

**Labour Relations Board
Saskatchewan**

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

LRB File No. 038-05; October 24, 2008

Chairperson, James Seibel; Members: John McCormick and Ken Ahl

For the Applicant Union: Drew Plaxton
For Wal-Mart Canada Corp.: John Beckman, Q.C.

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 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 the impugned action occurred outside of the province. Application has arguable case – preliminary application is dismissed.

The Trade Union Act, ss. 11(1)(a), 11(1)(b), 11(1)(e), 11(1)(g), 11(1)(i) and 12

REASONS FOR DECISION – PRELIMINARY ISSUE

Background:

[1] The Applicant, United Food and Commercial Workers, Local 1400 (the "Union"), filed an application alleging that Wal-Mart Canada Corp ("Wal-Mart") committed an unfair labour practice in violation of ss. 11(1)(a), (b), (e), (g), (i) and 12 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act") by reason of its threat of closure, and then actual closure, of its store in Jonquiere, Quebec, after it was unionized. The Union says that this action was intended by Wal-Mart to not only intimidate Wal-Mart's employees at its Jonquiere store ("Jonquiere"), but also its employees at any of its stores that are attempting to organize, including its stores in Saskatchewan at Weyburn, North Battleford and Moose Jaw. The Union has filed applications for certification at Wal-Mart's Weyburn and North Battleford stores, and for successorship at its Moose Jaw store, all of which were pending before the Board at the time that Wal-Mart closed Jonquiere.

[2] Wal-Mart chose not to file a reply to the application, but made a preliminary application alleging that the Board was without jurisdiction to hear and determine the application because its actions forming the basis for the alleged violations were committed outside Saskatchewan.

[3] The Board may exercise its discretion to allow a party to dispute jurisdiction without filing a reply. This issue was examined fully in *United Food and Commercial Workers, Local 1400 v. Walmart Canada Corp. o/a Wal-Mart Canada, Sam's Club and Sam's Club Canada*, [2004] Sask. L.R.B.R. 366, LRB File No. 172-04 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.

The Objections and Arguments:

[4] Mr. Beckman, counsel on behalf of Wal-Mart, outlined the specific objections as follows:

- (a) The Board has no jurisdiction over acts or conduct occurring in Quebec;
- (b) Wal-Mart is not responsible for the acts, statements and conclusions of others such as newspaper editorials or the Union's own statements;
- (c) Quebec is the forum conveniens for the Union's application;
- (d) The application offends the rule against multiplicity of actions;
- (e) The application offends the rule against forum shopping;
- (f) The application is frivolous and vexatious; and,

(g) The complaint is an abuse of process.

[5] With respect to the objection described in (a), above, the brief of argument filed on behalf of Wal-Mart states: "Quite obviously, the Saskatchewan Labour relations Board only has jurisdiction over acts or conduct occurring within the boundaries of the Province of Saskatchewan." Mr. Beckman submitted that the closure of the Jonquiere store was a lawful act in and of itself and did not contravene the Quebec labour legislation. Referring to part of the relief sought by the Union, counsel stated that the Board does not have the jurisdiction to issue a "cease and desist" order regarding the Jonquiere closure because the act was committed outside the province: "If that closure is a lawful act in Quebec, it cannot be an unlawful act in Saskatchewan.

[6] With respect to the objection described in (b), above, Counsel argued that the Board cannot hold Wal-Mart responsible for the acts of the press in reporting on the closure in Saskatchewan.

[7] With respect to the objection described in (c), above, Mr. Beckman submitted that even if the Board has jurisdiction over the matter in dispute, it should decline jurisdiction because Quebec is the forum conveniens. There is nothing which connects the complaint with Saskatchewan.

[8] With respect to the objection described in (d), above, Mr. Beckman submitted that the application offends the rule against multiplicity of actions because the Union has filed complaints with the Quebec Commission des Relations du Travail regarding the Jonquiere closure. If the present application were allowed to proceed the Union could file a similar complaint in every jurisdiction in Canada where it is undertaking organizing activities.

[9] With respect to the objection described in (e), above, Mr. Beckman argued that the application offends the rule against forum shopping. Because there is no connection with Saskatchewan, it must be assumed that the Union hopes to gain something by filing a complaint here.

[10] With respect to the objection described in (f), above, Mr. Beckman submitted that the application is frivolous and vexatious, alleging that the president of the Union has made public statements that contradict his declaration in the application in these proceedings.

[11] With respect to the objection described in (g), above, Mr. Beckman submitted that the application is an abuse of process, and is intended only to harass and annoy Wal-Mart.

[12] Because of the view that we take of this matter, we do not propose to summarise the arguments advanced on behalf of the Union.

Analysis and Decision:

[13] In our opinion, the Board has the jurisdiction to inquire into, hear and determine the application. The application does not seek to have the Board determine whether Wal-Mart committed a violation of Quebec labour legislation, but rather, asserts that actions by Wal-Mart fulfill the criteria for finding, *inter alia*, that its actions intimidated employees in Saskatchewan in the exercise of rights under the *Act*, i.e., to organise and be represented by a bargaining agent of their choosing.

[14] The fact that the actions of Wal-Mart upon which the allegations are based were committed outside the geographic confines of Saskatchewan does not mean that they cannot constitute violation of the restriction on intimidation of its employees in the province. It is not tenable to say that an employer with its head office elsewhere cannot by acts committed at or by that office, intimidate its employees in a different province. Particularly in construction, employers located in another province and with no administrative or working office in Saskatchewan, often bid on jobs in and have employees hired locally working jobs in Saskatchewan – indeed, they sometimes have no management personnel in the province at all, but accomplish day-to-day work direction with a working foreman who communicates with the employer's office in the other province.

[15] In the present case, the alleged unfair labour practice is not the Jonquiere closure *per se*, but, *inter alia*, the intimidation of the employees in Saskatchewan as a

result – the closure in Quebec is merely the means by which intimidation was achieved. Accordingly, the act of closure is not the violation, but the act of intimidation is. (It should be noted that a violation of s. 11(1)(a) does *not* require that an employer have the intention to intimidate, but merely that its acts would likely have such an effect on an employee of “reasonable fortitude”). Whether the Union can prove that it meets the necessary requirements of the specific provisions of s. 11 of the *Act* is quite a different matter and remains to be seen.

[16] While the Board may not be able to make a cease and desist order to reverse the Jonquiere closure, there is certainly other relief available that the Board could award.

[17] Furthermore, the actions of the media in reporting on the closure are not the unfair labour practice. While Wal-Mart certainly does not have control over what the media reports, it is disingenuous for it to intimate that it could not reasonably have known that the closure of Jonquiere following closely on unionization would be reported across the country, and particularly in the business press. Objection (b) above is without merit, and is no basis on which the Board should not have jurisdiction.

[18] The objection in (c) is without merit. Quebec is not the forum conveniens for determining a violation of *The Trade Union Act*.

[19] The objection in (d) is without merit. There is no evidence that similar applications have been made in Quebec. The application seeks relief not available in that jurisdiction.

[20] The objection in (e) is without merit. An application for violation of *The Trade Union Act* could not be made in any other jurisdiction.

[21] The objections in (f) and (g) are without merit. The Union has an arguable case.

[22] The preliminary application by Wal-Mart is dismissed.

DATED at Saskatoon, Saskatchewan this **24th** day of **October, 2008**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson