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

LRB File No. 172-04; March 12, 2007
Chairperson, James Seibel; Members: Mike Carr and John McCormick

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

Practice and procedure – Reply – Where respondent elects not to reply to application, Board limits respondent's participation to arguing only preliminary jurisdictional issue and does not allow respondent to cross-examine applicant's witnesses, advance argument or otherwise participate in hearing of application proper.

Unfair labour practice – Jurisdiction of Board – Board determines that it has jurisdiction to hear application despite fact that terminated employee not employee of respondent employer – Board takes modern approach to interpretation of *The Trade Union Act*.

Unfair labour practice – Interference – Objective test – While timing of respondent's request of third party to terminate employee may seem suspicious, Board cannot with any certainty draw the conclusion that an ordinary employee of respondent would likely "connect the dots" between termination of employee by third party and intention by respondent to discourage its employees' trade union activity – Board dismisses application.

***The Trade Union Act*, ss. 3, 11(1)(a), 11(1)(e) and 12.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local 1400 (the "Union") filed an application with the Board alleging that Wal-Mart Canada Corp. ("Wal-Mart"), committed unfair labour practices in violation of ss. 11(1)(a) and (e) and 12 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The application is based upon the allegation that, at the time that the Union was involved in a drive to organize employees at the Wal-Mart store in Weyburn and had filed an application for certification with the Board, Wal-Mart secured the termination of an employee or independent contractor (one Cyndi Babiarz) of a third party corporation in turn providing services under contract to Wal-Mart at the

Weyburn store. Ms. Babiarz also provided similar services on behalf of the third party to a unionized competitor of Wal-Mart in Weyburn, the Real Canadian Wholesale Club. At all material times Ms. Babiarz was a member of the Union by reason of her concurrent employment by the competitor. The Union alleges that the intention or effect of Wal-Mart's actions was to interfere with, intimidate, threaten or coerce employees of Wal-Mart in the exercise of their right to organize under the *Act*.

[2] Wal-Mart did not file a reply to the application. Before the application was assigned a date for hearing by the Board, Wal-Mart applied to the Saskatchewan Court of Queen's Bench for an order prohibiting the Board from hearing the application on the ground that the Board lacked jurisdiction alleging that the matter did not fall within the purview of the *Act*. In dismissing the application for prohibition, the Court found, *inter alia*, that the matter of jurisdiction ought properly to be raised with and determined by the Board before Wal-Mart could seek to prevail upon the supervisory jurisdiction of the Court.

[3] The Board set the matter for hearing. At the hearing Wal-Mart raised the issue of jurisdiction as a preliminary issue. As Wal-Mart did not file a reply to the application before the hearing, the Union raised a preliminary objection to Wal-Mart's standing to participate in the hearing or to make any representations. After hearing the respective arguments, the matter was adjourned pending decision by the Board of the preliminary issues.

[4] In Reasons for Decision reported at [2004] Sask. L.R.B.R. 366, the Board determined that, in the case of a party electing not to file a reply to an application in the form and within the time mandated by the *Act* and Regulations, the Board has a discretion to allow, deny or limit the participation of the party in default. The Board stated as follows at 371:

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

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

[5] The present application was scheduled for hearing approximately one month after the Reasons for Decision referred to above were rendered. Wal-Mart elected not to seek to file a reply to the application. At the hearing, the Board first heard argument by the solicitors for each of Wal-Mart and the Union with respect to how the Board ought to exercise its discretion as described above in the face of the intentional failure by Wal-Mart to file a reply to the application. The Board also heard argument on the preliminary issue as to whether the Board had jurisdiction to hear the present application. After considering the arguments and making an oral decision as to the manner in which it would exercise its discretion with respect to the participation of Wal-Mart in the hearing, the Board heard the application proper.

Statutory Provisions:

[6] The following provisions of the *Act* are relevant to the Board's determination of the application:

> *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;*
>
> *. . .*
>
> *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of*

> *discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*
>
> *. . .*
>
> *12 No person shall take part in, aid, abet, counsel or procure any unfair labour practice or any violation of this Act.*

Arguments on the Jurisdictional Issue and Discretion of the Board:

[7] It should first be noted that Mr. Beckman, counsel on behalf of Wal-Mart, did not dispute that the Board had the discretion outlined, *supra*, as a result of Wal-Mart's decision not to file a reply to the application.

[8] Mr. Beckman argued that the Board did not have jurisdiction to hear the application on the grounds that the subject matter of the application was not within the purview of the *Act*. This argument was based upon the assertion that Ms. Babiarz was not an employee of Wal-Mart, but an independent contractor to the third party which was in turn a contractor to Wal-Mart, and that she was also an employee of its competitor, the Real Canadian Wholesale Club. In other words, it was asserted that the Board has

no jurisdiction over the matter essentially because there is no employment relationship between Ms. Babiarz and Wal-Mart.

[9] Counsel argued that the phrase “any employee” in s. 11(1)(a) of the *Act* refers only to persons that Wal-Mart employs who are allegedly intimidated or coerced, etc. by an action by Wal-Mart within *that* employment relationship. With respect to s. 11(1)(e) of the *Act*, counsel argued that the phrase “discrimination in employment or a condition of employment,” in the context of this application, refers only to employees of Wal-Mart and Ms. Babiarz is not its employee. With respect to s. 12 of the *Act*, counsel argued that the provision has no application unless it is proven that the third party contractor committed an unfair labour practice and Wal-Mart aided and abetted the third party in that violation of the *Act*.

[10] Counsel for Wal-Mart advised the Board that Wal-Mart did not intend to call any evidence with respect to the application proper, but argued that the Board should exercise its discretion to allow cross-examination of any witnesses called by the Union and to advance argument with respect to the conclusions that the Board might draw from any evidence adduced by the Union.

[11] Counsel filed a written brief of argument with authorities which we have reviewed in detail.

[12] Mr. Plaxton, counsel on behalf of the Union, argued that, while Ms. Babiarz was not an employee of Wal-Mart, she was a member of the Union attempting to organize Wal-Mart and it would be an unfair labour practice by Wal-Mart to commit acts that interfered with either Ms. Babiarz’s exercise of that right under the *Act*, or the exercise of that right by Wal-Mart’s own employees. Counsel argued that s. 11(1)(a) of the *Act* does not require that there be an employment relationship between the perpetrator of the unfair labour practice and the employee intimidated or coerced by the perpetrator’s actions.

[13] With respect to s. 11(1)(e) of the *Act*, counsel argued that the second half of the provision does not require that the complainant employee be an employee of the party that committed the unfair labour practice. That is, while the provision first refers to

tenure of employment, it then refers to coercion or intimidation of any kind which, in the context of the present case, is in relation to the participation in a labour organization or exercise of rights under the *Act* by the employees of Wal-Mart who would be intimidated by Wal-Mart securing the termination of Ms. Babiarz by a third party while she was assisting in the organizing of Wal-Mart by the Union. In this regard, counsel referred to the decision of the Board in *Saskatchewan Government Employees' Union v. Regina Native Women's Association*, [1986] July Sask. Labour Rep. 29, LRB File Nos. 335-85 to 342-85, in which, he said, the Board found that the unfair labour practice provisions of the *Act* applied in respect of any person who is an "employee" within the meaning of the *Act*, including breaches of ss. 11(1)(a) and (e).

[14] With respect to the exercise of the Board's discretion, counsel for the Union argued that there was no basis for the Board to allow the participation of Wal-Mart in the hearing of the application when it elected not to accept the process at all. Counsel argued that it would be unfair to allow Wal-Mart to cross-examine the Union's witnesses and advance argument without "pleading" by filing a reply and disclosing the nature of its defence.

Decision with Respect to Jurisdiction and the Board's Discretion:

The Board's Discretion

[15] After briefly adjourning to consider the arguments adduced by counsel for each party, the Board elected to exercise its jurisdiction to limit Wal-Mart's participation to arguing only the preliminary jurisdictional issue and to not allow it to cross-examine the Union's witnesses, advance argument or otherwise participate in the hearing of the application proper.

[16] In our opinion, in a process where there is no allowance for pre-hearing examination or interrogatory and particularly in the context of the present application, it would be inherently unfair to allow Wal-Mart in essence, as requested by its counsel, to fully participate in the hearing without disclosing the basis upon which it intends to defend itself from the allegations made against it in the application. It would make it impossible for the applicant Union to properly plan its case and determine what

witnesses to call and what evidence to adduce, placing it at a significant disadvantage. To allow Wal-Mart to participate as requested by its counsel, would be to allow "trial by ambush" and deprive the applicant of its right to cross-examine a representative of the respondent on its reply made under statutory declaration.

The Jurisdiction of the Board

[17] In our opinion, there is no question that the Board has the jurisdiction to embark on the inquiry as to whether a respondent named in an application has committed an unfair labour practice or practices within the meaning of the *Act* as a result of such allegations in the application as the applicant may prove on the appropriate standard of proof.

[18] We agree generally that violations of the *Act* with respect to interference with employees in the exercise of rights under the *Act* are not limited to acts against persons with whom the alleged perpetrator alone has an employment relationship. And, more specifically, neither does the *Act* limit the purview of the operation of s. 11(1) (unless specifically so stated), or the commission of unfair labour practices thereunder, to actions in respect of persons with a direct employment relationship with the person or party alleged to have breached its provisions. More specifically, with respect to s. 11(1)(a), one may conceive of any number of scenarios where an employer could commit acts against employees of others that would have the effect of intimidating, or interfering with exercise of rights under the *Act* of its own employees.

[19] Section 3 of the *Act* provides as follows:

> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

[20] The Board has often propounded that s. 3 describes the purpose and objects of *Act*. For example, in *Saskatchewan Joint Board, Retail, Wholesale and*

Department Store Union v. Pepsi-Cola Canada Beverages (West) Ltd., [1997] Sask. L.R.B.R. 696, LRB File No. 166-97, the Board stated at 717-718:

> *Section 3 of the Act sets out the explicit legislative purpose of the Act … . When faced with an interpretative issue under the Act, the Board starts with the overall purpose of the Act which is to grant rights to employees to bargain collectively through unions of their own choosing. …The Act reinforces the preference of this relationship through its various provisions which prohibit certain conduct that would otherwise destroy or weaken the collective bargaining relationship. As a result, the remainder of the Act must be interpreted in light of the Act's central purpose.*

[21] In *McNairn v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, [2004] S.J. No. 249, the Saskatchewan Court of Appeal observed, at paragraph 31, that the scope of provisions of the *Act* is a matter of interpretation to be considered in light of s. 10 of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, and the principles enunciated by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27. The Court of Appeal stated:

> *31. Whether this is so depends in part on the scope of these sections, which is a matter of interpretation. The provisions of The Trade Union Act, no less than any other, fall to be interpreted along the lines laid down by section 10 of The Interpretation Act, 1995 …and by the decision of the Supreme Court of Canada in Rizzo and Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27. Section 10 states that every enactment is to be interpreted as remedial and "given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects." The decision in Rizzo and Rizzo Shoes states that words of an enactment are to be read in their entire context and in their grammatical ordinary sense harmoniously with the scheme of the enactment, the object of it, and the intention of the Legislature.*

[22] That is, the approach to interpretation of the *Act* is not the so called “plain meaning” method of interpretation, but the “modern approach” whereby the plain and ordinary meaning is informed fully by the objects and purposes of the *Act*. In our opinion, our interpretation of the scope of the unfair labour practice provisions of the *Act* recognizes these principles. It is within the principal jurisdiction of the Board to determine whether the *Act* has been breached. In our opinion, unfair labour practices under s. 11(1) may be committed in respect of employees other than one’s own employees and acts visited upon other than one’s own employees may in certain

circumstances constitute unfair labour practices. This interpretation is consonant with and promotes the objects and purposes of the *Act* in prohibiting conduct that violates the overarching right of employees to exercise s. 3 rights and sanctions activity that interferes with those rights or weakens the collective bargaining relationship. The Board and not the courts has the exclusive jurisdiction to hear and determine such matters.

[23] Therefore, we find that we have the jurisdiction to hear the present application.

Evidence:

[24] Lucia Figueiredo, a member of the Union for some ten years, is a special projects union representative. She testified that she assisted in the Union's organization of the employees at the Weyburn Wal-Mart store in April 2004. She stated that at least 9 employees of Wal-Mart at that time were former employees of the Real Canadian Wholesale Club which had been certified by the Union some years before.

[25] Cyndi Babiarz is a member of the Union by reason of her part-time employment at the Real Canadian Wholesale Club since 2000. She has been one of three union shop stewards there for several years and she was a picket captain during a strike in 2002.

[26] Ms. Babiarz testified that Wal-Mart opened its Weyburn store in the fall of 2003. She said that a number of employees of the Real Canadian Wholesale Club went to work there and she was able to name five whom she said she knew well. She applied for and obtained a job with a third party contractor to the Real Canadian Wholesale Club providing greeting card supply, display and servicing, starting in August 2002. In that position she completed order forms and gave them to a manager of the Real Canadian Wholesale Club, but she herself reported to a sales representative of the third party contractor, one Karen Krauchek. Ms. Barbiarz testified that she was hired by, and received her pay cheque from, the third party for her work on an hourly rate basis. Source deductions were made from her pay.

[27] Ms. Barbiarz stated that she was contacted by Ms. Krauchek about one month after the Wal-Mart store opened for business and was asked whether she would be interested in providing card merchandising services to the Wal-Mart store on behalf of the third party. She agreed and in early December 2003 began providing services to Wal-Mart on behalf of the third party similar to those she provided to the Real Canadian Wholesale Club.

[28] Ms. Barbiarz testified that she was never advised that any complaints were ever made about her by Wal-Mart to the third party. Indeed, she said that in February 2003 the manager of the Weyburn Wal-Mart store, Bev Ginter, told Ms. Barbiarz she was happy with the way that the card display was kept. During Ms. Barbiarz's annual performance review in March 2004, Ms. Krauchek told her that she was "outstanding in dealing with management at Wal-Mart." Ms. Krauchek provided Ms. Barbiarz with a copy of a letter dated February 25, 2004 bearing the logos of both Wal-Mart and the third party, purporting to be from the senior national account manager of "Team Wal-Mart," advising that the Weyburn Wal-Mart was the top merchandiser of the third party's products during a recent special promotion. While the letter was not addressed to Ms. Barbiarz and did not name her personally, it stated that, "Your outstanding sales drive for the program over the last three months has earned you a $100 Wal-Mart gift certificate." Ms. Krauchek provided Ms. Barbiarz with the gift certificate.

[29] Ms. Barbiarz testified that she had a conversation with Ms. Ginter on April 26, 2004 during which she was told that she was doing an excellent job. However, Ms. Barbiarz said that, in the evening of April 28, 2004, she received a telephone call from Ms. Krauchek who told Ms. Barbiarz that they no longer wanted her to work at Wal-Mart and that she was terminated immediately from her work there. When Ms. Barbiarz asked Ms. Krauchek for the reason, she said that Ms. Krauchek advised her that someone from Wal-Mart had called a senior executive of the third party and asked that Ms. Barbiarz not work in the Weyburn Wal-Mart because she worked at the Real Canadian Wholesale Club. Ms. Babiarz did continue working on behalf of the third party at the Real Canadian Wholesale Club. Ms. Barbiarz said that Wal-Mart would probably have been aware that she was an employee of the Real Canadian Wholesale Club

because Ms. Krauchek had advised the manager of the seasonal department at Wal-Mart of that fact when introducing Ms. Barbiarz to her.

Argument:

[30] Counsel on behalf of the Union argued that it was well known to Wal-Mart that Ms. Barbiarz worked for the Real Canadian Wholesale Club during the whole time that she worked on behalf of the third party at Wal-Mart. He asserted that she was also an employee of the third party and not an independent contractor by all of the usual indicia of an employment relationship. The Union did a quick organizing drive of the employees at the Weyburn Wal-Mart between April 16 and 19, 2004 and immediately filed the application for certification with the Board. Wal-Mart would have become aware of the organizing drive and application within at most a few days. Ms. Barbiarz, a shop steward for the Union at the Real Canadian Wholesale Club, was terminated without good reason within a few days. Counsel asserted that the primary reason for the termination must have been so that Wal-Mart could show its employees how much power it had to get Ms. Barbiarz, a member of the Union, out of its workplace. Counsel pointed out that the fact that Ms. Barbiarz worked for the competitor dovetailed with the fact that she was a member of the same Union attempting to organize Wal-Mart's employees.

[31] Counsel argued that the failure of Wal-Mart to respond to the application should lead the Board to draw a negative inference from the evidence that Wal-Mart secured the termination of Ms. Barbiarz for the purposes of intimidating its employees and interfering in the formation of a trade union.

[32] In support of his arguments counsel referred to the decisions of the Board in *Newspaper Guild Canada/Communication Workers of America v. Sterling Newspapers Group, a Division of Hollinger Inc*., [2000] Sask. L.R.B.R., LRB File Nos. 272-98 & 003-00, and the series of *Moose Jaw Sash and Door* cases in the early 1980's.

Analysis and Decision on the Application Proper:

[33] In our opinion, while the circumstances may arguably be suspicious, the allegations of unfair labour practices against Wal-Mart under ss. 11(1)(a) and (e) of the *Act* are not proven on the balance of probabilities.

[34] While it is quite clear that Wal-Mart used its influence over the third party to secure Ms. Barbiarz's termination with respect to working on behalf of the third party in its store (which some may find objectionable), the evidence is at least as consistent with an assertion that Wal-Mart is a hard-nosed corporate competitor, perhaps insensitive to the effect of this upon individuals, as it with the assertion that it secured Ms. Babiarz's termination for purposes that are in violation of the *Act*. We note that the third party contractor was not made a respondent to the application nor did the Union allege that the third party had violated s. 12 of the *Act*, which may have had a significant effect upon the conduct of the case and the evidence adduced.

[35] With respect to the assertion that the Board ought to draw an adverse inference from Wal-Mart's failure to file a reply to the application, the fact that a respondent does not reply to an application or participate in the hearing does not mean that the applicant is entitled to succeed as of right. In the superior courts one generally cannot obtain default judgment for other than simple debt. After noting for default of defence, a claimant must still prove its case on the appropriate standard of proof. By analogy, it is not all that uncommon for employers to fail to reply to or otherwise dispute applications for union certification, but the Board will not grant the applications without appropriate proof that the unit applied for is an appropriate unit and of majority support, or, in the case of an uncontested application by an employees' association, that the applicant is a properly constituted trade union within the meaning of the *Act.*

[36] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts*, [1996] Sask. L.R.B.R. 67, LRB File Nos. 292-95 & 293-95, the Board observed, at 73-74, that the assessment of an employer's actions in the context of s. 11(1)(a) of the *Act* is objective. The test is whether the action would likely interfere with, restrain, intimidate, threaten or coerce "an employee of reasonable fortitude" in the exercise of rights under the *Act*. That is, while it is not necessary that an applicant prove that the action actually was perceived as coercive or

intimidating, etc., or had that effect upon a particular person, it is necessary that it be proven that an employee of ordinary fortitude would likely feel so coerced or intimidated so as to discourage activity in or for a trade union. In the present case we do not find that that is likely to be the case on the balance of probabilities; we cannot with any certainty draw the conclusion that an ordinary employee of Wal-Mart would likely "connect the dots" between Ms. Babiarz's termination by the third party and an intention by Wal-Mart to discourage their trade union activity. With respect to Ms. Babiarz herself, her attribution of the termination to her activity on behalf of the Union is speculation. While the timing of Wal-Mart's request of the third party to terminate her will to some seem suspicious, the request was made nearly 10 days after the cessation of organizing activity and the filing of the application for certification and nothing in the evidence can properly lead us to conclude with any reasonable certainty that the request was made for a purpose for other than as was stated to Ms. Babiarz by Ms. Krauchek, i.e., that Ms. Barbiarz was employed by a key competitor and Wal-Mart did not want her working in its store. While we make no comment on whether the foundation for that request was fair, or driven by misplaced paranoia, in our opinion, the basis for finding a breach of s. 11(1)(a) is not made out on the evidence

[37] Accordingly, we have determined that the application must be dismissed. However, we have little doubt that if the allegations were proven, it would have constituted an unfair labour practice at least pursuant to s. 11(1)(a) of the *Act*. That is, notwithstanding that the actions complained of were directed against an employee (i.e., Ms. Babiarz) with no employment relationship with Wal-Mart, we have little doubt that if it had been proven that the actions were taken in furtherance of an intention by Wal-Mart to intimidate or otherwise interfere with its own employees in the exercise of their rights under s. 3 of the *Act,* or those of Ms. Babiarz*,* an unfair labour practice would have been made out.

[38] An order will issue directing that the application be dismissed.

DATED at Saskatoon, Saskatchewan, this **12th** day of **March, 2007.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson