary application or to participate in the hearing of the unfair labour practice application proper on the grounds that Wal-Mart had not filed a reply to the unfair labour practice application. The Union had its witnesses present and was prepared to proceed to present its evidence with respect to the unfair labour practice application proper. Upon being queried by the Chairperson of the Board panel as to whether Wal-Mart was prepared to continue with the hearing of the unfair labour practice application proper in the event that the Board either ruled that it had jurisdiction or exercised its discretion to reserve its decision on the jurisdictional issue and proceed to hear the application proper, Mr. Beckman, of the solicitors for Wal-Mart advised that he would have to seek instructions.

[7] The Board heard argument as to whether Wal-Mart was obliged to file a reply to the unfair labour practice application proper. Following argument of this issue, the Board ruled that Wal-Mart was obliged to file a reply, with written reasons for its ruling to follow. The hearing of the unfair labour practice application proper and the preliminary issue relating to jurisdiction was adjourned to December 9 and 10, 2004.

Statutory and Regulatory Provisions:

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

18 *The board and each member thereof and its duly appointed agents have the power of a commissioner under The Public Inquiries Act and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not.*

...

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 rules or regulations made under this Act or with any decision in respect of any matter before the board.*

[9] Relevant provisions of Saskatchewan Regulations 163/72 (the “Regulations”) include the following:

6(1) *Any trade union or any person directly affected may apply to the board for an order or orders determining whether or not any person has engaged in or is engaging in any unfair labour practice or any violation of the Act, and requiring such person to refrain from engaging in any such unfair labour practice or any violation of the Act.*

(2) *The application shall be in Form 2 and shall be verified by statutory declaration.*

...

18(1) *Except as provided in subsection (3), any employer directly affected by an application for certification any any trade union, labour organization, or person directly affected by any other application, may reply within 12 days after the date on which the application was received in the office of the board or within 10 days after the date on which a copy of the application was forwarded to such trade union, labour organization, employer or employee by the secretary of the board, whichever is the later.*

(2) *The reply shall be in Form 11 and shall be verified by statutory declaration.*

...

22 *Any trade union, labour organization or person entitled to intervene in or reply to any application who fails to intervene or reply within the time limited by these regulations or any extension thereof, shall not be entitled to any further notice of the proceedings and the application may be disposed of by the board notwithstanding such failure to intervene or reply, but the board may in its discretion allow such trade union, labour organization, or person to submit evidence and make representations in respect of such application.*

[10] Relevant provisions of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, include the following:

2 *In this Act:*

...

“enactment” means an Act or a regulation or a portion of an Act or a regulation;

...

26(2) *Words in an enactment signifying male persons include female persons and words signifying either sex include corporations.*

Arguments:

[11] Ms. Sloan, of the solicitors for Wal-Mart, argued that there was no requirement under the *Act* or the Regulations for Wal-Mart to file a reply to an application alleging an unfair labour practice. Counsel submitted that, because the term “employer” is not defined in the Regulations and s. 18 of the Regulations refers to a reply by an employer only in the context of an application for certification while s. 22 of the Regulations does not mention the term at all, the appropriate interpretation is that an employer is not required to file a reply to an unfair labour practice application in order to participate fully in the hearing of the application.

[12] Mr. Plaxton, counsel on behalf of the Union, argued that s. 18 of the Regulations required that a reply be filed in order to be assured of being allowed to participate in the hearing of the application. Counsel asserted that the term “person” in s. 22 of the Regulations includes a corporate employer. The Board has the discretion to bar a party that fails to file a reply to an application from participating further, or from submitting evidence and making representations in respect of the application. Counsel submitted that the intent of the *Act* and the Regulations in this regard is to ensure that all parties receive a fair hearing.

Analysis and Decision:

[13] In our opinion, to be ensured of receiving notice of the hearing of an application and being allowed to participate fully in the hearing, a party otherwise entitled to respond to an application must file a reply to the application in accordance with Form 11 of the Regulations within the time limited by the Regulations or any extension thereof.

[14] We do not accept the interpretation of s. 18 of the Regulations urged by counsel for Wal-Mart, viz., that employers are only permitted to reply to applications for certification and are not included in the group of entities comprising any “trade union, labour organization, or person directly affected by any other application” permitted to reply to such other applications.

[15] An “employer” (as defined by the *Act*) is the only “party” directly affected by a certification application: other affected trade unions or employees are “intervenor” (who must use Form 10 in order to intervene in the proceedings) or “interested parties” (who must seek leave to participate), respectively. In other kinds of applications, entities or persons “directly affected” may file a reply to the application. In the case of an unfair labour practice application brought by a trade union against an employer, this ordinarily will only include the employer. Section 18 of the Regulations is permissive. Pursuant to s. 26(2) of *The Interpretation Act, 1995, supra*, the word “person” in s. 18 of the Regulations includes corporations. If a corporation is directly affected by an application it is permitted by the Regulations to file a reply. It would be absurd if the Regulations were interpreted so as to exclude an employer from availing itself of the opportunity to file a reply in the case of, for example, successorship or violation of the technological change provisions of the *Act*.

[16] While s. 18 of the Regulations is permissive, the consequences to a person directly affected by an application that is entitled to file a reply but elects not to do so, lies within the discretion of the Board. Such person is not entitled to any further notice of the proceedings and the Board may dispose of the application notwithstanding such failure to reply. However, in its discretion, which is unfettered, the Board may allow such person to submit evidence and make representations.

[17] The purpose of the Regulations in this regard is clear: while the Board’s process is to allow for the expeditious disposition of disputes, it does not countenance “trial by ambush.” The filing of an application and reply in the forms mandated by the Regulations ensures that each party must state the basis of its application or defence thereto. As both the application and reply are in the form of a statutory declaration, they form the basis for the entitlement by the party opposite to cross-examine the declarant in a process that does not allow for pre-hearing examinations or interrogatories.

[18] In the present case, we find that Wal-Mart is a person directly affected by the application and, as such, is entitled to file a reply. While the time to do so pursuant to s. 18 of the Regulations has expired, we extend that time to the close of business on December 7, 2004. If Wal-Mart elects not to file a reply, the panel hearing the application may make the determination as to whether to exercise the discretion afforded by s. 22 of the Regulations.

DATED at Regina, Saskatchewan this **3rd** day of **December, 2004**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson