Labour Relations Board
Saskatchewan

TEAMSTERS UNION, LOCAL 395, Applicant v. REGINA LEADER POST GROUP INC., Respondent

LRB File No. 118-05, December 4, 2007
Chairperson, James Seibel; Member: Kendra Cruson

For the Applicant: Neil McLeod, Q.C.
For the Respondent: Brian Kenny, Q.C.

Employee – Independent contractor – Haulers able to control manner in which work done and kind of equipment used – Principal responsible for virtually no expenses related to execution of work – Overall success or failure of hauler's enterprise dependent upon efficient use of capital and labour hauler controls – Board concludes that haulers not employees within meaning of *The Trade Union Act* and dismisses application for certification of haulers.

***The Trade Union Act*, ss. 2(f), 5(a), 5(b) and 5(c).**

REASONS FOR DECISION

Background:

[1] Teamsters Union, Local 395 (the "Union") has applied, pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), for an order to be designated as the certified bargaining agent for a unit of persons delivering newspapers and advertising materials on behalf of Regina Leader Post Group Inc. (the "Leader Post").

[2] The description of the proposed bargaining unit in the application is as follows:

> *All delivery haulers in Southern Saskatchewan, including night service, employed by contract with Regina Leader Post Group Inc. to deliver bundles of Leader-Post, National Post, Community News, Val-Pak, X-Pak, and other products and supplies, as indicated on a manifest supplied by Regina Leader Post Group Inc., to drops designated by Regina Leader Post Group Inc. as part of the contract run on the said run each publishing day;*

[3] At the hearing, the Union proposed to add the following phrase to the end of the

above description for reasons explained later in these Reasons for Decision:

> *and who regularly provide the services under at least one contract in person.*

[4] In its application, the Union estimated there were 39 employees in the proposed bargaining unit. In its reply to the application, the Leader Post stated that the persons in issue are not employees but independent contractors and, therefore, the *Act* has no application and, in the alternative, that the proposed unit is not appropriate for the purposes of collective bargaining.

[5] Eighteen witnesses testified over six days of hearing. Counsel for the parties elected to submit written argument and to forego the opportunity to present oral argument. Unfortunately, a panel member, Patricia Gallagher, passed away subsequent to the hearing and before this decision was rendered. Of necessity, the two remaining panel members decided the case: See, *Graham Construction and Engineering Ltd. et al. v. United Brotherhood of Carpenters and Joiners of America, Local 1985 and Saskatchewan Labour Relations Board,* [1999] Sask. L.R.B.R. c-25 (Sask. Q.B.)

Evidence:

[6] The testimony of many of the witnesses was repetitive. We do not intend to set out the evidence of each in any great detail although it is necessary for us to assess the position of each person affected. Following is a brief summary of the material points of evidence.

[7] The Leader Post produces a daily morning newspaper and advertising publications and materials, including the Sunday Sun (the "Sun") and Val-Pak ("V-Pak"), at its plant in Regina. The newspapers and other materials are distributed in Regina and southern Saskatchewan. At all material times, Jeff Epp was the Leader Post's manager in charge of delivery via distribution using a complement of some 40 delivery haulers ("haulers"). Ken Parker was Mr. Epp's predecessor. Kim Wingerter was the Leader Post's express distribution co-ordinator involved in the Sun/V-Pak distribution.

[8] The distribution system includes delivery by certain of the haulers under one or

more contracts as follows:

- to Regina city dealers, Monday through Saturday (a “dealer run”);
- home carrier delivery drops in Regina, Monday through Saturday (a “home delivery run”);
- to rural dealers and home carriers outside Regina, Monday through Saturday (a “rural run”);
- Sun/V-Pak deliveries three days a week (a “Sun/V-Pak run”); and
- deliveries of shortages in Regina, Monday through Saturday (“city shortage delivery”).

[9] The 40 haulers service 64 runs. The number of runs serviced by an individual hauler ranges from one to five.

[10] The hauler-under-contract delivery system has been in place for some years. There is no shortage of persons who want to do the work. The delivery contracts are negotiated with each hauler by Mr. Epp, who reviews the manifest describing the delivery requirements of each run and the contract setting out the obligations of each party with the potential hauler (or existing hauler if it is a renewal). After assessing the costs involved, Mr. Epp offers the hauler the run or runs on a daily rate basis. The hauler can accept or attempt to negotiate a different rate. The process is often abbreviated as new contracts or open contracts are often taken by existing haulers. Once the parties are agreed as to the terms, a formal contract is signed.

[11] The contract daily rate is set for the term of the contract and does not vary, notwithstanding changes in product weight, number of drops or cost of petroleum. For example, many of the contracts were negotiated when the Leader Post had included delivery drops for the National Post in the run manifests but, when that work was lost to the Leader Post resulting in a decrease in the work required of the haulers under some of the contracts, the terms of those contracts were not changed.

[12] The contracts themselves are substantially uniform as between types of delivery for the various haulers on those runs. All of the contracts identify the contractor-hauler as an

independent contractor and that agreement is a part of the contract itself. Each contract expires at the end of its term and is not automatically renewed. The haulers each agree to deliver the products on each publishing day. The haulers are responsible for having a vehicle and a spare vehicle for the work involved and for all costs associated with providing their services including, the costs of vehicle operation, maintenance, licensing (personal and vehicle), replacement, consumables such as fuel, oil and tires (unless they have agreed to use the Leader Post's cardlock fuel provider), and must carry a minimum $2 million dollars liability insurance. The haulers also agree to provide a replacement driver as may be necessary (e.g., vacation, illness, etc.). The haulers are responsible for any other equipment they may choose to use, for example, trailers or cell phones. The haulers invoice the Leader Post for their services each month.

[13] The Leader Post does not make any source deductions except as required by the Workers' Compensation Board and provides no benefits or access to its employee benefit plans or programs. The Leader Post provides no equipment except plastic bags to cover the product in inclement weather. The Leader Post does not conduct performance reviews of the haulers.

[14] The haulers are not precluded by the contract from providing delivery or other services to other parties or undertaking any other business or employment but, under the contract, must give priority to their delivery obligations to the Leader Post. The haulers are free to use whatever means they find best to fulfil their obligations, including choosing the appropriate vehicle(s) by load size, fuel type, efficiency, weather condition or otherwise or by using sub-contractors, employees, regular drivers or relief drivers. At the hearing, the Union proposed adding a phrase to the end of the proposed unit description in the application to include the requirement, "and who regularly provide the services under at least one contract in person." The reason for this, counsel said, was because at least one contractor, Peter Broshko operating as Haul-Rite Enterprises, has employees who do the actual hauling for him.

[15] The haulers are free to determine how they execute the runs including the route travelled, sequence of drops and drop method. Complaints are relayed by the Leader Post to the appropriate hauler. Damages to product that are the fault of the hauler may be charged back to the hauler. Either party may terminate the contract on 14 days' notice to the other.

[16] While the foregoing is essentially common to all of the haulers, the evidence adduced demonstrated that there are differences as among some of the haulers regarding the nature of contract negotiations, mode of payment, the use of sub-contractors, regular, part-time and replacement drivers, methods used to achieve efficiency and other sources of income. Sixteen of the 40 haulers were called to testify, four by the Union and 12 by the Leader Post. Two of those witnesses have spouses that are also haulers and neither party objected to their giving evidence about the details of their spouses' contracts and situations.

[17] Most of the haulers have GST numbers and collect GST. They claim their income as business income or self-employed earnings and their expenses as the cost of doing business. Some of the haulers who use others to do delivery pay them as employees, make deductions on their behalf and issue T4 slips.

Statutory Provisions:

[18] Relevant statutory provisions include the following:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *. . .*
>
> *(i.1) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining.*
>
> *. . .*
>
> *(iii) any person designated by the board as an employee for the purposes of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor; and includes a person on strike or locked out in a current labour-management dispute who has not secured*

> *permanent employment elsewhere, and any person dismissed from his employment whose dismissal is the subject of any proceedings before the board;*

Arguments:

[19] Mr. McLeod, counsel on behalf of the Union, filed a brief of his argument which we have reviewed. In the brief it is argued that each of the haulers is an employee rather than an independent contractor based upon the criteria ordinarily applied by the Board as well as by several other labour relations tribunals. In *International Brotherhood of Electrical Workers, Local 2038 v. Tesco Electric Ltd*., [1990] Summer Sask. Labour Rep. 57, LRB File No. 267-89, following *Montreal v. Montreal Locomotive Works, et al.,* [1947] 1 D.L.R. 161 (P.C.) and *Livingston Transportation Ltd*., [1972] OLRB Rep. 488 (O.L.R.B.), the Board described the commonly accepted indices for determining the issue as follows at 59:

> *Boards have typically based their determination of whether individuals are employees or independent contractors by considering the following factors: 1) the degree of ownership over the method of providing goods and services; 2) Ownership of tools; 3) Chance of profit; 4) Risk of loss; 5) The question of whether a party is carrying on business on his own behalf or for a superior; and, finally, 6) The statutory purpose test.*

[20] Counsel further argued that, in *Retail, Wholesale Canada, a Division of United Steelworkers of America v. United Cabs Ltd.*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-95 at 345, the Board, after examining the definition of "employee" under ss. 2 (f)(i.1) and 2(f)(iii) of the *Act*, concluded that there was considerable flexibility in the analysis of the relationship between taxi drivers and what was alleged to be only a dispatch company. The Board, counsel said, linked the concept of "economic dependency" with that of "statutory purpose."

[21] Counsel submitted that, in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. McGavin Foods Limited*, [1997] Sask. L.R.B.R. 210, LRB File No, 173-96 at 220, the Board confirmed that it traditionally determines the status of owner-operators under both ss. 2(f)i.1 and 2(f)(iii) of the *Act* which it described, respectively, as setting out a purposive test for determining if the relationship could be the subject of collective bargaining and preventing the use of the common law test of "vicarious liability," that was developed to

determine the legal liability of the master for the acts of the servant, from being determinative of employment status.

[22] Counsel submitted that, in *Tesco Electric*, *supra*, the Board described the nature of the "statutory purpose" criterion in terms of "control" and "dependency," as follows at 59 and 60:

> *With respect to the final consideration: ... the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers. Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as "employer-employee", when in substance, they might be just as controlled and dependent on the party using their services as an employee is in relation to his employer. If the substance of the relationship between the individual and the company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an "employee" within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.*

[23] Counsel submitted that the "statutory purpose" factor pervades the analysis of the relationship in respect of all the other factors enumerated in *Tesco Electric*, *supra*, such that the question that should be asked is whether the persons performing the services have a relationship with the apparent principal that is of a nature such that it could be the subject of collective bargaining. In *Canadian Union of Public Employees, Local 287 v. City of North Battleford*, [1993] 1st Quarter Sask. Labour Relations Rep. 296, LRB File No. 090-93, the Board opined, at 299, that the role of the labour relations board in this context is to determine "whether the true character of the relationship is such that collective bargaining is an appropriate mechanism for the interactions between the parties." Counsel argued that the determination was ultimately reduced to an examination of the degree of "entrepreneurship" involved in the relationship between ostensible principal and contractor.

[24] Counsel submitted that in the present case, both in form and practice, the hauler does not function as an entrepreneur "capable of confronting and altering the market for his or her services to his or her advantage." Once committed to the task of delivery on a designated route, the hauler no longer functions on an independent basis and, in the words of the Board in *United*

Food and Commercial Workers, Local 241-2 v. Beatrice Foods Ltd., [1994] 3rd Quarter Sask. Labour Rep. 302, LRB File No. 264-93 at 309, does not "enjoy a great deal of autonomy in making decisions about how to deploy the resources available to her in order to improve the fortunes of her enterprise."

[25] Counsel extensively reviewed the evidence in the context of the eleven (11) factors enumerated in *Algonquin Tavern v. Canada Labour Congress*, [1981] 3 Can. LRBR 337 (O.L.R.B.) beginning at 360 as adopted and applied by the Board in *Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation*, [1997] Sask. L.R.B.R. 273, LRB File No. 012-97 and *Saskatchewan Government and General Employees' Union v. Saskatoon Open Door Society*, [2001] Sask. Labour Rep. 210, LRB File No. 177-99 and argued that the haulers were employees as opposed to independent contractors. However, in the interests of brevity we shall not set out that review here.

[26] Mr. Kenny, counsel on behalf of the Leader Post, argued that the haulers are independent contractors rather than employees under the *Act*. Counsel relied upon many of the same authorities as were relied upon by counsel for the Union and also extensively reviewed the evidence in the context of the established criteria, noting in *Lovatt v. Saskatchewan Government and General Employees' Union and Town of Raymore* and *Saskatchewan Government and General Employees' Union v. Town of Raymore*, [2006] Sask. L.R.B.R. 28, LRB File Nos. 306-04 & 310-04 that the Board confirmed the use of the analysis framework of the eleven factors enumerated in *Saskatoon Open Door Society Inc*., *supra*. Again, we shall not set out that lengthy review here.

Analysis and Decision:

[27] The issue in the present case is the employment status of the haulers of the Leader Post products. As the Board observed in *Saskatoon Open Door Society Inc.*, *supra*, at 217, "determination of the contractor employee relationship really is a matter of degree; the cases that are obviously black and white rarely come before the Board." The Board also noted in *Beatrice Foods Ltd.*, *supra*, at 305:

> *There are many details of a relationship which will yield clues as to whether its essential character is closer to employment or contract. As the Ontario Labour Relations Board pointed out in the Livingston Transportation decision, supra, when a tribunal such as ours is asked to make the determination, it is often a sign that the line of demarcation is difficult to discern under the circumstances.*

[28] In *Saskatoon Open Door Society Inc.*, *supra*, the Board considered the position of a caretaker at the Society's offices and, acknowledging the often blurred demarcation between an employee and an independent contractor, observed at 218 that the case did "not fit neatly into any notional box labeled either 'employee' or 'contractor'" but that, in all the circumstances of the case, "the tenor of the relationship" between the individual and the Society was more like that of a principal and contractor than that of an employer and an employee.

[29] The present case is not obviously black and white and we have had to make a close analysis of the voluminous evidence in the context of the established case law.

[30] It is acknowledged that the "statutory purpose" criterion is central to the analysis. The Board observed as follows in *Tesco Electric*, *supra*, at 59 and 60:

> *With respect to the final consideration: ... the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers. Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as "employer-employee", when in substance, they might be just as controlled and dependent on the party using their services as an employee is in relation to his employer. If the substance of the relationship between the individual and the company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an "employee" within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.*

[31] In *Saskatoon Open Door Society Inc.*, *supra*, the Board reviewed the evolution of the approach to the issue by the Board over the last two decades building from the seminal decision in *Montréal Locomotive Works*, *supra*. The eleven (11) factors enumerated in that case, at 215-16, as first described in *Algonquin Tavern*, *supra*, are as follows:

1. The use of or right to use substitutes.
2. Ownership of instruments, tools, equipment, appliances or the supply of materials.
3. Evidence of entrepreneurial activity.
4. The selling of one's services to the market generally.
5. Economic mobility or independence, including the freedom to reject job opportunities or work when and where one wishes.
6. Evidence of some variation in the fees charged for the services rendered.
7. Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.
8. The degree of specialization, skill, expertise or creativity involved.
9. Control of the manner and means of performing the work - especially if there is active interference with the activity.
10. The magnitude of the contract amount, terms and manner of payment.
11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.

[32] In *Saskatoon Open Door Society Inc.*, *supra*, some of the characteristics of the relationship that were noted by the Board included: that the caretaker was able to control the manner in which he would fulfill the contract, that is, by his own labour alone or with the assistance or complete use of his own employees; that he could subcontract the work; that he was not restricted from pursuing other business activities; that he had assumed the risk of profit and loss, albeit that both were relatively minimal because of the modest size of the contract; and that the economic control over the enterprise was in his hands.

[33] For strikingly similar reasons, the Board recently arrived at a similar conclusion in *Lovatt*, *supra*, finding that the applicant for rescission, a contract janitor, was

not an employee within the meaning of the *Act*.

[34] In *Saskatchewan Government and General Employees' Union v. Rural Municipality of Meadow Lake, No. 588*, [2001] Sask. L.R.B.R. 782, LRB File No. 140-01, the Board held that a landfill custodian was not an employee within the meaning of the *Act,* attaching a somewhat large degree of significance to the facts that the individual had unrestricted freedom to engage others to assist or wholly perform the work and that motivation and efficiency could significantly affect the degree of profit or loss.

[35] In assessing the present situation, we are mindful that, while there are some differences in the work done by the individual haulers or the manner in which their contracts were acquired, the main characteristics of their function are substantially the same. The haulers are able to control the manner in which the work is done: solely by their own labour, the labour of their own employees, by subcontractors or any combination of these methods. The kind of equipment employed to perform the contract is a major investment and is solely their own choice – obviously the cost, size, fuel type, condition and efficiency of the vehicle may greatly affect the degree of risk of profit or loss. Fuel alone is a volatile-price commodity running into thousands of dollars a month for some haulers. The ability of the haulers to realize a greater or lesser profit is also dependent upon, *inter alia*, the vagaries of illness, vehicle breakdown and weather as well as personal motivation, work organization and procedural efficiency. All expenses associated with execution of their obligations under the contract are their responsibility. Renewal of the contracts is not assured and the terms of same are subject to new negotiation. The haulers are not eligible to participate in any of the employment benefit plans that are compulsory or optional for the Leader Post's employees.

[36] The Leader Post is responsible for virtually no expenses related to the execution of the work. It makes no financial contributions for any expenses. It makes no source deductions (other than as required by the Workers' Compensation Board which the parties agreed was not determinative of the issue). The Leader Post does provide access to a fuel cardlock system for the convenience of the haulers but it is not mandatory that they use it and many do not.

[37] Overall, the success or failure of the individual hauler's enterprise is dependent upon the efficient use of the capital and labour that he controls. The fact that in some cases the margin of operation or the potential for profit is slim has more to do with one's skill as an entrepreneur than alleged control by the Leader Post. This has often resulted in haulers deciding to give up routes, specializing in certain kinds of routes, acquiring other or additional routes, hiring employees, subcontracting routes or some of the work, turning the endeavour into a kind of shared spousal or even family enterprise or getting out of the business altogether.

[38] For these reasons, we find that none of the haulers is an employee within the meaning of the *Act*. The application is dismissed.

DATED at Regina, Saskatchewan, this **4th** day of **December, 2007.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson