Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. WESTFAIR FOODS LTD., Respondent

LRB File No. 018-05; August 28, 2007
Vice-Chairperson, Angela Zborosky; Members: Bruce McDonald and Joan White

For the Applicant: Rod Gillies
For the Respondent: Larry Seiferling, Q.C.

Certification – Amendment – Add-on to existing unit – Board confirms three ways in which employee or group of employees might be added to bargaining unit – Where newly created positions fall within defined scope of certification order or collective bargaining agreement, application of union security clause results in inclusion of new positions in certified bargaining units without evidence of support.

Certification – Amendment – New position – In context of all-employee bargaining unit there is presumption that newly created position in scope of bargaining unit unless and until employer negotiates exclusion or applies to Board for additional exclusion – Principle applies whether dealing with one all-employee unit of employer or multiple all-employee units at several operations/locations of employer.

***The Trade Union Act*, ss. 5(c), 5(d), 5(e), 5(g), 11(1)(a), 11(1)(c), 32 and 36.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local 1400 (the “Union”) is designated as the bargaining agent for a number of bargaining units of employees at various retail operations of Westfair Foods Ltd. (the "Employer" or “Westfair”) in Saskatchewan. In particular, the Union represents "all employee" units, with certain named exceptions, at The Real Canadian Wholesale Clubs (“Wholesale Clubs”), The Real Canadian Superstores (“Superstores”), O.K. Economy stores and Extra Foods stores, all of which are retail operations and are described in the certification orders as "divisions and/or trade names" of the Employer.

[2] On January 13, 2005, the Union filed an application alleging that the Employer committed unfair labour practices within the meaning of ss. 3, 11(1)(a), 11(1)(c), 32 and 36 of *The Trade Union Act*, R.S.S. 1978 c. T-17 (the "*Act*") by failing to: place certain employees of these retail operations working in the security department, specifically the "door hosts" and "loss prevention officers," in the bargaining units for which the Union holds certification orders; enforce the union security provisions contained in the *Act* and the relevant collective bargaining agreements; pay union dues on behalf of those employees; and apply the terms and conditions of employment set out in the relevant collective bargaining agreements. The Union maintains that the door hosts and loss prevention officers are within the scope of the certification orders it holds in relation to the various retail operations of the Employer. The Union seeks various orders including a determination that the Employer is guilty of an unfair labour practice or violation of the *Act*, a cease and desist order, an order requiring the Employer to pay all losses suffered by the employees as a result of the Employer's failure to recognize the bargaining rights of the employees (i.e. lost wages, benefits, etc.) and an order requiring the Employer to remit past union dues to the Union.

[3] In its reply, the Employer noted that certification orders in Saskatchewan have been issued for divisions of Westfair and that certification orders are held by division by both the Union and the Retail, Wholesale and Department Store Union ("RWDSU") at different locations. The Employer stated that the employees in the positions of door host and loss prevention officer are actually employed by Loblaws Loss Prevention Division 98-9761 and they have never been part of a division certified in Saskatchewan. As such, the employees in those disputed positions are not required to join the Union and pay dues.

[4] In its application, the Union asserted in the alternative that, if the division in which the Employer asserts the disputed positions are located is a separate corporation, this corporation and the certified divisions are associated or related undertakings operated under common control or direction and ought to be treated as one business. In this regard, the Union sought orders pursuant to ss. 37 and 37.3 finding a transfer of the various businesses to each other and that they are all bound by the certification orders and collective agreements. In its reply, the Employer denied that it had transferred any business from one division to another and at the outset of the

hearing the Employer advised that the common employer provisions could not apply because the divisions were in place prior to s. 37.3 of the *Act* coming into force.

[5] The Union also alleged that the Employer changed the name of its O.K. Economy stores to "Extra Foods" or, alternatively, that the Employer sold, leased, transferred or otherwise disposed of its business to Extra Foods. At the hearing, the Employer indicated that the O.K. Economy division has now become the Extra Foods division and agreed that an amended certification order could issue to the Union with respect to that change.

[6] The matter came before a panel of the Board for hearing on August 24, 2005. At the hearing, the parties agreed to separate the issues raised by the application and asked the Board to address only the issue of whether the door host and loss prevention officer positions fall within the scope of the bargaining units covered by the certification orders and collective agreements between the parties. The parties agreed that any other issues raised by the application, including issues concerning the exclusion of the positions for other reasons as well as any issues related to the unfair labour practice allegations and monetary loss, would be dealt with at a later hearing, if necessary.

Relevant Certification Orders:

[7] The Union holds four certification orders in relation to employees of the Employer by reference to various divisions of the Employer at a variety of locations in Saskatchewan. While the details of the current certification orders are set out below, we note that they are all amended orders that derived from previous orders of the Board, some of which were initially issued in the early 1970s and had somewhat differently configured bargaining units as well as reference to different names of certain retail operations of the Employer and the name of the Union's predecessor. The certification orders now in effect were issued on the following dates with the following bargaining unit descriptions and designated employers:

> **O.K. Economy Stores, Econo Mart Stores, Loblaws Stores, and Pik 'n Pak Stores - Saskatoon, Regina, Moose Jaw, Melville, and Swift Current**

Date: June 12, 1985

Bargaining unit description in paragraph (a): *all employees of O.K. Economy Stores, Econo Mart Stores, Loblaws Stores, and Pik 'n Pak Stores, all being divisions and/or trade names of Westfair Foods Ltd. at its above-noted stores located in Saskatoon, Regina, Moose Jaw, Melville, and Swift Current, all in the Province of Saskatchewan, except the following: . . .*

Designated employer in paragraph (c): *O.K. Economy Stores, Econo Mart Stores, Loblaws Stores and Pik 'n Pak Stores, all being divisions and/or trade names of Westfair Foods Ltd., a body corporate, incorporated pursuant to the laws of the Dominion of Canada, with head office at Winnipeg, Manitoba, the employer,* ….

O.K. Economy Stores and Extra Foods – Humboldt, Tisdale, Kindersley, Melfort, Nipawin and Meadow Lake

Date: August 31, 1998

Bargaining unit description in paragraph (a): *all employees of the O.K. Economy Stores and Extra Foods, divisions and/or trade names of Westfair Foods Ltd. in the Towns of Humboldt, Tisdale, Kindersley, Melfort, Nipawin and Meadow Lake , in the Province of Saskatchewan, except . . . .*

Designated employer in paragraph (c): *Westfair Foods Ltd., Calgary, Alberta, the employer,* ….

The Real Canadian Superstore and The Real Canadian Wholesale Club – Province-wide

Date: August 5, 1992

Bargaining unit description in paragraph (a): *all employees employed by The Real Canadian Superstore, a division of Westfair Foods Ltd., in the Province of Saskatchewan and all employees employed by The Real Canadian Wholesale Club, a division of Westfair Foods Ltd., in the Province of Saskatchewan, except . . . .*

Designated employer in paragraph (c): *Westfair Foods Ltd., the employer,* ….

Evidence:

[8] At the hearing, the Union led evidence through Norm Neault who has been the Union's secretary-treasurer since October 2003. Mr. Neault has held other

positions in the Union for a number of years and, from 2000 until 2003, he was employed by the Union as a full-time representative. The Employer responded with evidence by Brad Denluck, Westfair's senior director of industrial relations. Many of the facts were not in dispute; however, any differences in the evidence given by the witnesses will be noted.

[9] The Union entered the following collective bargaining agreements into evidence:

- Collective agreement between the Union and Extra Foods stores in Saskatoon, Regina and Melville (referred to as the "urban agreements for Extra Foods")[1], expiring March 26, 2008;

- Collective agreement between the Union and Extra Foods stores in Humboldt, Tisdale, Kindersley, Melfort, Meadow Lake and Nipawin (referred to as the "rural agreement for Extra Foods")[2], expiring March 26, 2008;

- Collective agreement between the Union and the Real Canadian Wholesale Club[3], expiring March 26, 2008;

- Collective agreement between the Union and The Real Canadian Superstores[4], expiring March 26, 2008.[5]

[10] Mr. Neault gave evidence concerning a meeting he attended in the spring of 2003 with representatives of the Union and with Mr. Denluck and Bruce Kent, vice president of industrial relations for the Employer. One of a number of issues that were discussed at the meeting was the issue of the inclusion of door hosts and loss prevention officers in the bargaining units certified by the Union. The Union took the

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[1] The scope clause indicates it includes all full-time and part-time employees "employed by all retail operations of Westfair Foods Limited" in Saskatoon, Regina and Melville (but not Swift Current), "except Real Canadian Superstores and Real Canadian Wholesale Clubs stores" and certain specified managerial exclusions.

[2] The scope clause indicates it includes all full-time and part-time employees "employed by Extra Foods stores" in the designated geographical locations, with certain specified managerial exclusions.

[3] The scope clause indicates it includes all full-time and part-time employees "employed by The Real Canadian Wholesale Club in the Province of Saskatchewan" with certain specified managerial exclusions.

[4] The scope clause indicates it includes all full-time and part-time employees " employed by Real Canadian Superstores, in the Province of Saskatchewan" with certain specified managerial exclusions.

[5] None of the collective agreements specifically name as exclusions door hosts, loss prevention officers, or the security employees.

position that these positions belonged in-scope on the basis of the scope clauses in the collective agreements. In a letter the Union sent to the Employer on November 23, 2004, the Union made a demand for the Employer to begin deducting union dues from employees employed in its retail stores as door hosts and loss prevention officers in accordance with the respective collective agreements between the Employer and the Union or pursuant to s. 32 of the *Act*. The Union also demanded that the Employer uphold the union security provisions of the collective agreements or s. 36 of the *Act* in relation to these employees. Lastly, the Union demanded that the Employer abide by the terms of the collective agreements including wage rates, scheduling and the payment of benefit plan premiums in relation to the employees in the disputed positions. Mr. Neault testified that the Employer did not respond to these demands and has not deducted and remitted union dues on behalf of the employees in the disputed positions.

[11] In cross-examination, Mr. Neault acknowledged that at the spring 2003 meeting the Union had asked the Employer to voluntarily recognize the door hosts and loss prevention officers, although he was unsure into which division they would be placed and in which locations the employees in the disputed positions worked. Mr. Neault acknowledged that he had limited information concerning the treatment of door hosts and loss prevention officers prior to 2002. Mr. Neault explained that the Union did not follow up the spring 2003 meeting with its written demand until November 2004 because, at the spring 2003 meeting, the Employer's representatives had indicated that they would get back to the Union with the Employer's position. Mr. Neault said that the issue arose one other time when the Employer was seeking other exclusions in the Moose Jaw store. Also, in that intervening time period, the Union had requested further meetings with the Employer specifically to discuss the issue but the one meeting that had been set was cancelled. Mr. Neault was not aware of any correspondence sent by the Employer to the Union purporting to indicate that the disputed positions were part of a different division, one not certified by the Union. Mr. Neault acknowledged in cross-examination that the Employer had been separately certified by division and that the door hosts and loss prevention officers had never been a part of a division certified in Saskatchewan.

[12] When questioned about the issue of whether the loss prevention officers and door hosts were interchanged by the security division between the retail stores and

the wholesale operation, Mr. Neault stated that he believed that the loss prevention officers were but he was not certain about the door hosts. Also in cross-examination, Mr. Neault acknowledged that loss prevention officers act as shoppers in the store to attempt to catch shoplifters, whether they be employees or customers, but he stated that the door hosts act in a customer service capacity as greeters at the doors to the store. He acknowledged that the door hosts play a limited security role in that they check customers' bags when they leave the store.

[13] Mr. Denluck, on behalf of the Employer, testified that he started working for Westfair in June 1989 while he was attending university. Not long after his graduation, Mr. Denluck was appointed to the position of industrial relations manager for Saskatchewan. He held this position for approximately four to five years after which time he was appointed to the position of director of industrial relations. In January 2004, Mr. Denluck was appointed to the position of senior director of industrial relations of Westfair for Saskatchewan, Manitoba and northwestern Ontario. Mr. Denluck reports to Bruce Kent, whom he stated is the senior vice president of loss prevention/industrial relations for Westfair. Mr. Kent reports to two separate vice presidents of Loblaws Companies Ltd. ("Loblaws"), the parent company of Westfair.[6] In his current position, Mr. Denluck is primarily responsible for overseeing the administration of approximately 18 collective agreements across three provinces, six of which relate to bargaining units in Saskatchewan.

[14] Mr. Denluck described Westfair's business generally as a retailer and wholesaler of grocery and general merchandise products. Westfair is a wholly owned subsidiary of Loblaws. It operates with the following divisions:

> Retail divisions: The Real Canadian Superstores, The Real Canadian Wholesale Clubs, Extra Foods
>
> Other divisions: Wholesale Division, Distribution Centers (operate under the name "Western Grocers" in Saskatoon and Yorkton), Loss

[6] At the hearing the parties and Mr. Denluck were uncertain of the exact corporate name for the parent company of Westfair. It was agreed that the company would be known as Loblaws Companies Ltd. for the purposes of the hearing because no issues of fact or law turned on the point of the proper and exact name of the parent company.

Prevention/Industrial Relations Division, Sunspun Food Service Division, Display Fixtures Division, Independent Stores Division

[15] Mr. Denluck testified that the above stated divisions are all part of Westfair and are not separate corporate entities. Westfair has operated by division since the 1960s or 1970s. He indicated that the unionized divisions in Saskatchewan include the Superstores, the Wholesale Clubs, Extra Foods and Western Grocers. Mr. Denluck testified that loss prevention/industrial relations have been in the same division at least since 1990 and that the individuals in loss prevention (also referred to as the security division) have never been part of a bargaining unit at Westfair.

[16] Mr. Denluck explained the reporting structure within Westfair for the loss prevention/industrial relations division. The door hosts and loss prevention officers report to a district manager for Saskatchewan who in turn reports to a zone manager for Manitoba/Saskatchewan/northwestern Ontario. That zone manager as well as the zone managers for British Columbia and Alberta report to Pat Robertson, the "director of loss prevention" of Westfair (responsible for western Canada), who in turn reports to a vice-president of Loblaws. In cross-examination, Mr. Denluck indicated that loss prevention and industrial relations have always been grouped in the same division but acknowledged that there are two very distinct reporting structures in that division with no overlap between them. Mr. Denluck (responsible for industrial relations) has no reporting relationship with loss prevention in the loss prevention/industrial relations division and even though Mr. Denluck's superior, Mr. Kent, has a position bearing the title "senior vice president of loss prevention/industrial relations" no one in loss prevention reports directly to him. Furthermore, Mr. Robertson, who occupies the most senior position in loss prevention at Westfair, and Mr. Kent each reports to a different vice president of Loblaws.

[17] In cross-examination, Mr. Denluck was questioned concerning the Employer's characterization of door hosts and loss prevention officers as being employed by "Loblaws Companies Loss Prevention" or "LCL Prevention." Mr. Denluck clarified that the reply filed by the Employer was worded in this manner because of a recent change in the reporting structure which now has Mr. Robertson reporting directly to a vice president of Loblaws. In January 2005 Loblaws wanted to have loss prevention

on a nation-wide reporting structure and that is when Mr. Robertson began reporting directly to a vice president of Loblaws. It was acknowledged that LCL Prevention is not a separate corporation and that the door hosts and loss prevention officers are employed by the loss prevention/industrial relations division (or "security division") of Westfair. Mr. Denluck stated that he sometimes refers to loss prevention as being in "LCL Prevention." Mr. Denluck also stated that the reference to the numbers "98-9761" means the division is #98 (loss prevention/industrial relations) and 9761 is only the general ledger code used for the division and he was unsure why that was included in the reply.

[18] Mr. Denluck explained that door hosts are and have been in the loss prevention division since approximately July 1991 when the Wholesale Club was first opened in Saskatoon and the position of door host was created although loss prevention, as a division, came into being in the early 1980s. Mr. Denluck explained that the Wholesale Club was modeled after Costco, a company that also used door hosts. Mr. Denluck indicated that there are now approximately 75 door hosts. Mr. Denluck stated that the loss prevention employees do not report to anyone in the store in which they are working but that the door hosts take direction from a loss prevention officer. He stated that loss prevention has offices in two of the Superstores in Saskatchewan and he assumes that is where the schedules are drawn up, although he was not certain. Loss prevention officers work in various locations in the retail stores and in some of the distribution centers and their primary duties are security related, looking for theft/shoplifting (by customers and employees) and doing investigations. The door hosts work at the Superstores, Wholesale Clubs and Extra Foods stores and their security responsibilities are limited to checking customers' bags when they come into and out of the stores (although Mr. Denluck acknowledged that all employees in the bargaining unit have responsibilities for security to that extent). Initially Mr. Denluck stated that door hosts do not move around as much as loss prevention officers but in cross-examination he stated that, while a door host might be scheduled at more than one store in the city, he could not answer whether that was an exception rather than the general rule. In cross-examination, Mr. Denluck acknowledged that the door hosts and loss prevention officers are employees of Westfair, as are the employees in the bargaining units represented by the Union and that Westfair does the payroll for all of Loblaws across Canada.

[19] In cross-examination, Mr. Denluck admitted that an employee in the bargaining unit at a Superstore in Saskatoon was accommodated from her bargaining unit position to a door host position on a temporary basis and that the individual “did not switch employers” when this occurred. Mr. Denluck does not believe the employee was still scheduled by the store when she was in the door host position but rather that a loss prevention officer scheduled her.

[20] Mr. Denluck was cross-examined in relation to the similarities in the Employer’s and Union’s relationships concerning the unionized divisions. Mr. Denluck testified that they bargain at a common table for part of the negotiations for more than one division and, after the last round of bargaining, all of the collective agreements were put in one book for convenience, although there are several common clauses covering employees across the retail divisions. Mr. Denluck acknowledged that all the bargaining units have the same insurer and that the dental and pension benefits are the same in all of the retail agreements but are different in the wholesale unit.

[21] Mr. Denluck stated that in 1998 the issue of the inclusion of door hosts in the Union through voluntary recognition was raised by the Union with the Employer but the Employer advised the Union it would not agree to this. Mr. Denluck acknowledged that at the spring 2003 meeting with the Union Mr. Kent did say that he would get back to the Union on the issue of voluntary recognition of these employees. In cross-examination, Mr. Denluck was uncertain why Mr. Kent did not get back to the Union. Mr. Denluck stated that the Union wrote a letter to the Employer later in 2003 and that the Employer responded by stating that the employees simply were not in the divisions that were certified by the Union. Mr. Denluck has no knowledge of the Union ever applying for certification of this group of employees although, in the early 90s, he was advised by a loss prevention officer that the officer had been approached by a union to sign a card.

[22] Mr. Denluck pointed out that, even though there are industrial relations employees working in Saskatchewan, there are no industrial relations positions specifically excluded in any of the collective agreements between the Union and the

Employer. At the same time, none of those individuals has been treated as part of any of the bargaining units.

[23] While Mr. Denluck initially asserted that the loss prevention officers and door hosts are part of the loss prevention division for western Canada and northwestern Ontario and are not part of a bargaining unit for any of the unionized divisions, he qualified that statement by saying it did not apply in Manitoba and British Columbia. In Manitoba, the door hosts became unionized when the Employer and the United Food and Commercial Workers, Local 832 entered into a letter of agreement to include the door hosts. The Employer had been seeking certain exclusions and the union got the door hosts in return.

[24] Also, in British Columbia, in approximately 1998 or 1999, when the Canadian Auto Workers Union applied to the British Columbia Labour Relations Board to certify the door hosts and loss prevention officers, discussions between the Employer and another local of the United Food and Commercial Workers Union resulted in the voluntary recognition of the door hosts by that local of the union.

[25] When asked in cross-examination whether the door hosts were then employed in the retail divisions and not the loss prevention division in Manitoba and British Columbia, Mr. Denluck responded by stating that he was unsure how the language was worded in the collective agreements but that he believed the door hosts were still employed by the loss prevention division. In Manitoba, all of the retail divisions of Westfair (including the Extra Foods stores, Superstores and one Wholesale Club) with the exclusion of one Wholesale Club store, which is certified by the United Steelworkers of America, are covered by one collective agreement and the door hosts are in that collective agreement. A letter of understanding is attached to that agreement that speaks to the inclusion of the door hosts in the bargaining unit. Mr. Denluck could not answer whether there was a certification order in Manitoba covering the employees of the loss prevention division, indicating that he has not read any of the certification orders in Manitoba. He also had no knowledge of whether the Manitoba collective agreement references the loss prevention division but he believed that there was a department of door hosts at each store. When asked then if the retail division is the employer of the door hosts, Mr. Denluck responded that Westfair is their employer and he simply was not

certain whether their payroll was done as a separate division. Mr. Denluck agreed with counsel for the Union that it is likely that, if the door hosts are in a separate department in the stores, they are hired by the retail division just like employees of any other department in that retail store. The letter of understanding dated February 15, 1999, attached to the retail agreement in Manitoba, reads in part,[7] as follows:

> *The parties agree that Loss Prevention Hosts shall be covered under the existing agreement subject to ratification by a majority of existing Hosts.*
>
> *Loss Prevention Supervisors and Loss Prevention Officers will be excluded from the bargaining unit.*
>
> *Loss Prevention Hosts will constitute a new department in each store and the language concerning guarantee of hours (19.14) and full-time positions (section 7) will not apply to Hosts.*
>
> *Hosts will be paid on the following wage appendix:*
>
> . . . [wage appendix omitted]

[26] With respect to British Columbia, Mr. Denluck stated that the distribution centers, warehouse, Extra Foods and Superstores are all in one collective agreement and that is the collective agreement in which the hosts were placed. Mr. Denluck indicated that there are no certification orders held in relation to any of its operations in Alberta and northwestern Ontario.

[27] In re-examination, when asked if the agreement respecting the door hosts in Manitoba was ratified by the door hosts as a separate group, Mr. Denluck responded that he believed so and said that, prior to the voluntary recognition, they were not part of a bargaining unit. Mr. Denluck agreed that there were no non-unionized retail stores in Manitoba or in British Columbia, except for possibly some franchise stores. He also indicated there were no unionized retail stores in Alberta.

Arguments:

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[7] The letter of understanding is between Westfair and United Food and Commercial Workers union and deals with several issues involving a number of retail operations or divisions, including issues related to new positions and scope.

[28] Mr. Gillies, counsel on behalf of the Union, argued that the Union holds "all employee" certification orders with certain named exceptions (primarily managerial ones) and because door hosts and loss prevention officers are not specifically excluded in the certification order (and there has been no agreement to amend any scope clauses to exclude them), they must be included in the bargaining units. It is for these reasons that the Union distinguishes this situation from that of an application to "add on" a group to the bargaining unit in which case the Union would be required to show evidence of support. The Union argued that this case falls in the category of cases which are concerned with the enforcement of the union security clause. Even though Westfair is certified by division (or by retail store), the employees in the certified bargaining units as well as the door hosts and loss prevention officers are all employees of Westfair. Therefore, any new positions that have been created by the Employer must fall within the scope of the unit without the need to show support from the employees in those classifications. In making these arguments, the Union relied on *Canadian Association of Fighter Bomber Pilots and James Stockdale v. The Government, of Saskatchewan and the Saskatchewan Government Employees Union*, [1993], 1st Quarter, Sask. Labour Rep. 202, LRB File No. 164-92, and *Canadian Union Public Employees, Local 88 v. St. Elizabeth's Hospital*, [1995] 4th Quarter Sask. Labour Rep. 85, LRB File Nos. 260-94 and 032-95.

[29] The Union argued that there is no issue concerning timeliness of its application and, on the basis of the reasoning in *St. Elizabeth's*, any delay in filing this application to enforce the union security clause only goes to the issue of remedy.

[30] The Union also argued that the evidence established that door hosts are, as a matter of fact, employed in the retail divisions. The Union pointed to the following facts: the door hosts and loss prevention officers perform their work in the retail stores; the loss prevention offices are located in some of the retail stores; a bargaining unit member of a retail store was temporarily accommodated in a door host position in that store; no specific evidence of who schedules door hosts and loss prevention officers was provided by the Employer; and the door hosts do not work in the wholesale divisions.

[31] The Union argued that the fact that the Employer asserts that the door hosts and loss prevention officers are in the loss prevention/industrial relations division

and therefore are not in a certified division does not make it so. In its view, such an assertion makes no labour relations sense in that it is inappropriate to create a classification, the incumbents of which work in the store, and simply place it in a division titled "loss prevention/industrial relations," particularly because the security portion of the job does not fit into or relate to industrial relations and there are no common reporting structures between loss prevention and industrial relations. The Union urged the Board to find that the retail division is the employer of the loss prevention employees, in a labour relations sense.

[32] Mr. Seiferling, counsel on behalf of the Employer, argued that the employees in the positions of door host and loss prevention officer are not covered by any of the existing certification orders held by the Union. He stated that the Board has certified each division of the Employer separately and that the collective agreements negotiated between the Union and the Employer reflect that. The Employer stated that the door hosts and loss prevention officers are in the loss prevention/industrial relations division and that division has never been subject to a certification order.

[33] The Employer stated that the security division, of which the door hosts and loss prevention officers are a part, has been a separate division of the Employer since the 1980s when loss prevention officers came into existence and since 1991 when the door host position was created. The Employer argued that, if the division existed at the time of the last amendment to the certification order and the positions were not specifically included, they must be considered to be excluded from the certification order. These were not, therefore, new positions. Alternatively, even if these positions were treated as new positions, they appropriately belong in the industrial relations/loss prevention division because the primary focus of the positions is security.

[34] The Employer suggested that the Union has delayed in seeking to include these employees because neither party thought that they were covered by any of the certification orders. The Employer argued that the parties never intended that the disputed positions be included in the certification orders held by the Union, on the initial certification and through subsequent amendments. Their "vote" was not counted on those applications. They simply were not considered because they were not part of the division being certified.

[35] In support of its position, the Employer pointed out that, in Manitoba and British Columbia, the door hosts and loss prevention officers only became members of the bargaining unit through negotiation and voluntary recognition. The Employer argued that they must have considered these positions as excluded if they were ultimately required to negotiate their inclusion.

[36] Mr. Seiferling argued that, aside from voluntary recognition, the only appropriate means for the Union to have these employees subject to a certification order is to make an application for certification with appropriate support evidence and establish that the employees in these positions form an appropriate bargaining unit. Alternatively, the Union might request that the loss prevention division and a retail division be combined, in which case evidence of support would still be required as well as a determination that the combination would not create a conflict of interest.

[37] The Employer also argued that, just because the security division is not specifically excluded in the certification orders, it does not mean that the positions in that division are included in the bargaining unit of another certified division. There are other positions employed by the Employer that are not specifically named as exclusions in any of the certification orders, yet the Union has not claimed that the employees in those positions belong in another certified division. Examples include any of the employees employed by Westfair in industrial relations positions.

[38] Mr. Seiferling also argued that the Union cannot use ss. 37 and 37.3 (successorship and common employer provisions) to expand its bargaining units. Those provisions can only be used to preserve bargaining rights. Also, s. 37.3 contains a grandfathering provision such that it would not apply here because the company was in place prior to the coming into force of s. 37.3.

[39] In support of the above arguments, the Employer relied on the following cases: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and United Food and Commercial Workers, Local 1400 and Westfair Foods Ltd.*, [1992] 4th Quarter Sask. Labour Rep. 100, LRB File No. 096-92; *Retail, Wholesale and Department Store Union, Local 454 v. Westfair Foods Ltd. and United Food and*

Commercial Workers, Local 1400 and *United Food and Commercial Workers, Local 1400 v. Westfair Foods Ltd. and Retail, Wholesale and Department Store Union, Local 454*, [1993] 1st Quarter Sask. Labour Rep. 102, LRB File Nos. 232-92, 233-92 & 096-92; *United Food and Commercial Workers, Local 1400 v. Inner-Tec Security Consultants Ltd. and Argus Guard and Patrol Ltd.*, [1994] 4th Quarter Sask. Labour Rep. 183, LRB File No. 089-94; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pioneer Co-operative Association Limited,* [2005] Sask. L.R.B.R. 334, LRB File No. 151-01; *University of Saskatchewan v. Canadian Union of Public Employees, Local 1975* (1977), 22 N.R. 316 (Sask. C.A.); *University of Saskatchewan v. Canadian Union of Public Employees Local 1975, Administrative and Supervisory Personnel Association and Saskatchewan (Labour Relations Board),* [1978] 2 S.C.R. 834 (S.C.C.); *Prince Albert Co-operative Association v. Retail, Wholesale and Department Store Union, Local 496 and Saskatchewan Labour Relations Board*, [1983] 1 W.W.R. 549 (Sask. C.A.); *Crowsnest Pass (Municipality) v. Alberta (Labour Relations Board)*, [1985] A.J. No. 628 (Alta. C.A.); *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre and Physical Therapists Association*, [1993] 1st Quarter Sask. Labour. Rep. 167, LRB File No. 236-92; *Retail, Wholesale and Department Store Union v. Sunnyland Poultry Products Ltd.*, [1993] 2nd Quarter Sask. Labour Rep. 213, LRB File No. 001-92; *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Kindersley and District Co-operative Ltd.*, [1998] S.J. No. 776 (Sask. C.A.); *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Young Co-operative Association Limited and Federated Co-operatives Ltd.*, [2001] Sask. L.R.B.R. 676, LRB File No. 060-98.

Statutory Provisions:

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

> *5 The board may make orders:*
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> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*

(e) requiring any person to do any of the following:

(i) to refrain from violations of this Act or from engaging in any unfair labour practice;

(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;

(g) fixing and determining the monetary loss suffered by an employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;

(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;

32(1) Upon the request in writing of an employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the trade union to receive the same, the union dues, assessments and initiation fees of the employee, and the employer shall furnish to that trade union the names of the employees who have given such authority.

(2) Failure to make payments and furnish information required by subsection (1) is an unfair labour practice.

36(1) Upon the request of a trade union representing a majority of employees in any appropriate unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:

> *Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within 30 days after the commencement in his employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of his employment, provided that any employee in the appropriate bargaining unit who is not required to maintain his membership or apply for and maintain his membership in the union shall, as a condition of his employment, tender to the union the periodic dues uniformly required to be paid by the members of the union;*

and the expression 'the union' in the clause shall mean the trade union making such request.

(2) Failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice.

(3) Where membership in a trade union or labour organization is a condition of employment and:

> *(a) membership in the trade union is not available to an employee on the same terms and conditions generally applicable to other members; or*
>
> *(b) an employee is denied membership in the trade union or his membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessment and initiation fees uniformly required to be paid by all other members of the trade union as a condition of acquiring or maintaining membership;*

> *the employee, if he tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership:*
>
> > *(c) shall be deemed to maintain his membership in the trade union for purposes of this section; and*
> >
> > *(d) shall not lose his membership in the trade union for purposes of this section for failure to pay any dues, assessments and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members.*

Analysis and Decision:

[41] As previously stated, the parties limited the scope of the hearing to one issue - whether the employees in the positions of door host and loss prevention officer fall within the scope of the Union's bargaining units as defined by the three certification orders and four collective agreements referred to in these Reasons for Decision. The parties have limited the scope of the hearing and our determination in a way that has made it somewhat difficult to address the essential matters in dispute between them. We will attempt to answer their questions and provide some direction concerning further proceedings on the application, if necessary.

[42] In *Saskatchewan Government Employees Union v. Wascana Rehabilitation Center*, *supra*, the Board identified three ways in which an employee or groups of employees might be added to a bargaining unit, stating at 169 and 170:

> *There are three general ways in which employees may be added to the group of employees represented by a particular trade union for the purpose of bargaining collectively. Though there may in some cases be difficulty in deciding on the facts which of these is appropriate, it is possible to describe in a general way the circumstances in which they apply.*
>
> *The **first method of adding employees to an existing unit is through the union security clause** in a collective agreement. Once a trade union has been certified to represent the employees in a bargaining unit which is defined, the resulting collective agreement typically requires that **employees who are added to the workforce in the unit must obtain membership in the union** as a condition of employment. Though the majority of bargaining units are defined in terms of one workplace, there are bargaining units which have a wider geographical scope, covering*

> *a municipal area or even the province as a whole; in these cases, if the employer, for example, opens a new outlet into which the kinds of employees described in the certification order are hired, those employees will be added to the existing bargaining unit.*
>
> *The* ***second method by which employees are added to an existing unit is through bargaining between a trade union and an employer concerning the scope*** *of the bargaining unit. In these cases, which* ***often involve questions of whether newly created positions will be excluded from the unit, the parties may agree that the description of the unit should be amended****, and apply to the Board to have this amendment recorded in the certification order. Section 5(j) contemplates such an application where the employer and the trade union agree to the proposed amendment.*
>
> *The* ***third way*** *by which a trade union may ask to have employees added to the bargaining unit is by* ***bringing an application to have the description of the bargaining unit altered to reflect the inclusion of these employees****. The circumstances under which this may be done, and the criteria which the Board will use in determining whether to allow such an amendment, have not been fully articulated, but it is possible to discern from previous Board and judicial statements on this issue some principles which should be applied in a case such as this.*
>
> *It is not always easy to make the factual distinctions which reveal the category into which any given situation should fall. . . .*
>
> [**emphasis added**]

[43] In *Wascana Rehabilitation, supra*, the Board went on to note that the case before it belonged in the third category because the addition of physiotherapists would require the unit to be redefined given that the physiotherapists had been explicitly excluded in a succession of Board decisions and collective bargaining agreements.

[44] The Board, in *Fighter Bomber Pilots*, *supra*, after noting the three categories above, went on to examine the differences between the first and the third categories (application of union security versus the redefinition of the bargaining unit) and stated at 218:

> *It is not always a straightforward matter to determine whether the circumstances in any given case call for the simple application of the union security provisions of an agreement, or whether what is taking place requires a redefinition of the bargaining unit. Neither is*

> *it always easy to draw the balance between the interest of a trade union in consolidating its position as a bargaining unit when new employees are brought into the bargaining unit, and the interest of employees in being able to voice their wishes with respect to representation. To give some indication as to where the line may be drawn in various circumstances, it may be helpful to consider several examples of common issues which come before this Board.*
>
> *. . .*
>
> ***In circumstances where individual new employees are hired into an existing bargaining unit, or where an employer sets up a new enterprise or administrative unit which falls within the scope of the bargaining unit and new employees are hired into that, the union has generally been found to represent these "new" employees without demonstrating that they have obtained the support of any of them****: see, for example, Retail, Wholesale and Department Store Union v. Western Grocers, LRB File Nos. 232-92 and 233-92; and United Food and Commercial Workers v. Westfair Foods Ltd., LRB File No. 096-92.*
>
> [**emphasis added**]

[45] The question posed by the case before us is into which of the three categories identified in the *Wascana Rehabilitation* case *supra* does the present fact situation fall? It is clear we are not dealing with an agreement between the parties on scope and therefore are not dealing with the second category. The first category deals with the application of the union security clause in circumstances where new employees or newly created positions fall within the defined scope of the certification order or collective bargaining agreement. This situation is often seen on s. 5(m) applications (employee determinations), applications alleging a violation of s. 32 (union security demand) or unfair labour practice applications alleging a violation of s. 11(1)(c) (failure to negotiate the exclusion of a position and/or unilateral placement of a position either out-of-scope or, in a multi-bargaining unit setting, in one unit over another). The third category, where the bargaining unit must be redefined, has often been referred to by the Board in a situation where a union attempts to "add-on" a group of employees to an existing bargaining unit. This might occur where the bargaining unit is defined by reference to certain positions being included within its scope and the union seeks to have another position or group of positions included. It could also arise in a situation where the union has an all-employee unit and seeks to include individuals who were specifically excluded in the certification order or in an amended scope clause.

[46] The Employer urges us to find that the present fact situation falls within the third category, that is, the bargaining units need to be redefined to include door hosts and loss prevention officers within their scope. The Employer argues that the Union is seeking to add-on a group of employees (the door hosts and loss prevention officers) who, although not specifically named as exclusions in the certification order, are excluded because they do not fall within the “division and/or trade name” limitation of the scope of the bargaining unit. We cannot characterize the facts of this case in such a way. For the reasons that follow, it is our view that the situation before us falls more into the first category than into the third. As a result, the door hosts and loss prevention officers are included within the scope of the certified bargaining units held by the Union, without providing evidence of support.

[47] The Employer correctly points out that the bargaining units are certified by division or, in other words, each certification order references a division or divisions of Westfair as part of the description of its scope. The divisions for which the Union holds certification orders are not separate companies or corporations but are merely each a certain type of retail operation Westfair operates under a separate business name. Although the terminology used in these bargaining unit descriptions (i.e. "a division and/or trade name of") has seldom been used by the Board and certainly not in recent years, it is similar to the language which the Board currently appears to prefer, that is, "the [employer], operating as [business name]," in order to specify *the scope of the employer's operations* to which the certification order applies. In the case of Westfair, the use of the words "a division and/or trade name of . . ." is rooted in the historical use of that phrase in the original certification orders, some of which date back to the early 1970s. In any event, it is our view that the significance of the language that references each retail operation of Westfair as a division and/or trade name of Westfair, is only that it restricts the scope of the certified bargaining units to a certain retail operation of Westfair, in much the same way as if the order had read, for example, "Westfair, operating as Extra Foods," to use the language currently used by the Board. In either case, the true employer is Westfair and the scope of the bargaining unit is defined as all employees (with specified managerial exclusions) who work in the retail operation specified in the order, in the geographical locations specified in the order. This conclusion is further supported by the reference in paragraph (c) of two of the more

recent of the three certification orders to "Westfair" being the employer obligated to bargain with the Union.

[48] Also, it is important to note that we consider the bargaining units represented by the Union to each be an "all-employee" unit. The Employer urged the Board to find that the units are not true all-employee units because the scope of each unit is limited to a specific division or operation, rather than extending to all of the employees of Westfair. While Westfair is the employer of all of the employees in the bargaining units, the scope of each bargaining unit is limited by the scope of the Employer's operations, that is, a certain retail operation. The fact that a certification order is limited in this manner in no way detracts from the unit being an all-employee one - it is an all-employee unit in a certain retail operation of the Employer.

[49] As stated, it is clear in the certification orders and it was admitted by the Employer that the employer of all of the employees in all of the designated bargaining units is Westfair. What is also clear on the evidence before us is that the employer of the door hosts and loss prevention officers is Westfair. In addition to the argument that these disputed positions do not fall within the scope of the certified bargaining units because the door hosts and loss prevention officers are in a different division than the divisions certified by the Union, the Employer also argued that the parties never intended the certification orders to include the door host and loss prevention officer positions. However, we see the argument or the issue in slightly different terms, that is, can Westfair create new positions and place them within or beyond the scope of a designated bargaining unit through its unilateral assignment of those positions to a division of its choosing that is within its internal business structure. In our view, it cannot.

[50] There can be no other conclusion drawn from the facts of this case than that the matter before us falls within the first category; the application of the union security clause. The present situation involves the creation of new positions since the initial certification orders were issued in relation to all of the retail stores where the Union represents employees. The evidence indicates that the loss prevention officer position was created in the 1980s (although the witness was not more precise nor did he indicate in which retail operations loss prevention officers worked) while the door host position

was created soon after the Wholesale Clubs commenced operations in approximately 1991. The certification orders in all cases, except for the Wholesale Clubs, were first granted in some form or another in the 1970s. The Wholesale Clubs were added to the Superstores' certification order in 1991 at the time the first Wholesale Club opened in Saskatoon. This represented an expansion of the Superstore bargaining unit that went unopposed by the Employer.

[51] The present situation is similar to the situation described in the Board's decision in *St. Elizabeth's Hospital*, *supra*, where the Board determined that the matter fell within the first category. In *St. Elizabeth's*, the Union alleged a violation of s. 32 of the *Act* and an unfair labour practice as a result of the employer's refusal to deduct union dues for a number of employees that the union asserted were part of the bargaining unit. In making its determination, the Board was required to decide whether the union could rely on the certification order to include these employees, without evidence of support. The employer argued that the union had, by previous agreement, relinquished any bargaining rights it may have had with regard to the disputed positions and that, if the union now proposed to obtain such bargaining rights, it must bring an application for amendment during the open period and with evidence of majority support for the add-on group. The Board stated that, in the absence of an agreement between the parties to alter the scope of the bargaining unit described in the certification order, the parties continued to be bound by the order. The Board characterized the positions of the parties as follows, at 97 and 98:

> *On the other hand, the Employer chose to advance no evidence of any explicit agreement between the parties which might have added the positions disputed here to the listed exclusions in the certification Order. This approach may have stemmed from the position taken by the Employer that what the Union is seeking to do is in essence to amend the certification Order by changing the scope of the bargaining unit, and that the Union should be required to make the application which would achieve this purpose during the relevant open period.*
>
> *In our view, this is not the effect of the Union application. What the Union is arguing is that these positions are already covered under the existing certification Order, because that certification order gives the Union bargaining rights for all employees with the exception of those specifically excluded. If this argument is accepted, the*

> *position taken by the Union is that no question of timeliness or of evidence of support arises.*

[52] The Board went on to examine the issue of whether there had been such an agreement between the parties, at 98 and 99:

> *It was repeatedly asserted by counsel for the Employer that there had been an agreement between the Union and the Employer that these positions are not within the scope of the bargaining unit. The only evidence which was relevant to this question was the acknowledgement by Ms. Power that the Union had not previously sought to have dues deducted for these persons, a fact which might almost be said to be self-evident, given the nature of the application.*
>
> *There was no other evidence, however, which might indicate whether this failure to ask for dues in relation to these positions might have come about by design or through oversight, or how and when an agreement was made between the parties that the bargaining rights of the Union did not extend to these positions.* ***The fact that the Union had not asked for dues prior to November of 1994 might have some impact on the remedy to which the Union might ultimately be entitled. It does not seem to us, however, to answer the essential question of whether the incumbents in these positions are among the employees included in the bargaining unit.***
>
> *It may be that the Employer genuinely felt they had an agreement, formal or informal, with the Union that these positions should not be in the bargaining unit. It may even be that a finding that they are in the bargaining unit represents a windfall to which the Union is not entitled.* ***Nonetheless, in the absence of any evidence whatsoever of the nature or terms of an agreement between the parties modifying the scope of the bargaining unit, we must conclude that the bargaining unit description in the certification Order governs the question of scope, and that the Union is entitled to rely on it in making the claim that these positions fall within the bargaining unit. The wording of that Order indicates that all employees who are not specifically excluded from the bargaining unit are included within the scope of the Order, and we have concluded that there has been nothing put before us to this point which would exclude these positions from the bargaining unit.***
>
> ***The implication of this conclusion is that it is open to the Union to insist that the employees who occupy these position become members of the Union and authorize the deduction of union dues from their wages, pursuant to the Union security***

> ***provision in the collective agreement, to which the parties have agreed.***
>
> [**emphasis added**]

[53] The Board in *St. Elizabeth's* noted two exceptions to the proposition that a union is entitled to rely on the union security clause to include the positions in the bargaining unit, absent a specific agreement to exclude them: (i) those incumbents who were not union members at the time the union security clause was agreed to, are not required to become union members; and (ii) individuals who are not "employees" within the meaning of the *Act* are not within the bargaining unit and are not required to join the union. In the case before us, exception (i) does not apply and the parties have asked that we not address exception (ii) at this time.

[54] In the present case, the Employer also argued that the parties did not contemplate that the door hosts and loss prevention officers would be included in the certification orders. To the extent that that matters to the determination of this application, it is not true. The granting of an all-employee certification order implicitly contemplates that any individuals who work at the workplace designated in the certification order are included in the bargaining unit unless they are specifically excluded in the order or in an amended scope clause of the collective agreement. Furthermore, while we had little evidence before us concerning the creation of the loss prevention officer position, we note that the creation of the door host position occurred either at the same time or after the latest amendment to one certification order to include the Wholesale Club, where the first door hosts worked. A review of the Board files concerning the initial certification orders held by the Union as well as subsequent amendment applications reveals that, on any occasion where a statement of employment was filed, the Employer did not disclose the existence of door hosts or loss prevention officers. Therefore, the status of these positions has never formally been raised as an issue before the Board. The Employer therefore cannot rely on the fact that there have been amendments to the certification orders subsequent to the creation of the disputed positions when it did not disclose the positions or bargain collectively with the Union concerning the positions as a basis for its argument that, because the positions were not specifically raised or contemplated at the time the last certification orders were amended, they cannot now be included.

[55] The Employer's argument is not unlike that made by the employer in the *St. Elizabeth's* case, *supra*, where the employer argued that the parties had agreed that the positions were excluded but the only evidence of that agreement was the fact that the union had never sought to collect dues from the employees in the positions in dispute. Similarly, in the case before us, there is no evidence of such an "explicit agreement" to exclude the positions. There is only evidence that the Union has not sought to collect dues for these employees nor asserted rights to have them treated as a part of one of the unionized divisions, other than the steps it took in 2003 and 2004 which led to the filing of this application. We take the same view of such evidence as the Board did in *St. Elizabeth's* - in the absence of an express agreement to exclude the positions there can be no such implied agreement as a result of the Union's inaction. The Union's failure to enforce bargaining rights in relation to these positions earlier affects only the remedy to which it might be entitled.

[56] Our conclusion is further supported by a decision of the Board in *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan and Administrative and Supervisory Personnel Association*, [2000] Sask. L.R.B.R. 207, LRB File No. 297-99. In that case, the Board was required to determine which bargaining unit, in a multi-bargaining unit setting, a position should be assigned to. On the issues of demonstration of support and the University's obligations upon the creation of a new position, the Board stated at 214 and 215:

> *[24] With respect to a demonstration of support, we are of the view that these positions do not fall within the terms of the Supreme Court decision referred to earlier. The positions at NAPN are not new or unique at the University and do not represent a group that is not dealt with in the certification Orders issued by the Board to the various bargaining agents. At the time of their creation, they would have properly been assigned either to the CUPE bargaining unit or the ASPA bargaining unit. The Board set out the procedures for determining the assignment of positions in LRB File No. 218-98 and placed the responsibility for initiating the process on the Employer. The assignment of the position at the appointment stage to one of the two bargaining units would take place without any demonstration of support.* ***This results from the effect of the certification Orders, which are intended to describe a group of employees in such a fashion that new positions can be included in the bargaining units***

> ***without the need for constantly altering the certification Orders. Certification Orders are designed to speak to the current and on-going environment of the Employer and are not fixed in time to include only those positions which were in existence at the time the Orders issued.***
>
> ***[25] In our view, the University had an obligation when the positions at NAPN were first created to negotiate with CUPE and ASPA with respect to the assignment of the positions to one of the bargaining units. It would seem unfair if the University were permitted to rely on its own failure to comply with the Act to now insist that ASPA or CUPE demonstrate support for each of the tag-end groups that remain outside of collective bargaining regimes.***
>
> [**emphasis added**]

[57] Having concluded that the situation before us essentially involves the creation of new positions by Westfair, what then are/were the obligations of the Employer?

[58] One of the first cases to address this issue and set out the status of a newly created position until the matter of its bargaining unit status could be determined by the Board was *Saskatchewan Government Employees Union v. Wascana Rehabilitation Center*, [1991] 3rd Quarter Sask. Labour Rep. 56, LRB File Nos. 199-90 & 234-90. In that case, the employer had applied to amend the certification order to exclude the newly created positions of assistant directors of nursing and nursing managers. One of the issues the Board was required to determine was the status of the positions while the amendment application was pending before the Board. At 58 and 59, the Board reasoned:

> *As stated, the above cases do not deal with a position's status while the employer's application is pending. Furthermore, there is no logical extension of these decisions which assist the Board in the present case; accordingly, there is not much to be gained from a minute analysis of them. The salient fact that emerges is that the parties require a clear direction from the Board on a position's status while the application is pending.*
>
> *There are only three alternatives available:*

> *1. First, the position is out-of-scope of the bargaining unit until the Board orders that it is in. In such case, the Employer will only be guilty of an unfair labour practice if it is subsequently ruled that the position is in-scope. This is the Empire Oil option which was followed by the Board without comment in Pioneer Village and Regina General Hospital. In practical terms, this alternative permits the Employer to exclude a position and refuse to recognize the Union while its application is before the Board. This procedure encourages unilateral action and exposes the Employer to an unfair labour practice; it also creates the risk of conflict between the Board's ultimate ruling and the basis upon which the employee was hired.*
>
> *2. The second possibility is that the position is out-of-scope, while the application is pending, regardless of how the Board ultimately rules. This option creates the same problem as the first, except that it removes the risk of an unfair labour practice from the Employer's shoulders.*
>
> *3. The final option is that the position is in-scope while the application is pending, regardless of how the Board ultimately rules. Admittedly, there is still a risk of conflict between the Board's eventual order and the basis upon which the employee was hired, however, this option has several advantages and all the unpalatable features of unilateral action and the consequent risk of unfair labour practices are removed.*

When arriving at a certification order the Board considers, inter alia, the need for managerial exclusions (see: Westfair Foods Ltd. v. UFCW SLRB 085-80; Corporation District of Burnaby v. Canadian Union of Public Employees, Local 23 (1974) 1 CLLC p. 1). Unless changed, the certification order so described applies to the parties for the balance of their bargaining relationship and is of fundamental importance in the conduct of their subsequent affairs. The Empire Oil argument neglects to consider that in order for a position to be excluded from an existing all-employee unit, the Board must first find that the person filling that position is not an "employee" within the meaning of Section 2(f) of the Act. The status of "employee" or "non-employee is a judgment for the Board to make on an appropriate application where the parties cannot agree. Essentially therefore, the Board's "saying so makes it so". ***From a procedural point of view, until the Board makes that decision, the position must remain in the all-employee unit in compliance with, and in deference to, the Board's***

existing certification order. *The substantive determination, at some subsequent date, that a person filling the position is not an "employee", cannot retroactively alter the integrity of an existing Board certification order directing all employees to be part of the unit.*

Assigning new positions into the bargaining unit until the Board orders otherwise is consistent with the Board's practice of placing the onus, in exclusion applications, on the employer. In addition, it coincides with the reasoning which prompted all boards to adopt the "all-employee" description of the bargaining unit over the enumerative or classification list method. One of the critical considerations why the "all-employee" method of unit description replaced the enumerative or classification list method was to avoid the endless applications which arose every time the employer reorganized, changed position titles or created new positions. "All-employee" units accommodate these changes without the necessity of an application to the Board. The only time an application to the Board is required is when the employer wishes to have a new position excluded.

Finally, assigning new positions into the unit, pending the Board's order, is also consistent with both orderly collective bargaining and the objects and philosophy of The Trade Union Act. It serves the interests of all the parties in that it avoids the necessity of an employer having to risk an unfair labour practice in order to have the exclusion issue of a position determined. To countenance an approach that would allow unilateral exclusions from an existing certification order would inevitably lead to industrial instability because it effectively encourages parties to ignore their contractual, as well as their statutory rights and obligations. ***Where the Board has a choice between two practices: one based upon unilateral action and one based upon respect for the Board's order, until changed in accordance with the provisions of The Trade Union Act, the Board will obviously prefer the latter.***

Accordingly, where a new position is created in an "all-employee" unit, it remains in the bargaining unit unless excluded by order of the Board or agreement of the parties*. Filing an amendment application pursuant to Section 5(k) of the Act does not have the same effect as an order. Therefore,* ***if the Employer wishes to exclude a new position from the scope of the bargaining unit, it must be done in one of the following ways:***

> ***1. it may be excluded through the process of collective bargaining;***
>
> ***2. if attempts at bargaining have failed, it can apply for an amendment to the certification order***

> *pursuant to Section 5(j), (k) or (m) of The Trade Union Act.*

[**emphasis added**]

[59] The creation of new positions by an employer, which structures its business operations in the manner that Westfair has, can also be compared to the creation of new positions by an employer in a multi-bargaining unit setting. Westfair owns and operates several distinct businesses in the form of retail stores and/or wholesale operations throughout the province with the Union, as well as the RWDSU, representing all employee units in each of the several operations. This business arrangement creates circumstances similar to those which exist in a multi-bargaining unit setting where several bargaining units are certified for different areas of operation of an employer, with the same or different unions representing those bargaining units. For example, there are five bargaining units representing employees at the City of Regina, including a unit of inside workers represented by Canadian Union Public Employees, Local 7; a unit of outside workers represented by Canadian Union of Public Employees, Local 21; a middle management unit represented by Regina Civic Middle Management Association; a unit of the employees of the fire department represented by the Regina Professional Firefighters' Association; and a unit of employees of the transit department represented by the Amalgamated Transit Union.

[60] The rules regarding the assignment of a newly created position in a multi-bargaining unit setting were most recently reviewed by the Board in *Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association*, [2005] Sask. L.R.B.R. 274, LRB File Nos. 103-04 & 222-04. At 311 through 313, the Board stated:

> *[97] A number of Board decisions dealing with disputes over the assignment of positions in a multiple bargaining unit setting were filed by the parties. . . .*
>
> *[98] In Canadian Union of Public Employees v. University of Saskatchewan and Administrative and Supervisory Personnel Association, [2000] Sask. L. R.B.R. 83, LRB File No. 218-98, the Board reviewed the appropriate practice for an employer to follow when assigning a newly created position to a bargaining unit or units. The Board stated at 97:*

[48] In Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre, [1991] 3rd Quarter Sask. Labour Rep. 56, LRB File Nos. 199-90 and 234-90, the Board held, at 59, that "where a new position is created in an 'all employee' unit, it remains in the bargaining unit unless excluded by order of the Board or agreement of the parties". An employer is required to bargain collectively with the Union in order to obtain agreement on an exclusion, or apply to the Board for an amended certification Order pursuant to s. 5(j), (k) or (m) of the Act. At 59 of its decision, the Board referred to its earlier decision in St. Paul's Hospital (Grey Nuns) as follows:

> *In that case, the Board heard a dispute between two competing unions regarding which of them represented a new position created by the employer. One unit was described as "all employees", while the second consisted essentially of exclusions from the all-employee unit. In those circumstances, the Board held that newly created positions would belong to the "all-employee" unit until such time as the Board found otherwise or the parties agreed.*

[49] Finally, in Canadian Union of Public Employees, Local 21 v. City of Regina; Regina Civic Middle Management Association v. City of Regina, [1998] Sask. L.R.B.R. 464, LRB File Nos. 023-95 and 037-96, the Board set out the procedure for determining jurisdictional disputes between two unions in the following terms:

> *In attempting to determine the proper assignment of newly created positions in multi-bargaining unit structures, employers have an obligation to discuss the assignment with the unions affected and to refer any dispute pertaining to the assignment to the Board if an agreement cannot be reached. The Board would encourage employers to seek expedited hearings of such applications or to request pre-hearing conferences with the Board Vice-Chairperson or Registrar to determine if an informal assessment of the position by the Board office could assist in resolving the matter.*

> *[50] In the present case, the University's practice of unilaterally assigning new positions to the ASPA bargaining unit, rather than to the CUPE bargaining unit, based on its understanding of the effect of the certification Orders, runs afoul of the principles stated in the St. Paul's Hospital case and the City of Regina case. Where an employer is faced with multiple bargaining units, it must follow these steps in determining the proper assignment of work:*
>
> *1. notify the interested bargaining agents of the proposed new position;*
>
> *2. if there is agreement on the assignment of the position to one bargaining unit, then no further action is required unless the parties wish to update the certification Order to include or exclude the position in question;*
>
> *3. if agreement is not reached on the proper placement of the position, the employer must apply to the Board to have the matter determined under ss. 5(j), (k) or (m);*
>
> *4. if the position requires filling on an urgent basis, the employer must seek an interim or provisional ruling from the Board or agreement from the parties on the interim assignment of bargaining units.*
>
> *[51] As indicated in the cases cited, an employer is not entitled to act unilaterally by assigning the position to one bargaining unit over another. Although the University in this instance may have acted fairly and without favoritism, it nevertheless violated its obligation to bargain collectively under s. 11(1)(c) by assigning positions to the ASPA bargaining unit without obtaining the agreement of CUPE and ASPA or, failing such agreement, without obtaining an Order from the Board.*

[99] In the present case, while the City may have acted fairly and without favouritism in assigning the two superintendent positions to the RCMMA bargaining unit and had notified CUPE and RCMMA of the organizational change and the proposed assignment of the positions to the RCMMA, it did not obtain the agreement of the bargaining representatives of those unions to the assignment following the discussions they had and the correspondence they exchanged. The City also failed to obtain an order of the Board regarding an appropriate assignment of the positions.

. . .

> *[101] . . . In this case however, the City unilaterally assigned the position without first obtaining the agreement of CUPE and RCMMA or an order of the Board. As such, the Board finds that the City has violated its obligation to bargain collectively with CUPE under s. 11(1)(c) of the Act.*

[61] In the context of all-employee units, such as those that exist in respect of each of the specified retail and/or wholesale operations of Westfair, there is a presumption that a newly created position is in the scope of the bargaining unit unless and until the employer negotiates its exclusion or applies to the Board for an additional exclusion, whether on the grounds that the individual in the disputed position is not an "employee" within the meaning of s. 2(f) of the *Act* or it is otherwise not appropriate to include the position in the bargaining unit . Based on the case law cited above, we conclude that this applies whether we are dealing with one all-employee unit of an employer or whether there are multiple all-employee units at several operations/locations of one employer.

[62] In *St. Elizabeth's, supra*, the Board referred to *Regina General Hospital*, LRB File No. 165-87 which stands for the proposition that, upon the creation of a new position, if the parties are unable to agree on its exclusion from or inclusion in the bargaining unit, the proper procedure is for the employer to apply to the Board to amend the certification order to exclude the position. Although the Board noted that the situation in *St. Elizabeth's* did not involve the creation of new positions, the procedure for determining the inclusion/exclusion of new positions equally applied. The Board stated at 100:

> *Though this is not a case where a new position has been created, this comment seems equally applicable to this situation.* ***The question of whether any or all of these persons are performing managerial functions which would remove them from the bargaining unit cannot be resolved on the basis of a simple assertion to that effect by the Employer. The status of the incumbents in this respect lies finally to be determined by this Board on the basis of evidence concerning the duties they actually perform.*** *It is clearly open to the Employer to make application during the open period which occurs in the near future, to make an application to amend the Order in this respect.*
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> [**emphasis added]**

[63] In the present case, it appears to us that the Employer has put the cart before the horse, so to speak. Essentially, the Employer has created positions and placed them out-of-scope without any consideration as to whether they belong in a bargaining unit. It has done so under the guise of saying the positions are in the loss prevention/industrial relations division. In our view, the appropriate manner of dealing with the positions is first to determine, on a factual basis, whether their working conditions, duties and responsibilities fall within a certified bargaining unit or units or are out-of-scope of any bargaining unit.[8] It is only after that determination that the Employer can make a determination as to what division(s) the positions fall into.

[64] The certified divisions of Westfair are distinct from the other divisions of Westfair. While each division might operate independently, they are not separate corporate entities. It is clear that some of the divisions are more akin to administrative units or departments that act as support for the other divisions. While we did not hear evidence specific to each division, it is clear to us that industrial relations is one such division. While some industrial relations personnel perform their work at or in relation to one of the retail/wholesale operations, the division as a whole provides industrial relations services to all of these other retail/wholesale "divisions," and possibly other divisions of Westfair. In our view, those who work for loss prevention are not in a similar support position as those in industrial relations. The door hosts and loss prevention officers actually work in the retail operation(s) ("division(s)") on a day-to-day basis, performing their duties for the purposes of keeping secure the retail operation at which they are working that day. Simply put, their roles and purposes are much more similar to a cashier in, for example, the Superstore or one who stocks shelves at Extra Foods, than they are to an industrial relations employee who might, for example, perform payroll duties or provide collective bargaining advice for the other retail/wholesale divisions of Westfair.

[65] The Employer points out, however, the individuals in the disputed positions are in (and belong to) the loss prevention/industrial relations division and

therefore are not in a certified division. While the Employer might choose to place them there for administrative reasons, the divisions to which they belong for labour relations purposes are the divisions in which they actually perform their work. The fact that the reporting structure for loss prevention is separate and distinct from the reporting structure for industrial relations as well as the lack of any evidence concerning the integration of the functions of those areas suggest to us that loss prevention was put in the industrial relations division simply to avoid placement in any of the bargaining units certified by the Union.

[66] In *Inner-Tec Security, supra*, the Board was asked to determine whether the employees of an uncertified business (Argus), which was recently acquired by Inner-Tec Security, were within the scope of the bargaining unit represented by the union. While the fact situation is clearly different than that before us given that it was a separate corporate entity that was acquired by a certified business, the Board's analysis of whether the Argus employees became employees of Inner-Tec and "were employed within the bargaining unit set forth in the Union's certification order," is helpful to our analysis in this case. In the *Inner-Tec Security* case, the bargaining unit was defined in the certification order as including "only those employees of [Inner-Tech Security Consultants Ltd.] 'operating under the business name of Inner-Tec Security Services.' " The Board, in following principles from its decision in *Micro-Data Consulting Services*, [1992] 1st Quarter Sask. Labour. Rep. 35, LRB File No. 172-90 analyzed the issue as follows at 187 and 188:

> *Applying these principles to this case, for the Union to gain representation rights over the 70 Argus employees without regard to their wishes, the Union must establish two facts.* ***First, the Union must establish that the Argus employees became employees of ITSC Ltd.. Second, the Union must establish that they were employed within the classifications, geographic boundaries or other words in the certification order which define the extent of the Union's bargaining rights. In this case the Union is certified for all employees and for the entire Province, so the only words of limitation are the ones which limit the bargaining unit to employees of ITSC Ltd. "operating under the name Inner-Tec Security Services."***

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[8] In this case we are not dealing with competing unions. The RWDSU is not a party to the proceedings and, in any event, holds no certification order in relation to the retail operations where the door hosts and loss prevention officers work where the Union is claiming inclusions in its bargaining units.

The criteria used to make the first determination of whether the Argus employees were employees of Argus or ITSC Ltd. after the sale have been set out by the Board in a number of decisions (see: Flint Electrical Management Ltd., LRB File #040-89) but the parties did not really present evidence or focus upon this question. They focused their attention and evidence upon the second question which is whether Argus retained sufficient independence from ITSS to be viewed separately for labour relations purposes. ***We will therefore assume that both groups of employees are now employed by ITSC Ltd. and the only question is whether the Argus employees are employed within the ITSS division.***

It would be a simple matter to state that the Argus employees are still operating under the name Argus and therefore fall outside of the Union's reach because its reach is expressly limited to employees operating under the name of ITSS. However, the Board has stated in a variety of contexts that we are concerned with the reality of the employment relationship when making these determinations and will not be governed by the form.

The reality for the Argus employees is that they have little to do with the ITSS employees or the work of that bargaining unit, and that Argus continues to operate as a separate entity. There is thus no reason to deprive the Argus employees of their right to determine for themselves whether they will be represented by a union and if so, which union.

Our conclusion is based upon what we find to be the facts. Those facts include a finding that notwithstanding common management and premises, Argus has continued to be operated independently and on a stand alone basis from ITSS. The common premises factor is also less significant than it might at first appear because it is really only management which shares common premises. At the bargaining unit level the employees of the two businesses spend most of their time at their customer's facilities and spend little time at their employer's premises. Furthermore, when Argus employees are at their employer's premises in Saskatoon they are the sole or overriding presence, as ITSS has few bargaining unit employees in Saskatoon. In Regina the converse is true. ***Therefore any suggestion that these two groups of employees are working side-by-side in common premises in Saskatoon and Regina is an exaggeration of the actual facts. The two groups of employees are physically separated from each other by many miles, serve different customers in different geographic markets and have retained their separate corporate identities. Actual contact between the two groups of employees in Saskatoon or Regina is minimal.*** *At the bargaining unit level Argus has not been integrated into ITSS to the extent that would justify a finding that the Argus employees who greatly outnumber the ITSS employees, are in reality operating under the name ITSS.*

> ***The Argus employees have virtually nothing to do with the ITSS employees at the bargaining unit level or with the work of the ITSS bargaining unit.***
>
> ***To the general public, the customers and the employees of the two security businesses, there would be little in the outward appearance or conduct of the two businesses to suggest that one had been purchased by the other or that anything had changed as a result. All in all, the evidence showed two wholly owned subsidiaries of ITSC Ltd.*** *with an integrated management, but serving different geographic markets with different employees and treated as separate stand alone businesses by their management and owners for all purposes, including labour relations.* ***Finally, there was no suggestion that Argus was being used to subvert or undermine the ITSS bargaining unit.***
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> *If we keep in mind, as we must, that the fundamental premise of the Act is that employees are to choose for themselves whether or not they will be represented by a union and if so, by which union, then it is imperative that the Board refrain from depriving employees of this right unless there is a good and valid reason for doing so.* ***A finding that leads to such a result will not be made lightly and in this case cannot be made as Argus and ITSS have not been integrated to the extent that the Argus employees are now operating "under the business name of Inner-Tec Security Services."***
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> [**emphasis added**]

[67] Upon application of the principles found in *Inner Tec Security, supra*, we find as a fact that the door hosts and loss prevention officers are "employed within the bargaining unit set forth in the Union's certification order which defines the extent of the Union's bargaining rights." Firstly, the evidence establishes that the door hosts and loss prevention officers are employees of Westfair. Secondly, the evidence has established that they are "employed within the classifications, geographical boundaries or other words in the certification order," specifically, those words which limit the bargaining unit to employees of Westfair, operating under the divisions and/or trade names of each of the Superstores, Wholesale Clubs, Extra Foods, etc. Unlike the Argus employees in Inner Tec, the door hosts and loss prevention officers have much to do with the employees at the bargaining unit level and with the work of that bargaining unit in the retail operation where they are working on any given day. For the most part, they work side by side with the other employees and are involved with the same customers in the same geographical location as employees in the bargaining unit, at the retail operations

at which they are working. Although the door hosts may be scheduled by a loss prevention officer, their schedules are confined to the hours of operation of the retail operation at which they are working, just as is the case for many other employees in that bargaining unit. The scheduling function is no different than the scheduling of other classifications by their supervisors in that retail division/operation. Also, though loss prevention may have its own offices, the offices are located only in the retail operations' stores. In addition, the door hosts and loss prevention officers share the common goal and purpose of serving the best interests of that retail operation. The fact that their actual duties to serve the best interest of the store may be different than other employees has no effect on this conclusion - we are dealing with an all-employee unit that contains several classifications. Loss prevention would appear to function as a separate department in the store, rather than as a separate business or operation. There was no significant evidence to suggest that these individuals would appear to the general public, customers and employees to be serving the purposes of a different operation for the Employer. In fact, there is evidence to the contrary. For example, the Employer temporarily transferred a bargaining unit employee to the position of door host, for the purposes of accommodating the employee.

[68] In our view, the evidence enumerated above clearly leads to the conclusion that the door hosts are integrated to the extent that they are operating in/under the division of the retail operation at which they are working, whether it be a Superstore, Wholesale Club or an Extra Foods store. While the above indicators do not appear as strong with regard to loss prevention officers given the suggestion that their identity is confidential to employees in the store in which they are working on a given day, on the evidence before us at this hearing they are still integrated into the operation to the extent that they are operating in the divisions of the retail stores. It may well be that at the second stage of hearings in this matter, if a second stage is necessary, the loss prevention officers might be excluded on other grounds. However, that issue is not now before us.

[69] While scope is defined by division, division does not determine scope. If we permitted the Employer to engage in such unilateral determinations, industrial relations instability would result. For example, it would defy reason that the Employer could create a new position, the duties of which involved bagging groceries at a

Superstore location, and then unilaterally place the position in the Extra Foods division (and therefore the Extra Foods bargaining unit) only because employees currently do that kind of work at the Extra Foods store but not the Superstores. Likewise, it would make little sense to create a position of cashier in the lighting and fixture department of a Superstore yet place the position in the Fixtures and Lighting Division of Westfair and therefore outside the scope of the bargaining unit of the Superstore division. In our view, these were not at all the intended results of the Board certification of all-employee units by specific divisions of Westfair.

[70] We might also make an analogy to the situation that exists at the City of Regina. As stated, some of the certifications at the City are by department but the department does not determine scope upon the creation of a new position. For example, in *Regina Civic Middle Management Association and Regina Professional Firefighters Association, Local 181 and City of Regina*, [1994] 4th Quarter Sask. Labour Rep. 64, LRB File Nos. 202-94 & 226-94, the City created the position of computer and financial systems coordinator whose duties included the selection and adaptation of software for use in the fire department, the provision of user support for the department and the monitoring of the department budget. Utilizing the test adopted by the Board specifically in relation to the assignment of positions among the bargaining units at the City of Regina (which we note is a slightly different test from each of the multi-bargaining unit settings at the University of Saskatchewan and City of Saskatoon), the positions in question were assigned to the Regina Civic Middle Management Association's bargaining unit, even though the certification order for the Firefighters Association describes its bargaining unit as all employees employed by the City of Regina in the fire department (with stated exclusions) and the individual in the disputed position actually worked in the fire department.

[71] Our conclusion is not affected by reason that the loss prevention officers and door hosts may work at more than one of the retail and/or wholesale operations (although the evidence tended toward the door hosts usually working in only one retail location). Just as any other employee of Westfair might work in more than one retail operation and therefore belong to more than one bargaining unit, loss prevention officers and door hosts may similarly be included within the scope of more than one bargaining unit. Similarly, if an individual works in a certified division and non-certified division of

Westfair, only the work performed for the certified division will be governed by the terms and conditions of the applicable collective agreement. Any practical problems that arise through the application of the terms and conditions of more than one collective agreement to an employee may be addressed by the parties in their collective bargaining agreements, particularly where an incumbent in a disputed position works primarily within one certified retail operation and only occasionally works at another certified retail operation.

[72] We disagree with the Employer's argument that, if the Board includes the door hosts and loss prevention officers within the current wording of the certification order, the industrial relations employees would also be included because they are not specifically excluded in the orders. While it would be the Board's preference to have all positions which perform work in the retail operations specifically excluded in the orders, that issue simply does not arise on the facts before us. In this case, the Union is not asking that any of the industrial relations employees be included in its bargaining units.

[73] We wish to make a few final comments concerning the evidence of the situations of door hosts and loss prevention officers in British Columbia and Manitoba. A letter of understanding was introduced by the Union concerning the voluntary recognition arrangements in Manitoba and the Employer referred to a decision of the British Columbia Labour Relations Board in *Westfair Foods Ltd.*, [1999] B.C.L.R.B.D. No. 41. Firstly, it is not possible to apply the conclusions in those provinces to the situation before us – i.e. that the Employer's voluntary recognition of door hosts and loss prevention officers is the only method by which these positions could be included within the scope of the Union's certified bargaining units short of an application to add-on these employees with proof of majority support. The issues put squarely before us were not considered by the British Columbia Board or the Manitoba Board, although of interest is the fact that the Employer took the position at the hearing before the British Columbia Board that the Canadian Auto Workers Union could not certify door hosts and loss prevention officers because that would be an inappropriate unit and "the appropriate unit would be a variance of the existing U.F.C.W. bargaining unit that covers the balance of the employees at the locations." The experiences in British Columbia and Manitoba are also unhelpful because the bargaining structures in those provinces are different and Mr. Denluck had no specific knowledge of the content of the certification orders that exist in

those provinces, the nature of the amended scope clauses in the relevant collective agreements, which "division" the door hosts were placed in following the voluntary recognition or the specific terms of the voluntary recognition arrangements.[9] Furthermore, the distinguishing features of the relevant law and legislation of those provinces, including the legal status of voluntary recognition, was not before us. At best, the evidence referred to by the Union and the Employer signals to the Board that it is possible, within the business structure of Westfair across western Canada,[10] to include door hosts in the certified bargaining units and the operation of those collective agreements. The letter of understanding in Manitoba and the decision in British Columbia also suggest that there are reasons why the door hosts and loss prevention officers might be treated differently from one another but, given the limitation the parties have placed upon the Board concerning the scope of our determination at this time, that is an issue that may be addressed, if necessary, at a further hearing of this application.

[74] Given our conclusions above, it is unnecessary to deal with any arguments raised by the Union concerning the related/common employer provisions or any issues concerning the transfer of the business or businesses within Westfair.

Conclusion:

[75] Pursuant to the Employer's representation at the hearing that the O.K. Economy division has now become the Extra Foods division, an amended certification order will issue replacing the certification order dated June 12, 1985 in relation to O.K. Economy Stores, Econo Mart Stores, Loblaws Stores, and Pik 'n Pak Stores in Saskatoon, Regina, Moose Jaw, Melville and Swift Current. As the parties did not indicate that the name of Extra Foods was intended to replace all the names of the other

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[9] For example, in the letter of understanding in Manitoba, it is unclear as to whether there had to be majority support for inclusion in the bargaining unit, or simply whether the door hosts had to ratify the collective agreement. Obviously, ratification is not the equivalent of demonstrating majority support of all employees in a proposed or add-on unit.

[10] Although we do not consider the recitation of facts in the British Columbia Board decision as evidence before us, several statements of fact in that case are at odds with the position taken before us, even though it was represented to the Board that the loss prevention/industrial relations division existed across western Canada. In that decision, the, British Columbia Board outlined the evidence of the structure of Westfair as including the Superstores, Wholesale Clubs, Extra Foods, Western Grocers and an "institutional" division. In addition, loss prevention was referred to as a "department" in the retail stores, just as there are many other departments in the store whose employees belong to the certified bargaining unit. Also in that case,

divisions and/or trade names described in that order, we are simply adding the name "Extra Foods" to the order. If the Board has misunderstood the parties' agreement and the parties wish to further amend the order, they may do so by advising the Board of their agreement.

[76] As stated earlier, it is the Board's understanding that the parties wanted the Board to answer only the question of whether the door hosts and loss prevention officers were included within the scope of the bargaining units certified by the Union, as defined by the certification orders and collective bargaining agreements. We have answered that question in the affirmative, however, that does not lead to a final determination of this application. As requested by the parties, the Board will reserve jurisdiction to decide the following remaining issues raised by the application:

- whether the door hosts and loss prevention officers should otherwise be excluded from the bargaining unit because they are not "employees" within the meaning of the *Act* or it is otherwise not appropriate to include them;

- if the individuals in the disputed positions are employees and are appropriately included within the bargaining unit, whether the employer has committed an unfair labour practice by (i) failing to include them in the bargaining unit and/or failing to comply with the union security demand; and (ii) failing to apply the terms and conditions of the collective bargaining agreement to the employees in these positions; and

- any issues related to monetary loss resulting from the commission of an unfair labour practice or a violation of the *Act*.

[77] Following the issuance of these Reasons for Decision, the Board Registrar will provide the parties with new scheduling information forms in order that a second hearing can be scheduled to deal with the remainder of the issues in the application.

Mr. Kent is quoted as testifying that loss prevention employees were not initially included in the bargaining units because at the time of certification, their numbers were very small.

DATED at Regina, Saskatchewan, this **28th** day of **August, 2007**.

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson