

**The Labour Relations Board
Saskatchewan**

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 454, Applicants v. WESTFAIR FOODS LTD., Respondent and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Intervenor

LRB File Nos. 054-10 & 042-11; October 20, 2011

Vice-Chairperson, Steven Schiefner; Members: John McCormick and Ken Ahl

For the Applicants: Mr. Larry Kowalchuk.
For the Respondent: Mr. Larry F. Seiferling, Q.C.
For the Intervenor: Mr. Drew S. Plaxton.

Successorship – Applicant trade union asks Board to transfer collective bargaining obligations imposed upon one division of respondent to another division of that same employer – Board not prepared to transfer collective bargaining obligations between two divisions of the same employer – Board concludes that appropriate mechanism for trade union to preserve its collective bargaining rights would be to make application to amend its certification order.

Successorship – Applicant trade union asks Board to determine that employees of new warehousing and distribution centre fall within the scope of its existing certification Order – Board not prepared to transfer collective bargaining obligations to new facility as doing so would result in an unwarranted expansion of trade union’s existing bargaining rights.

Unfair Labour Practice – Applicant trade union alleges that respondent failed to bargain collectively with respect to employees of new warehousing and distribution centre – Board finds that respondent’s parent company owned and controlled new facility and had contracted-out the operation of that facility to independent third party – Board not satisfied that respondent was actual employer of any employees working at that facility.

Employer - Designation of Principle or Contractor – Applicant trade union asks Board to designate the respondent as “true” employer of employee of contractor pursuant to s. 2(g)(iii) of *Trade Union Act* - Board not satisfied that contractor was bound by certification Order and, even if it was, Board not satisfied that respondent could be or ought to be deemed “true” employer of contractor’s employees.

The Trade Union Act, ss. 2(g)(iii), 37.

REASONS FOR DECISION

Background:

[1] Steven D. Schiefner, Vice-Chairperson: This case involves a dispute between two (2) trade unions as to which of them, if either, enjoys the right to represent certain employees working at a new and very large distribution and warehousing facility located in the far West end of the City of Regina (hereinafter the “Regina Distribution Centre”). The construction of the Regina Distribution Centre was announced by Loblaws Inc. (“Loblaws”) in the summer of 2008. The new facility, when fully constructed, is anticipated to involve hundreds of employees, providing warehousing and distribution services to Loblaw affiliated grocers not just in Saskatchewan but on a regional basis. At the time of announcement, the Distribution Centre was to be located on land approximately five (5) kilometers West of Regina’s city limits. The City of Regina has since annexed these lands and they now fall within the city limits.

[2] On May 18, 2010, the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, together with the Retail, Wholesale and Department Store Union, Local 454 (collectively referred to as the “RWDSU”) made application¹ to the Saskatchewan Labour Relations Board (the “Board”) alleging that Westfair Foods Ltd. (“Westfair Foods”) was the employer (either actual or deemed) of certain employees working at the Regina Distribution Centre and that Westfair Foods had committed an unfair labour practice pursuant to s.11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the “Act”) by failing to recognize it as the exclusive bargaining agent for those employees. RWDSU’s claim to represent the disputed employees stems from a 1984 Certification Order² of this Board involving employees of “*Western Grocers Ltd., a Division of Westfair Foods Ltd., in or in connection with its places of business located in the City of Regina*” (emphasis added).

[3] On June 1, 2010, the United Food and Commercial Workers, Local 1400 (referred to as “UFCW”) made application to the Board to intervene in RWDSU’s application on the basis that the Regina Distribution Centre is a replacement for warehousing operations in Saskatchewan; operations for which UFCW holds a certification Order from this Board. UFCW’s claim to represent the disputed employees stems from a 1992 Certification Order³ of this Board involving employees of “*Western Grocers, a Division of Westfair Foods Ltd., in or in connection*”

¹ Application Bearing LRB File No. 054-10.

² LRB File No. 055-83.

³ LRB File No. 157-92.

with its places of business in the City of Saskatoon ... or any replacement for such ... Warehouse" (emphasis added).

[4] On June 21, 2010, the Respondent, Westfair Foods, through its parent company, Loblaws, filed a Reply with this Board, denying that it was bound by either of the two (2) certification Orders with respect to its new operations at the Regina Distribution Centre.

[5] On July 29, 2010, Canadian Logistic Services filed an application with the Board to intervene in RWDSU's application, claiming that it was the employer of the disputed employees but that it was an independent contractor and thus not bound by either of the two (2) certification Orders.

[6] On December 14, 2010, UFCW filed a certification application with the Board seeking to represent a unit of employees of Canadian Logistic Services⁴. On December 23, 2010, RWDSU filed a Reply to UFCW's certification application claiming that UFCW's application was a raid and that the employees involved in UFCW's application fell within the scope of its 1984 Certification Order. A pre-hearing representation vote was conducted of employees falling within the scope of UFCW's certification application on December 20, 2010. However, the ballot box was sealed following the conduct of that vote pending further direction from this Board.

[7] On January 27, 2011, the parties appeared before the Board to determine the procedure to be followed in adjudication of these interrelated applications. After hearing from the parties, the Board determined that the within application should proceed prior to UFCW's certification application. RWDSU was also granted leave to amend its application to, *inter alia*, add Canadian Logistic Services or Loblaws as named respondents.

[8] On March 11, 2011, RWDSU filed a modified application⁵ with the Board. Although RWDSU did not name Canadian Logistic Services as a respondent in its modified application, RWDSU did claim that Canadian Logistic Services was a successor pursuant to s. 37 of the *Act* and thus bound by RWDSU's 1984 Certification Order. In its modified application,

⁴ Application bearing LRB File No. 214-10.

⁵ RWDSU's modified application was assigned LRB File No. 042-11. This document was not in the form of an amended application and thus was assigned a new file number. Although this document was assigned a new file number, it was not treated as a new application; rather it was treated by the parties and the Board as a modification of RWDSU's original application. For the purposes of clarity, it would have been preferred by the Board had this document been drafted as an amended application.

RWDSU took the position that, if the Regina Distribution Centre was being operated by a third party, Westfair Foods was nonetheless the “true” employer of the contractor’s employees and asked the Board to make a designation to that effect pursuant to s. 2(g)(iii) of the *Act*.

[9] On March 29, 2011, Westfair Foods filed a Reply to RWDSU’s modified application. In this document, Westfair Foods repeated its denial that it was bound by RWDSU’s 1984 Certification Order. The Respondent denied that a sale of business had occurred to Canadian Logistic Services or that any other arrangements or transactions had occurred of the kind necessary to trigger the application of s. 37 of the *Act*. Finally, Westfair Foods denied that it was the “true” employer of any employees employed by Canadian Logistic Services.

[10] On or about March 29, 2011, Canadian Logistic Services advised the Registrar of the Board that it was withdrawing its application to intervene in RWDSU’s application.

[11] The hearing into RWDSU’s application commenced on July 12, 2011 in Regina, Saskatchewan. The parties appearing before the Board at that time were the applicant trade unions, RWDSU; the respondent, Westfair Foods; and the intervenor, UFCW. Canadian Logistic Services elected not to participate in the proceedings but maintained a watching brief.

[12] The RWDSU called Mr. Gary Burkart, and was granted leave to cross-examine Mr. Robert Barron, Canadian Logistic Services’ General Counsel; who was voluntarily-produced and agreed could testify on its behalf. Westfair Foods called Mr. Scott Shaw, the Senior Director of Labour Relations for Loblaws’ Distribution Network. UFCW called Mr. Darren Kurmey, UFCW’s secretary/treasurer.

[13] The evidentiary phase of the hearing concluded on July 13, 2011. The parties filed written briefs with the Board in August and then on September 8, 2011 made oral submissions. At the close of the hearing, the parties were granted leave to file additional arguments with the Board with respect to the application, if any, of this Board’s recent decision in *United Food and Commercial Workers, 1400 v. Canadian Salt Company Limited, et. al.* [2010] CanLii 65961, LRB File No. 047-10.

Facts:

[14] Loblaws is a large interprovincial company, headquartered in Ontario, operating or affiliated with various retail grocery outlets in Canada. Loblaws is incorporated into various regional companies or divisions. Through these regional divisions, Loblaws operates a spectrum of retail banners and/or is affiliated with various franchised grocery stores. Collectively, Loblaws is one of the largest grocery retailers in Canada and through its various divisions and operations employs approximately 130,000 full and part time employees. As this Board has previously noted, Loblaws operates under somewhat of a complex corporate structure and has had a penchant for corporate reorganization, particularly at the retail level.

[15] Westfair Foods is the corporate division of Loblaws responsible for retail grocery operations in Western Canada, including Saskatchewan. Westfair Foods operates both nationally-recognized grocery retailers, together with a variety of affiliated and/or franchised stores that cater to particular demographics in the grocery sectors. Examples of grocery retailers operating in Saskatchewan under the Loblaws banners include (or have included) the “Real Canadian Superstore”, “O.K. Economy”, “Extra Foods”, and “Loblaws Stores”. In Saskatchewan, these grocery retailers have historically operated as separate divisions of Westfair Foods.

[16] Until recently, warehousing and distribution to grocery retailers operating under the Loblaws banner in Western Canada was conducted through Western Grocers Ltd., which is also a separate division of Westfair Foods (we refer to this division as “Western Grocers”)⁶.

[17] In 1974, RWDSU was certified by this Board to represent a unit of employees of Western Grocers working at its warehousing operations in Regina, Saskatchewan. This certification Order was updated and amended in 1984 (i.e.: the “1984 Certification Order”). The bargaining unit whom RWDSU was certified to represent was described by this Board in the 1984 Certification Order as follows:

“[A]ll employees of Western Grocers Ltd., a Division of Westfair Foods Ltd., in or in connection with its places of business located in the City of Regina, in the Province of Saskatchewan, except the Branch Manager, Assistant Branch Manager, Meat Merchandising Manager, Credit Manager, Retail Counsellors, Buyers, Salesmen, Confidential Secretary, a Cash and Carry Manager,

⁶ Western Grocers Ltd. has also operated under the name of “Shelly Western”. No significance in the change in name of this division was advanced by the parties and this corporate division of Westfair Foods was consistently referred to as “Western Grocers” in these proceedings. We have followed that convention in these Reasons.

Warehouse Superintendent, Night Superintendent and Assistant Superintendent Days”;

[18] Pursuant to this certification Order, RWDSU represented non-exempt employees of Western Grocers working in Regina, Saskatchewan at both a large warehouse on Park Street and at two (2) smaller operations, one (1) in Regina and one (1) in Moose Jaw operating under the name “Cash & Carry”. It appears that the Moose Jaw operation was an accepted extension of the scope of this bargaining unit notwithstanding the geographic limits set forth in the 1984 Certification Order.

[19] RWDSU’s 1984 Certification Order did not, however, include any other operations of Westfair Foods, including its retailer grocery operations in either Regina or Moose Jaw. Generally speaking, the retail grocery operations of Westfair Foods were organized under separate certification Orders of this Board based on their respective divisions (i.e.: “O.K. Economy”, the “Superstore” division, etc.).

[20] In addition to its warehouse operations in Regina, Western Grocers also operated a large warehousing facility in Saskatoon (the “Saskatoon warehouse”). UFCW was certified to represent the non-exempt employees at the Saskatoon warehouse. The bargaining unit whom UFCW was certified to represent was described by this Board in a Certification Order issued in 1992 (the “1992 Certification Order”) as follows:

“[A]ll employees, employed by Western Grocers, a Division of Westfair Foods Ltd., in or in connection with its places of business, in the City of Saskatoon, in the Province of Saskatchewan, including those employed at its Office, Warehouse, at 302 Melville Street, or employed at its Cash and Carry outlet, or any replacement for such Office, Warehouse, or Cash and Carry outlet, save and except the following:

Zone Manager, Branch Manager, Assistant Branch Manager, Zone Marketing Manager, Personnel Manager, Office Manager, Merchandise Co-ordinator, Advertising Coordinators, Sales Manager, Accounts Manager, Chief Accountant, Branch Accountant, Accountants, Merchandisers, Store Contact, Produce Operations Manager, Assistant Produce Operations Manager, Sunspun Food Service Manager, Department Supervisors, Sunspun Food Service Co-ordinator, Confidential Secretaries (with knowledge of labour relations), Sunspun Food Service Sales Representatives, Independent Retail Councillors, Cash and Carry Manager, Plant Superintendent, Plant Assistant Superintendent, Produce Inspectors Shift Foreman, and Dispatcher”

[21] In 1992, Western Grocers announced the closure of its Park Street warehouse in Regina, together with the two (2) concomitant Cash and Carry outlets in Regina and Moose Jaw. At the time of these closures (i.e.: in Regina and Moose Jaw), Western Grocers was continuing to operate the Saskatoon warehouse and the employees working this facility fell within the scope of UFCW's 1992 Certification Order. In 1992, RWDSU made application to this Board alleging, *inter alia*, that a portion of the work done by employees at the Park Street warehouse in Regina (i.e.: employees within the scope of its bargaining unit) was moved to the Saskatoon warehouse. RWDSU applied to this Board to have the Saskatoon warehouse declared to be successor to the warehousing facility Western Grocers in Regina and to have RWDSU granted representation rights with respect to some of the employees at the Saskatoon warehouse. On January 15, 1993, this Board denied RWDSU's successorship application⁷.

[22] On November 19, 1993, RWDSU and Western Grocers entered into a closure agreement respecting the Regina (and Moose Jaw) operations; that agreement provided, in part, as follows:

The parties agree that any rights which may exist under The Trade Union Act, the R.W.D.S.U. Certification Order, or the current Collective Bargaining Agreement shall continue and shall not be removed or eliminated in the event that Western Grocers, a division of Westfair Foods Ltd., in or in connection with its places of business in the City of Regina, including its Cash and Carry outlets in the cities of Moose Jaw and Regina, reopens any of those places of business or sells those businesses to another company. Should Westfair Foods Ltd. itself, or through a related company, reopen these businesses before the year 1998 A.D., all employees previously employed at those businesses shall, regardless of whether they took their severance pay, be offered employment at those businesses prior to an offer of employment being made to any other person. Upon acceptance by any former employee, Westfair Foods Ltd. shall reinstate that employee and credit him/her with all previous service with the Company for the purposes of seniority and in the calculation of all benefits, rights, wages and privileges which are based upon length of service, credit them with all previous service. The Employer will, subject to The Trade Union Act, voluntarily recognize R.W.D.S.U. Local 454 as the exclusive bargaining agent for all employees hired and will recognize that the last expired collective bargaining agreement and/or negotiated agreement between R.W.D.S.U. Local 454 and Westfair Foods Ltd., operating as Western Grocers in Regina and Cash and Carry in Regina and Moose Jaw, as being binding until a new or revised collective bargaining agreement is negotiated. The parties will commence negotiations for a revised or new collective bargaining agreement within thirty (30) days of the Union being notified of the decision to open those facilities. The Company agrees to notify the Union at least ninety (90) days prior to the opening of the operation(s).

⁷ See: *Retail, Wholesale and Department Store Union, Local 454 v. Westfair Foods and United Foods and Commercial Workers, Local 1400*, [1993] 1st Quarter Sask. Labour Rep. 102, LRB File Nos. 096-92, 232-92 & 233-92.

[23] The Western Grocers facilities in Regina (and Moose Jaw) were permanently closed in 1993, with all equipment being dispersed or written-off at that time and all personnel from those facilities either transferred or severed in accordance with RWDSU's closure agreement. Western Grocers' warehouse facilities in Saskatoon took over the warehousing and distribution functions previously performed in Regina at the Park Street warehouse. From 1993 until recently, the only warehousing and distribution facility servicing grocers operating under the Loblaws banner was the facility in Saskatoon operated by Western Grocers, which facility was certified to UFCW.

[24] In 2006, in response to both a change in its senior personnel and after experiencing ongoing difficulties in its supply and distribution chain, Loblaws decided to start contracting for its warehousing and distribution needs across Canada. Previously, Loblaws had operated its own warehousing and distribution services through its own internal corporate divisions, such as was done in Western Canada through Western Grocers. Mr. Shaw testified that, following this decision, Loblaws began contracting with third parties for warehousing and distribution service. By 2010, Loblaws had contracted-out the operation of many of its distribution centres to third parties, including facilities located in Ontario, British Columbia and Alberta. Mr. Shaw testified that warehousing and distribution represented only a small portion of Loblaws' overall operations and Loblaws' goal was to increase the efficiency in its supply chain by turning that portion of their operation over to experts in the field.

[25] In early 2008, Loblaws announced that it was going to build the Regina Distribution Centre. Following this announcement, a number of things happened. For example, employees at the Saskatoon warehouse were notified in March of 2008 that the Saskatoon warehouse would be permanently closing. Following negotiations, Western Grocers entered into a closure agreement with UFCW in April of 2008.

[26] After hearing of the planned construction of the Regina Distribution Centre, on August 21, 2008, RWDSU wrote to UFCW and suggested that RWDSU be given the first opportunity "*to exercise [its] jurisdiction in regards to the certification and collective bargaining rights to cover all employees in this new facility when it becomes operational*". On August 26, 2008, UFCW wrote back to RWDSU indicating that UFCW believed that it had "*certification and bargaining rights which cover any replacement for the current UFCW facilities*". Simply put, while RWDSU and UFCW both agreed that the Regina Distribution Centre should be unionized,

they disagreed over which of them should be given the first opportunity to organize the facility and/or seek to enforce their respective certification Orders.

[27] Concomitant with its decision to build the Regina Distribution Centre and in keeping with its new philosophy respecting warehousing and distribution services, Loblaws began communicating with various companies and personnel in the logistics business (i.e.: contractors providing warehousing and distribution services) regarding the potential of operating the Regina Distribution Centre on a contract basis. One (1) of the individuals consulted by Loblaws was Mr. Joe Rodder, who was the president of various logistics companies operating in the United States. These discussions culminated in Loblaws issuing a request for proposals for the operation of the Regina Distribution Centre. Mr. Rodder and other individuals, who later became the principals of Canadian Logistic Services, submitted a proposal.

[28] At about this same time, on January 20, 2010, RWDSU wrote to Westfair Foods, provided it with a copy of RWDSU's 1984 Certification Order, and indicated that it believed that RWDSU had the exclusive authority to represent the future employees who would be working at the Regina Distribution Centre. RWDSU sought to enter into collective bargaining discussions with Westfair Foods regarding the operation of the Regina Distribution Centre. On February 22, 2010, Westfair Foods responded to RWDSU's letter indicating that the company took the position that RWDSU's Certification Order did not apply to the Regina Distribution Centre because it was not "re-opening" the warehousing facilities previously operated by Western Grocers on Park Street in Regina.

[29] In the spring of 2010, the principals of Canadian Logistic Services were informed by Loblaws that they had been awarded the contract to operate the Regina Distribution Centre. As a result of this decision, a number of additional things happened. For example, the principals of Canadian Logistic Services incorporated a company (i.e.: Canadian Logistic Services) and entered into detailed negotiations with Loblaws regarding the operation of the Regina Distribution Centre.

[30] Canadian Logistic Services was formed specifically for the purpose of operating the Regina Distribution Centre by various individuals, including Mr. Joe Rodder. Mr. Barron was general counsel for many of the logistics companies with which Mr. Rodder was associated and was hired as General Counsel for Canadian Logistic Services at the company's inception. Mr.

Barron testified that the principals of Canadian Logistic Services had no affiliation or corporate relationship with Loblaws or with any of its divisions at the time the company was formed. Mr. Barron testified that the principals of Canadian Logistic Services had limited knowledge of Loblaws' distribution chain but, because they were involved in the logistics industry and had existing warehousing and distribution contracts with other large grocery retailers in the United States, they were very interested when they were contacted regarding the Regina Distribution Centre.

[31] Canadian Logistic Services entered into a Master Warehousing Agreement in May of 2010. Mr. Barron testified that the Master Warehousing Agreement was the result of extensive negotiations between the principals of Canadian Logistic Services and representatives of Loblaws. During these negotiations, the issue of trade unions was discussed. Mr. Barron indicated that it was Canadian Logistic Services' preference to operate the Regina Distribution Centre non-union. However, during discussions with representatives of Loblaws, the principals of Canadian Logistic Services were informed that employees operating in this sector in Saskatchewan tended to be organized by trade unions. Mr. Barron denied that Loblaws made any specific recommendations to them during these discussions on how Canadian Logistic Services should deal with trade unions or any strategy with respect to the unionization or avoidance of unionization of the employees of the Regina Distribution Centre. However, the principals of Canadian Logistic Services were told that, of the two (2) trade unions that Loblaws had worked with in the past in Western Canada, UFCW was easier to work with than RWDSU.

[32] During the negotiations with Loblaws over the Master Warehousing Agreement, Canadian Logistic Services retained legal counsel in Saskatchewan. Mr. Barron testified that, following discussions with counsel in Saskatchewan regarding labour relations in this Province, the principals of Canadian Logistic Services concluded: (1) that it was probable that employees of the Regina Distribution Center would seek to become organized once operations began; and (2) that it would be advantageous for Canadian Logistic Services to approach UFCW and to explore the potential of working with that trade union.

[33] In June of 2010, Mr. Barron called Mr. Paul Meinema, the then president of UFCW, and informed him that Canadian Logistic Services had been awarded the contract to operate the Regina Distribution Centre and that Canadian Logistic Services was interested in

discussing the potential of working with UFCW. As a result of this conversation, Mr. Barron and Mr. Meinema agreed to meet, which they did in late July of 2010.

[34] At about this same time, on July 6, 2010, Loblaws wrote to RWDSU and indicated that the company was not intending to operate the Regina Distribution Centre and that it had entered into contractual arrangement with Canadian Logistic Services to operate their new facility. Loblaws gave contact information to RWDSU for Canadian Logistic Services. On July 12, 2010, RWDSU wrote to Canadian Logistic Services and indicated its belief that Canadian Logistic Services was bound by RWDSU's 1984 Certification Order. RWDSU also indicated its desire to meet with company officials and enter into collective bargaining discussions with respect to the operation of the Regina Distribution Centre.

[35] Canadian Logistic Services did not respond to RWDSU's July 12, 2010 letter. Mr. Barron testified that he was aware of RWDSU's claim because Loblaws had provided Canadian Logistic Services with a copy of RWDSU's unfair labour practice against Westfair Foods⁸. Mr. Barron testified that the principals of Canadian Logistic Services did not think there was much to the RWDSU claim because it was based on a thirty (30) year-old certification Order. At this point in time, the principals of Canadian Logistic Services did not believe that it was bound by RWDSU's 1984 Certification Order. Furthermore, they had also concluded that, unlike UFCW, RWDSU was not a trade union that they would volunteer to work with.

[36] Mr. Barron testified that he came to Regina and met with Mr. Meinema on or about July 27 and 28, 2010. During their meetings, Mr. Barron indicated to Mr. Meinema that Canadian Logistic Services preference was to operate non-union. However, Mr. Barron also indicated to Mr. Meinema that, if they (i.e.: the principals of Canadian Logistic Services) were "*comfortable with UFCW*" and if it could demonstrate support from the employees, they would voluntarily recognize UFCW. "*Comfortable*" for Mr. Barron meant that Canadian Logistic Services could live with the kind of terms and conditions in a collective agreement that UFCW would be seeking for employees working at the Regina Distribution Centre. Mr. Meinema informed Mr. Barron that UFCW had its own conditions, including that any collective agreement negotiated in advance would have to be submitted to the employees of the workplace for a ratification vote. In the end result, their meetings were positive and they agreed to continue working together.

⁸ Application bearing LRB File No. 054-10, filed with the Board on May 18, 2010.

[37] For example, UFCW informed Canadian Logistic Services that it had a number of workers that had been laid off from a plant in Moose Jaw who were looking for work. Mr. Meinema agreed to (and did) provide Mr. Barron with a list of its available workers, some of whom were contacted by Canadian Logistic Services and began working at the Regina Distribution Centre when it opened in November of 2010.

[38] In September or October of 2010, Canadian Logistic Services and UFCW began exchanging proposals on the terms for a potential collective agreement. Mr. Barron testified that most of the negotiations toward the collective agreement occurred between officials of Canadian Logistic Services and Mr. Norm Neault, on behalf of UFCW. However, later Mr. Tim Conley, an employee representative, also joined the negotiations.

[39] Canadian Logistic Services started hiring employees in November of 2010 and began receiving shipments in the first week of January of 2011. Mr. Barron testified that management with Canadian Logistic Services was responsible for hiring, supervising and disciplining all of its employees at the Regina Distribution Centre. Mr. Barron denied that Loblaws or any official thereof, were involved in the hiring or management of any of its employees, including the determination of wages or benefits paid to its employees or any of their terms or conditions of employment.

[40] UFCW started organizing workers at the Regina Distribution Centre as soon as Canadian Logistic Services began hiring them. While UFCW did not receive any direct assistance from Canadian Logistic Services (for example, UFCW was not allowed to organize at the workplace nor did they receive a list of, or contact information for, workers), a number of UFCW members were hired by Canadian Logistic Services as a result of the list of available workers that UFCW had previously provided to the company.

[41] When the UFCW filed its certification application with the Board on December 14, 2010, there were approximately fifteen (15) employees working at the Regina Distribution Centre for Canadian Logistic Services. Mr. Barron indicated that he could not remember how UFCW had demonstrated to Canadian Logistic Services that it had the support of the employees at the workplace but it was clear that, by the end of December, 2010, Canadian Logistic Services was satisfied that the majority of employees then working at the Regina Distribution Centre wanted to

be represented by UFCW. In January of 2011, Canadian Logistic Services and UFCW signed a collective bargaining agreement (with an effective date of December 16, 2010 and expiring on December 16, 2015). Mr. Kurmey testified that the collective agreement was ratified by a majority of employees then working at the Regina Distribution Centre before it was executed by UFCW.

[42] Mr. Barron testified that Canadian Logistic Services kept Loblaws informed as to the progress of its discussion with UFCW and provided information with respect to the progress on collective bargaining and UFCW's certification application⁹. However, Mr. Barron denied that Canadian Logistic Services took any instructions or received any recommendations from Loblaws officials regarding these matters.

[43] Pursuant to the terms of Master Warehousing Agreement that Canadian Logistic Services negotiated with Loblaws, Canadian Logistic Services is responsible for the handling and packaging of all produce delivered to the Regina Distribution Centre and the repackaging of that product into loads that are shipped to other destinations. Simply put, Canadian Logistic Services is responsible for everything that happens to goods once delivered to the Regina Distribution Centre until they are placed on a trailer for distribution to the next location in the supply chain (be that either another warehouse or a Loblaws affiliated grocer). Canadian Logistic Services is not involved in the transportation of goods from the Regina Distribution Centre.

[44] Mr. Barron indicated that the principle of Canadian Logistic Services already had significant experience in the logistics business (i.e.: warehousing and distribution) when they were approached by Loblaws regarding the potential of operating the Regina Distribution Centre. Mr. Barron denied that Canadian Logistic Services received any expertise from Loblaws on how to operate a warehousing and distribution facility. As Mr. Barron put it, Loblaws "*hired us because we are experts in logistics*".

[45] With respect to employees working at or out of the Regina Distribution Centre, Mr. Barron testified that Canadian Logistic Services started hiring employees for the Regina Distribution Centre in November of 2010; that at the time of the first shipments to the warehouse (January, 2011), they had hired between thirty (30) and forty (40) employees; and that, as of

⁹ Application bearing LRB File No. 214-10 filed with the Board on December 14, 2010.

the date of his testimony (i.e.: July 12, 2011), Canadian Logistic Services had between 300 and 400 employees working at the Regina Distribution Centre. Mr. Barron testified that Canadian Logistic Services did not employ any truck drivers. While he acknowledged that various truck drivers came to the Regina Distribution Centre, Mr. Barron testified that none of these individuals worked for Canadian Logistic Services.

[46] While Mr. Barron testified that, to the best of his knowledge, everyone who worked at the Regina Distribution Centre was employed by Canadian Logistic Services, Mr. Shaw indicated that a few of the employees that worked at the warehouse were employed by Loblaws. For example, Mr. Shaw testified that a team of quality assurance specialists worked at the Regina Distribution Centre and that these individuals were employed by Loblaws. Mr. Shaw indicated that the quality assurance personnel were responsible for inspecting the loads delivered to the warehouse and reported directly to Loblaws. Mr. Shaw also testified that Loblaws employed dispatchers that worked in the dunnage building, which was located at the Regina Distribution Centre. However, Mr. Shaw testified that it was common in the industry for these two (2) types of positions to be considered out-of-scope.

[47] Finally, Mr. Shaw testified that, for the most part, Loblaws tended to use private contractors to transport trailers to and from the Regina Distribution Centre. However, Mr. Shaw testified that Loblaws had recently established a new trucking division located in Calgary, Alberta, and that Loblaws had hired truck drivers to work for this new division. Mr. Shaw indicated that these truck drivers operated specialized tractor/trailer units called "Long Combination Vehicles". Mr. Shaw testified that some of these specialized truck drivers, referred to as "LCV drivers", worked out of the Regina Distribution Centre.

[48] No other evidence was presented that tended to identify the employer of the employees working at the Regina Distribution Centre, save Mr. Barron's general belief that everyone who worked there was employed by Canadian Logistic Services.

Argument of the Parties:

[49] RWDSU took the position that Westfair Foods (either directly or through its parent company, Loblaws) was operating a new warehousing and distribution facility within the geographic limits of its 1984 Certification Order. RWDSU took the position that it was properly certified to represent all employees working at the Regina Distribution Centre and that Loblaws

and/or Westfair Foods (and/or whichever corporate division of Loblaws was running that facility) was bound by its 1984 Certification Order.

[50] In the first instance, RWDSU argued that Westfair Foods was the corporate successor to the collective bargaining obligations arising out of its 1984 Certification Order. RWDSU noted that the named employer in its 1984 Certification Order was Western Grocers, which was a division of Westfair Foods, which is the corporate division of Loblaws through which it operates in Western Canada. RWDSU noted that there was no dispute that Loblaws owned the Regina Distribution Centre and that this facility was located within the corporate limits of the City of Regina. RWDSU noted that the Regina Distribution Centre was a warehousing facility, different only in scale, but similar in kind, to the warehousing facility on Park Street that was operated by Western Grocers; which facility fell within the scope of RWDSU's 1984 certification Order. RWDSU argued that it should not matter which division of Loblaws was in control of this new facility and asked this Board to pierce the corporate veil to ensure that Westfair Foods was not able to avoid its collective bargaining obligations through corporate reorganization.

[51] In the alternative (in the event this Board was to determine that Loblaws and/or Westfair Foods had successfully contracted out the operation of the Regina Distribution Centre), RWDSU argued that Westfair Foods was the "true" employer of the employees working at that facility within the meaning of s. 2(g)(iii) of the *Act*. RWDSU argued that Loblaws controlled all aspects of where, how, when and through what means its goods were warehoused and distributed to its affiliated grocers. RWDSU took the position that Loblaws and/or Westfair Foods controlled all aspects of operations at this facility, which together with the cost-plus arrangements negotiated with Canadian Logistic Services, ensured that it continued to have fundamental control over industrial relations at this workplace. RWDSU took the position that the "true" employer of Canadian Logistic Services' employees was Loblaws and, thus, Westfair Foods.

[52] In either event, RWDSU argued that its 1982 Certification Order, which covering "*all employees of Western Grocers Ltd., a Division of Westfair Foods Limited in or in connection with its places of business located in the City of Regina*" applied to the Regina Distribution Centre and noted that the evidence clearly established that no one involved in the operation of this facility, including Loblaws, Westfair Foods or Canadian Logistic Services, had recognized it as the bargaining agent for the employees of that facility.

[53] RWDSU sought an Order from this Board naming Loblaws and/or Westfair Foods, as the employer of the employees at the Regina Distribution Centre and a determination that Loblaws and/or Westfair Foods was guilty of an unfair labour practice for failing to bargain collectively with RWDSU.

[54] RWDSU injected an additional element into its argument; an element that RWDSU argued should be weighed in its favour in any determination involving discretion by this Board. RWDSU argued that Loblaws had put in motion a plan to defeat RWDSU's collective bargaining rights and that it had used both Canadian Logistic Services and UFCW to implement that plan. RWDSU argued that the conversations between officials from Loblaws and Canadian Logistic Services regarding trade unions occurred at a time when both employers were aware that RWDSU was attempting to enforce existing collective bargaining rights and when both employers knew that RWDSU asserted that it represented the employees at the Regina Distribution Centre. RWDSU argued that it is reasonable for this Board to assume that Loblaws did more than to just suggest to Canadian Logistic Services which trade union would be easier to work with. RWDSU asked this Board to infer that Loblaws had in fact asked, and potentially even directed, Canadian Logistic Services to avoid dealing with RWDSU.

[55] In support of these allegations, RWDSU pointed to the fact that Canadian Logistic Services had initiated contact with UFCW and negotiated a deal that saw UFCW members employed at the Regina Distribution Centre and aided that union in its organizing drive at the very time that RWDSU was attempting to enforce its collective bargaining rights. RWDSU argued that it was anti-union for Loblaws to pick one (1) trade union over another and for it to suggest, let alone recommend, that Canadian Logistic Services avoid dealing with RWDSU. RWDSU argued that Loblaws' plan culminated in a collective agreement being negotiated with UFCW before employees even started working at the facility and saw UFCW apply for certification at a time when only a fraction of the total compliment of workers were actually employed at the Regina Distribution Centre.

[56] RWDSU argued that Loblaws' so-called "new model" for operating its new facility that was merely a facade to avoid and/or defeat the obligations imposed upon it pursuant to the 1984 Certification Order. RWDSU argued that this plan involved purporting to contract-out the operations of the facility (while still maintaining control over all aspects of its operation, including

industrial relations) and actively seeking out another trade union (i.e.: a more cooperative trade union than RWDSU) to represent its employees. RWDSU argued that these circumstances are unique, egregious and cried out for intervention by the Board.

[57] In the final alternative (in the event this Board was to conclude that both RWDSU's 1984 Certification Order and UFCW's 1992 Certification Order applied to the Regina Distribution Centre), RWDSU argued that a run-off vote should take place between the two (2) unions but only after RWDSU had a reasonable opportunity to communicate with the employees of that facility.

[58] Westfair Foods argued that RWDSU's 1984 Certification Order did not apply to the Regina Distribution Centre and, thus, it was under no obligation to bargain collectively with RWDSU. Firstly, Westfair Foods noted that this Board's various certification Orders involving Westfair Foods were only for "divisions" of Westfair Foods. For example, RWDSU's 1984 Certification Order was only for the "*Western Grocers*" division of Westfair Foods; not Westfair itself. Westfair Foods argued that this Board had obviously used the divisional boundaries within Westfair Foods' corporate structure to help define the scope of each bargaining unit; just as the Board had also used geographic boundaries and in some case street addresses.

[59] Westfair Foods argued that RWDSU's 1984 Certification Order only applied to the facilities that it operated at that time; namely, the Park Street warehouse and the two (2) Cash and Carry outlets. Westfair observed that there was no evidence that any of these facilities were reopened, or that they were sold, or that any assets from these facilities were transferred to the Regina Distribution Centre. In this regard, Westfair Foods took the position that RWDSU's 1993 Closure Agreement should resolve any doubt that may exist as to exactly what facilities were covered by the 1984 Certification Order. Westfair Foods argued that RWDSU's 1984 Certification Order covered specific facilities; facilities that had no involvement with the Regina Distribution Centre.

[60] Secondly, Westfair Foods disputed that it was the successor to Western Grocers' collective bargaining obligations and, in particular, that it was the successor to the obligation arising out of either RWDSU's 1984 Certification Order or UFCW's 1992 Certification Order. Westfair Foods relied upon this Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and United Food and*

Commercial Workers Union, Local 1400, [1995] 3rd Quarter Sask. Labour Rep. 140, LRB File Nos. 246-94 & 291-94 (the “*Yorkton O.K. Economy/Superstore*” case), as standing for the proposition that the successorship provisions in s. 37 of the *Act* do not apply to a re-organization within the same employer. Westfair Foods argued that the proper means for either RWDSU or UFCW to add Westfair Foods as a party to their respective certification Orders would be through an application to this Board for an amendment to one (1) or the other of their certification Orders; which application, Westfair Foods noted, would need to be accompanied by evidence of support from the affected employees.

[61] In an alternative argument on this point (in the event this Board should conclude that s. 37 of the *Act* can apply to an internal corporate re-organization), Westfair Foods asked this Board to decline to exercise its discretion to grant successorship in light of the seventeen (17) years that have elapsed since there have been any employees in RWDSU's bargaining unit. Westfair Foods argued that the business activities to which RWDSU was originally certified are long over and the employees that worked at those facilities are long gone. Westfair Foods argued that, if ever there was a case where this Board should decline to exercise its discretion to transfer collective bargaining obligations, this would be it.

[62] Thirdly, Westfair Foods argued that there was no evidence that it or its Western Grocers division were involved in the operation of the Regina Distribution Centre; let alone had any employees at that facility. Westfair Foods argued that the evidence clearly demonstrated that Loblaws had reorganized; that it had adopted a new model for the provision of warehousing and distribution services to affiliated grocers in Saskatchewan (and the rest of Canada); and that Westfair Foods was not involved in the construction of the Regina Distribution Centre or its operations. Westfair Foods argued that the evidence demonstrated that, with a few exceptions (i.e.: truck drivers, dispatchers and quality control specialists), all of the employees working at the Regina Distribution Centre were employed by Canadian Logistic Services.

[63] With respect to the employees working at the Regina Distribution Centre who were not employees of Canadian Logistic Services, Westfair Foods argued that none of these employees were employed by either Western Grocers or Westfair Foods.

[64] Fourthly, Westfair Foods argued that there is no basis upon which this Board could designate Westfair Foods or Loblaws as the “true” employer of Canadian Logistic Services’

employees. Westfair Foods argued that, because Loblaws had contracted-out the operation of the Regina Distribution Centre and because Canadian Logistic Services was merely a contractor, it was not a successor within the meaning of s. 37 of the *Act*. In this regard, Westfair Foods relied upon a number of decisions of this Board, the most recent of which being *Service Employees International Union, Local 333 v. Smiley's Buffet and Catering, et. al.*, 2008 CanLII 75623, LRB File Nos. 007-08 & 008-08, as all standing for the proposition that collective bargaining obligations do not transfer to mere contractors. Even if it were otherwise, Westfair Foods took the position that there was no evidence upon which this Board could reasonably conclude that it had any control (let alone fundamental control) over actual industrial relations at the Regina Distribution Centre.

[65] Finally, Westfair Foods noted that neither Loblaws nor Canadian Logistic Services were named by RWDSU as respondents in these proceedings and that RWDSU had neither plead nor relied upon s. 37.3 of the *Act*. Westfair Foods cautioned that this Board not allow these proceedings to extend beyond the natural limits of RWDSU's application (i.e.: whether or not Westfair Foods was subject to RWDSU's 1984 Certification Order and, if so, whether or not it had failed to bargain collectively with RWDSU).

[66] Westfair Foods asked that RWDSU's application be dismissed.

[67] UFCW argued in the first instances that neither their 1992 Certification Order nor RWDSU's 1984 Certification Order applied to the Regina Distribution Centre. UFCW acknowledged that, based on the decisions of this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and United Food and Commercial Workers Union, Local 1400*, [1993] 1st Qtr. Sask. Labour Rep. 102, LRB File Nos. 096-92, 232-92 & 233-92 (the "Saskatoon Warehouse" case) and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and United Food and Commercial Workers Union, Local 1400, supra*, (the "Yorkton O.K. Economy/Superstore" case), there can not be a successorship between two (2) divisions of the same company. Secondly, UFCW acknowledged that the evidence presented in these proceedings indicated that Loblaws had contracted-out the operation of the Regina Distribution Centre. In taking this position, UFCW noted that Loblaws had altered the manner in which it performed certain of its business activities by paying a contractor to provide those services. UFCW argued that none of the traditional indicia of successorship were present in the arrangements between Canadian Logistic

Services and Loblaws. In this regard, UFCW relied upon numerous decisions of this Board, including *United Brotherhood of Carpenters and Joiners of America, Local 1805 and 1990 v. Cana Construction Co. Ltd., et. al.*, [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84, 201-84, 202-84 & 204-84, *Canadian Union of Public Employees, Local 59 v. City of Saskatoon and Saskatoon Regional Economic Development Authority Inc.*, [1998] Sask. L.R.B.R. 376, LRB File No. 164-97.

[68] However, UFCW also took the position that, if a transfer had occurred and if any certification Order applied to the Regina Distribution Centre, it ought to be their 1992 Certification Order. UFCW argued that the Regina Distribution Centre was a direct replacement for the warehouse that was closed in Saskatoon by Westfair Foods and their 1992 Certification Order contemplated the potential transfer of the facilities covered by that Order to new geographic locations.

[69] All parties filed written briefs of law, which we have read and for which we are thankful.

Relevant Statutory Provisions:

[70] The relevant provisions of *The Trade Union Act* are as follows:

2 *In this Act:*

- (g) "employer" means:
- (i) an employer who employs three or more employees;
 - (ii) an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;
 - (iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;
- and includes Her Majesty in the right of the Province of Saskatchewan;

37(1) *Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective*

bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:

(a) determining whether the disposition or proposed disposition relates to a business or part of it;

(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:

(i) an employee unit;

(ii) a craft unit;

(iii) a plant unit;

(iv) a subdivision of an employee unit, craft unit or plant unit;

or

(v) some other unit;

(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);

(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);

(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;

(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).

Analysis:

[71] For the reasons that follow, we have concluded that the within application must be dismissed. We would, however, like to preface our analysis with an observation regarding these proceedings. We note that RWDSU did not name either Loblaw's or Canadian Logistic Services as respondents to its application. As such, this Board has no authority to declare any remedial relief with respect to either of these corporate entities. The only named respondent in RWDSU's application was Westfair Foods. The sole issue for this Board to determine is whether or not Westfair Foods committed an unfair labour practice by failing to recognize RWDSU as the exclusive bargaining agent for the employees working at the Regina Distribution Centre.

[72] To be successful in its application, RWDSU must demonstrate to the satisfaction of this Board each of the following elements:

1. That Westfair Foods is a successor to the collective bargaining obligations arising out of RWDSU's 1984 Certification Order.
2. That RWDSU's 1984 Certification Order applies to the employees working at the Regina Distribution Centre.
- 3 That Westfair Foods is the actual employer of the employees of that facility or, in the alternative, that Westfair Foods ought to be designated as the "true" employer of those employees pursuant to ss. 2(g)(iii) of the *Act*.
4. That Westfair Foods failed to bargain collectively with RWDSU.

[73] Having considered the evidence and argument presented in these proceedings, we are not satisfied that RWDSU has made out any of these elements, save the fourth. While there is no doubt that Westfair Foods failed to bargain collectively with RWDSU regarding the operation of the Regina Distribution Centre, we were not satisfied that Westfair Foods was bound by RWDSU's 1984 Certification Order or that it applied to the employees working at the Regina Distribution Centre. Even if these elements could have been established, we were not satisfied that Westfair Foods was the actual employer or ought to be declared to be the true employer of any of the employees working at that facility. We have organized our analysis around the following questions.

Do the Collective Bargaining Obligations arising pursuant to RWDSU's 1984 Certification Order apply to Westfair Foods?

[74] RWDSU strenuously argued that both Westfair Foods and Loblaws were bound by its 1984 Certification Order. RWDSU argued that Loblaws had a demonstrated propensity for corporate reorganization and that it did so in this case specifically to avoid the collective bargaining obligations arising out of its 1984 Certification Order. RWDSU relied upon s. 37 of the *Act* but also asked this Board in argument to exercise whatever discretion we may have to ensure that Westfair Foods and/or Loblaws did not escape their collective bargaining obligations; particularly so, in the face of what RWDSU described as, the "taint of anti-union animus".

[75] Firstly, we note that RWDSU's 1984 Certification Order (as did UFCW's 1992 Certification Order) named "*Western Grocers Ltd., a division of Westfair Foods*" as the certified employer of the employees in RWDSU's bargaining unit. Secondly, it was with Western Grocers that RWDSU negotiated its various collective agreements and with whom it negotiated the 1993

Closure Agreement. Thirdly, a review of the numerous certification Orders¹⁰ that have been issued by this Board covering various Loblaws affiliated operations would indicate that the divisions within Loblaws' corporate structure (as well as municipal boundaries, and in some case, street addresses) were used by this Board as a means of defining the scope of appropriate bargaining units. In our opinion, the reference in RWDSU's 1984 Certification Order to a division of Westfair Foods does not extend the application of that certification Order to Westfair Foods but rather limits the scope of the bargaining unit to the employees of that particular division of Westfair Foods (i.e.: to the employees of Western Grocers). It is not apparent on the face of RWDSU's 1984 Certification Order that it was intended to apply to employees other than those employed by Western Grocers.

[76] As a consequence, for RWDSU's 1984 Certification Order to apply to Westfair Foods, there must be a transfer of those obligations to that division. However, we agree with the position advanced by counsel for Westfair Foods and counsel for UFCW that the issue of transferring obligations between two (2) divisions of the same employer was previously before this Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and United Food and Commercial Workers Union, Local 1400, supra*, (the "Yorkton O.K. Economy/Superstore" case). In this case, which involved these same parties, the Board concluded that the successorship provisions of the *Act* do not apply to a corporate reorganization within the same company. In that case, certain grocery retailers within the "O.K. Economy" division of Westfair Foods were certified by this Board to be represented by RWDSU. At the same time, all "Superstores" (being another banner of retail grocers, in that case within the "Superstore" division of Westfair Foods) in Saskatchewan were certified to UFCW. In 1994, Westfair Foods closed an O.K. Economy store in Yorkton and opened a Superstore. RWDSU applied to this Board claiming successorship rights with respect to the new Superstore arguing a transfer of obligations had occurred from the O.K. Economy store to the new Superstore. In denying RWDSU's application, the Board made the following observations:

We have concluded that Section 37 does not apply to a circumstance where the employer named in the certification Order still owns the business following whatever change occurred. Though the Board has been prepared to give a liberal interpretation to the idea of "disposition" under Section 37(1), the term "the person acquiring the business or part thereof" can only, in our view, apply to an employer who has not previously been affected by the certification Order. The

¹⁰ See: "Real Canadian Superstore, a division of Westfair Foods Ltd.", Certification Order dated August 5, 1992, LRB File No. 096-92. See also: "O.K. Economy and Extra Foods, divisions and/or trade names of Westfair Foods Ltd.", dated August 31, 1998, LRB File No. 165-98.

effect of a finding that the new employer is a successor is to impose, by law, the collective bargaining obligations to which the former owner was subject upon the person who has acquired the business or part of a business.

[77] In our opinion, the analysis of this Board in the “*Yorkton O.K. Economy/Superstore*” case was correct. It followed an examination of the comments of the Saskatchewan Court of Appeal contained in *Aluminum, Brick & Glass Workers Union v. Western Clay Products*, (1988) 68 Sask. R. 285, wherein the court cautioned that nothing in s. 37 of the *Act* authorized the extension of bargaining rights beyond the limits (in that case “geographic” limits) specified in a certification Order. The court went on to comment that, unless an employer’s actions were motivated by an anti-union animus or fell within the definition of a technological change, the appropriate action for a trade union facing a change affecting its bargaining relationship with an employer is to apply to the Board for an amendment to its certification Order.

[78] In the *Yorkton O.K. Economy/Superstore* case, this Board concluded that the employer’s action did not constitute a technological change and was not satisfied that the employer’s actions were motivated by an anti-union animus. As a consequence, the Board concluded that it was not prepared to utilize s. 37 of the *Act* to transfer the collective bargaining rights which RWDSU enjoyed in that case from one (1) division of Westfair Foods to another. In the present case, RWDSU seeks the same relief under similar circumstances; asking this Board to transfer the collective bargaining obligations that arose in relation to the Western Grocers division to Westfair Foods or some other division of Loblaws.

[79] In our opinion, the circumstances of the present application are parallel to the circumstances before the Board in the *Yorkton O.K. Economy/Superstore* case, including the allegations of anti-union animus on the part of Loblaws, which for reasons described later we do not accept. The result of this conclusion is that RWDSU can not rely upon s. 37 of the *Act* to transfer the obligations arising out of its 1984 Certification Order to either Westfair Foods or to Loblaws. There are other avenues available within the *Act* for RWDSU to preserve its existing collective bargaining rights, including an application to amend its 1984 Certification Order. However, as noted by counsel for Westfair Foods, such an application must be accompanied by evidence of support.

[80] Finally, in coming to the conclusion that RWDSU cannot rely upon s. 37 of the *Act* to transfer collective bargaining obligations in the present application, we note that there is no allegation (nor does the evidence indicate) that Westfair Foods or Loblaws had re-opened any of the facilities previously operated by Western Grocers in the City of Regina. If such had been the case, different considerations may well have been applicable affecting the result.

Does RWDSU's 1984 Certification Order apply to the Regina Distribution Centre?

[81] RWDSU strenuously argued that its 1984 Certification Order applied to the employees working at the Regina Distribution Centre. RWDSU took the position that it mattered little whether this facility was being operated by Western Grocers or Westfair Foods or some other division of Loblaws. RWDSU argued that the Regina Distribution Centre is a warehousing and distribution facility located within the geographic limits of its 1984 Certification Order operated by the same employer and performing essentially the same function as that performed at the previous Park Street warehouse in Regina. As such, RWDSU argued that it did not matter which corporate division of Loblaws was operating the Regina Distribution Centre and that, whichever division was operating this new facility, it was bound by their Certification Order.

[82] For the reasons already stated, in our opinion, it does matter which division within Loblaws' corporate structure is operating the Regina Distribution Centre because the various certifications Orders of this Board are for particular divisions within that corporate structure and they do not transfer from division to division (save by an application to amend). However, even if we were to accept for the purposes of these proceedings, that Westfair Foods is or could be the successor to the collective bargaining obligations arising out of RWDSU's 1984 Certification Order (and/or UFCW's 1992 Certification Order), we saw no evidence that Westfair Foods, the named respondent in RWDSU's application, was involved in the operation of the Regina Distribution Centre or that it employed any employees working at that facility.

[83] The uncontradicted evidence was that Loblaws built and now owns and controls the Regina Distribution Centre. We accept the evidence of Mr. Shaw that Loblaws changed its corporate operating philosophy and that, by the time a decision was made to build the Regina Distribution Centre, Loblaws had decided that it would no longer be utilizing its internal divisions (in this case, Westfair Foods) to provide warehousing and distribution services to Loblaws affiliated grocers. Simply put, Loblaws made a corporate decision to **not** have Westfair Foods operate the Regina Distribution Centre. This Board saw no evidence that Westfair Foods was

involved in the operation of the Regina Distribution Centre or that Loblaws intended to continue to use Westfair Foods to provide warehousing and distribution services in Saskatchewan as it had previously done. The evidence indicated that, with the closure of the Western Grocers' warehouse in Saskatoon in early 2011, Westfair Foods would cease being involved in the warehousing and distribution business.

[84] As a consequence, for RWDSU to be successful in its application, this Board would have to be prepared to transfer the collective bargaining obligations not to Westfair Foods but to Loblaws, who was not named as a respondent in these proceedings. Assuming for the purposes of argument that we had the authority to transfer the obligations arising out of RWDSU's 1984 Certification Order to Loblaws, to extend those obligations to the operation of the Regina Distribution Centre would involve the exercise of discretion on the part of this Board. As this Board has stated on many occasions, the exercise of discretion by the Board must be based on a sound labour relations footing; typically that footing is the fulfillment of the legislative objectives of the provision upon which this Board's discretion arises. See: *Wayne Bus Ltd., supra.*

[85] This Board and the courts have stated on many occasions that the purpose of s. 37 is to preserve existing collective bargaining rights; but not to bring about an expansion of those rights. See: *Aluminum, Brick & Glass Workers Union v. Western Clay Products, supra.* See also: *International Brotherhood of Electrical Workers, Local 529 v. Sun Electric (1975) Ltd.* [1985] July Sask. Labour Rep. 34, LRB File No. 052-85; *Saskatchewan Government Employees Union v. Headway Ski Corporation*, [1987] Aug. Sask. Labour Rep. 48, LRB File No. 396-86; and *Saskatoon Regional Economic Development Authority, supra.*

[86] As previously noted, none of the facilities that were certified pursuant to RWDSU's 1984 Certification Order, including the Park Street warehouse and the two (2) Cash and Carry outlets, are being re-opened or have any involvement or connection with the Regina Distribution Centre. Furthermore, these facilities were closed over seventeen (17) years ago and a new facility has now been constructed; not by Westfair Foods, but by Loblaws. Of particular significance to this Board is the fact that there have been no employees in, or with a right of recall to, RWDSU's bargaining unit for well over a decade. In our opinion, the transfer of the collective bargaining obligations arising out of RWDSU's 1984 Certification Order to Loblaws for application to the employees of the Regina Distribution Centre would result in an unwarranted

expansion of RWDSU's existing bargaining rights. Furthermore, in doing so, this Board would unreasonably preempt the right of employees of this new workplace to decide the representative question.

[87] Nonetheless, RWDSU asked that we take such action because, in its opinion, Loblaw's conduct has been motivated by an anti-union animus. RWDSU argued that Loblaw set in motion a plan intended to undermine its collective bargaining rights. Precisely because of Loblaw's conduct toward it, RWDSU argued that this Board had the requisite authority and ought to transfer the collective bargaining obligations originally imposed upon Western Grocers as a means to remediate against Loblaw's conduct; conduct which RWDSU described as egregious.

[88] With all due respect, we were not persuaded that there was evidence to suggest, or sufficient evidence from which this Board could reasonably infer, that Loblaw had adopted an anti-union stance. Firstly, we were not satisfied that the decision to contract-out the operation of the Regina Distribution Centre was merely a façade to avoid or defeat collective bargaining rights. The evidence demonstrated that Loblaw made a corporate decision to alter its operation model for warehousing and distribution of goods to its affiliated grocers and that this decision was motivated by legitimate business concerns (to improve inefficiencies in its supply chain). Furthermore, this decision had already been implemented by Loblaw in other areas of Canada before the Regina Distribution Centre was announced; let alone constructed and made operational.

[89] Secondly, we were not satisfied that the evidence reasonably lead to the conclusion that Loblaw did anything more than that which was stated by Mr. Barron; namely, that Loblaw had indicated to Canadian Logistic Services that UFCW was easier to work with than RWDSU. In this regard, we accept the evidence of Mr. Barron as to the nature of the communications between Loblaw and Canadian Logistic Services. In our opinion, there is nothing in the actions of Canadian Logistic Services in seeking out UFCW; or in its decision to voluntarily recognize UFCW; from which this Board could reasonably infer an anti-union animus on the part of Loblaw. Employers have the right, as Loblaw did in this case, to state their preference for one (1) trade union over another to another employer. There is nothing egregious in Canadian Logistic Services' conduct in acting upon that information. As this Board has stated, the test for an anti-union animus is not whether an employer likes one (1) trade union over another. See: *Energy and Chemical Workers' Union v. Remai Investment Corporation and*

Saskatchewan Joint Board, Retail, Wholesale Department Store Union, [1992] 2nd Qtr. Sask. Labour Rep. 97, LRB File Nos. 028-92 & 027-92. Similarly, there is nothing egregious in the actions of UFCW in agreeing to cooperate with Canadian Logistic Services in light of the conditions that it imposed for doing so.

[90] For these reasons, we were not persuaded that Loblaws had adopted an anti-union stance or that its conduct was of a nature to justify the remedy which RWDSU sought from this Board.

[91] In conclusion, even if we could have found the requisite authority to transfer the collective bargaining obligations arising pursuant to RWDSU's 1984 Certification Order to either Westfair Foods or to Loblaws, we would not have been persuaded to do so. Doing as RWDSU suggested would see this Board unreasonably preempt the right of employees of the Regina Distribution Centre to decide the representative question and would be contrary to the jurisprudence of this Board on the issue of successorship. In our opinion, the conduct of Loblaws was neither anti-union nor justification for this Board to transfer RWDSU's 1984 Certification Order to the employees working at the Regina Distribution Centre.

Is Westfair Foods the Actual Employer of Any Employees at the Regina Distribution Centre?

[92] Even if it we were to accept that Westfair Foods was bound by RWDSU's 1984 Certification Order and that Order ought to be extended to include activities at the Regina Distribution Centre, we saw no evidence that Westfair Foods was the actual employer of any of the employees working at that facility.

[93] As indicated, the evidence established that Loblaws (and not Westfair Foods) owned and controlled the facility and that Loblaws had contracted-out the day-to-day operation of the Regina Distribution Centre to Canadian Logistic Services. In our opinion, the evidence also established that, with a few exceptions, the majority of the employees working at that facility were employees of Canadian Logistic Services. The only evidence that indicated that there were employees working at or out of the Regina Distribution Centre, who were not employed by Canadian Logistic Services, involved the dispatchers, a team of quality assurance specialists; and the LCV drivers.

[94] Mr. Shaw testified that the dispatchers were employed by Loblaws and, in any event, would be out-of-scope. Mr. Shaw testified that the quality assurance specialists were employed by Loblaws and would generally be considered to be out-of-scope. Finally, Mr. Shaw testified that most of the truck drivers reporting to the Regina Distribution Centre were employed by private trucking companies but that a few LCV drivers were employed by a new trucking division that Loblaws had established with its head office in Calgary, Alberta. This evidence was uncontradicted and, as such, we accept it.

[95] Simply put, the evidence in these proceedings did not demonstrate that any employees working at the Regina Distribution Centre were employed by Westfair Foods.

Is Westfair Foods the “True” Employer of the Employees of Canadian Logistic Services working at the Regina Distribution Centre?

[96] In our opinion, there is a fundamental flaw in RWDSU’s assertion that Westfair Foods ought to be deemed by this Board to be the “true” employer of the employees working at the Regina Distribution Centre. As indicate, in our opinion, the evidence demonstrates that Loblaws contracted-out the operation of the Regina Distribution Centre to Canadian Logistic Services. Therefore, this Board must first determine whether or not Canadian Logistic Services is a successor or a mere contractor.

[97] In this regard, our review of the evidence would indicate that Canadian Logistic Services is a mere contractor. We accept that Loblaws made a corporate decision to contract-out the operation of its distribution centres and sought out experts in that field to operate their new facility in Regina when it was being constructed. We are satisfied that the principals of Canadian Logistic Services were unrelated to Loblaws and that they had previous experience in the logistics business. Canadian Logistic Services received the contract to operate the Regina Distribution Centre following a request for proposals. There is no evidence that any good will, equipment, knowledge, inventory or personnel were acquired by Canadian Logistic Services from Loblaws; what Canadian Logistic Services acquired was a contract to provide a service for a fee for a specified period of time. In our opinion, the business of warehousing and transportation of goods to affiliated grocers continues to rest with Loblaws and the arrangements between Loblaws and Canadian Logistic Services are wholly consistent with that of a contractor providing specified services to a principal. Simply put, we saw nothing in the evidence to indicate that a business or part thereof has been acquired by or transferred to Canadian Logistic

Services or that would otherwise satisfy the accepted criteria for the transfer of collective bargaining obligations to a successor. See: *Canadian Union of Public Employees v. Metropolitan Parking Inc.*, (1980) C.L.R.B.R. 197 (Ont).

[98] As mere contractors are not successors within the meaning of s. 37 of the *Act*, even if we had concluded that the obligations arising out of RWDSU's 1984 Certification Order were applicable to the operation of the Regina Distribution Centre, these obligations would not have transferred to Canadian Logistic Services as an independent contractor. See: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Crescent Heights Janitorial Service*, [1985] Oct. Sask. Labour Rep., LRB File Nos. 079-85, 080-85 & 083-85 to 086-85; *S.G.E.U. v. Chatterson Building Cleaning Ltd.*, [1986] Dec. Sask. Labour Rep. 42, L.R.B. File Nos. 193-86, 194-86, 195-86 & 196-86; and *Service Employees International Union, Local 333 v. Smiley's Buffet and Catering*, *supra*.

[99] All of which gives rise to the fundamental flaw in RWDSU's claim that either Westfair Foods or Loblaws is the "true" employer of Canadian Logistic Services' employees. In our opinion, s. 2(g)(iii) of the *Act* is not applicable to a contractor who is under no collective bargaining obligations. This provision is the vehicle by which this Board may determine that a principal (i.e.: a party who has engaged the services of a contractor) is deemed to be the employer of a contractor's employees for purpose of the *Act*. This is an extraordinary authority exercisable if the Board is satisfied that the principal (and not the contractor) has fundamental control over labour relations involving the contractor's employees. Generally speaking, the purpose of s. 2(g)(iii) is to ensure that the party exercising fundamental control over day-to-day labour relations at the workplace is at the bargaining table when it comes time to negotiate a collective agreement. See: *Amalgamated Transit Union, Local 588 v. City of Regina*, [1999] Sask. L.R.B.R. 238, LRB File No. 363-97. See also: *Canadian Salt*, *supra*. However, if there are no collective bargaining obligations on the contractor, then there is no need for this Board to make any determination as to who ought to sit at the bargaining table.

[100] However, even if these significant obstacles could have been overcome, we would not have been persuaded that either Westfair Foods or Loblaws ought to be deemed to be the "true" employer of Canadian Logistic Services' employees. In *Canadian Salt*, *supra*, this Board described the application of s. 2(g)(iii) of the *Act* as follows:

[84] Section 2(g)(iii) of the Act permits the Board to designate the principal (i.e.: the business or person to whom a contractor provides its services) to be the designated employer of a contractor's employees for purposes of collective bargaining. While the contractor continues to be the "actual" employer of those employees for most purposes (source deductions, Labour Standards, Workers Compensation, insurance, etc.), the principal is deemed by the Board to be the "employer" of the employees for purpose of application of The Trade Union Act. In such case, the principal is described (somewhat inaccurately) as the "true" employer.

[85] This Board has previously been called upon to make determinations as to whether the principal or the contractor is the "true" employer of a unit of employees pursuant to s. 2(g)(iii) of the Act. In doing so, the Board has first focused its examination on which party exercises "fundamental control" over labour relations at the work place. In other words, who has effective control over the essential aspects of the employment relationship? The Board has previously adopted several (non-exclusive) criteria to assist in this determination, which criteria include[ing] an examination of the following aspects of the relationship between the parties:

1. The party exercising direction and control over the employees performing the work;
2. The party bearing the burden of remuneration;
3. The party imposing discipline;
4. The party hiring the employees;
5. The party with the authority to dismiss the employees;
6. The party who is perceived to be the employer by the employees; and
7. The existence of an intention to create the relationship of employer and employee.

[86] The next stage of the Board's inquiry is for the Board to determine whether or not it ought to exercise its discretion in the circumstances of the particular case before it. As previously stated by this Board, a determination made pursuant to s. 2(g)(iii) involves the exercise of an extraordinary authority on the part of the Board and thus the Board's discretion must be based on a sound labour relations footing. See: Wayne Bus Ltd., supra, and Canadian Union of Public Employees, Local 4836 v. Lutheran Home of Saskatoon, Regina Lutheran Care Society Inc. and Broadway Terrace Inc., 2009 CanLII 54774, LRB No. 043-09.

[101] Having reviewed the evidence in these proceedings, we were not satisfied that either Westfair Foods or Loblaws exercised any control (let alone essential or fundamental control) over labour relations involving the employees of Canadian Logistic Services. We accept the evidence of Mr. Barron and Mr. Shaw that Loblaws had no involvement in the hiring of Canadian Logistic Services' employees; or in the negotiation of the terms and conditions of their employment; or in the negotiation of the collective agreement in place with UFCW; or in any aspect of the day-to-day working conditions of Canadian Logistic Services' employees. In this sense, the circumstances of employment for employees of Canadian Logistic Services at the

Regina Distribution Centre can be seen in stark contrast to the circumstances of employment of the disputed employees of the contractor in *Canadian Salt, supra*.

[102] RWDSU asked this Board to infer fundamental control from the fact that Loblaws was Canadian Logistic Services' only client and that it was paid on a cost-plus basis. While these are factors that may be taken into consideration by the Board, alone they are insufficient for this Board to infer that Canadian Logistic Services no longer has fundamental control over labour relations of its own employees.

[103] For the foregoing reasons, in our opinion, there would have been no basis upon which this Board could have designated either Westfair Foods or Loblaws to be the "true" employer of the employees of Canadian Logistic Services.

Conclusion:

[104] Having considered the evidence and argument presented in these proceedings, we were not satisfied that Westfair Foods was bound by RWDSU's 1984 Certification Order or that this certification Order ought to apply to the employees working at the Regina Distribution Centre. Even if these elements could have been established, we were not persuaded that Westfair Foods was the actual employer or ought to be declared to be the true employer of any of the employees working at that facility. As a consequence, in our opinion, Westfair Foods was under no obligation to bargain collectively with RWDSU with respect to the employees working at the Regina Distribution Centre.

[105] For the foregoing reasons, the within application must be dismissed.

[106] Board Member, John McCormick, dissents from these Reasons.

DATED at Regina, Saskatchewan, this **20th** day of **October, 2011**.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson

[107] Dissent of John McCormick: I have read the Reasons for Decision of my colleagues and, while I have a concern regarding certain aspects of their conclusions, I agreed with the disposition of RWDSU's application. My concern respecting the decision stems from their application of this Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Ltd. and United Food and Commercial Workers Union, Local 1400, supra*, (the "Yorkton O.K. Economy/Superstore" case). In my opinion, the *Yorkton O.K. Economy/Superstore* case created an unfortunate loop-hole in section 37 of *The Trade Union Act* that allows large corporate employers that have organized themselves into various divisions to interfere with the collective bargaining rights of certified trade unions by transferring work between divisions. In my opinion, this Board's decision in the *Yorkton O.K. Economy/Superstore* case requires further refinement by this Board. The only way to prevent organized workers of large corporate employers from having to re-organize themselves following a transfer of business activity between corporate divisions is to allow for the application of s. 37 to transfers of work between divisions of the same company.

[108] However, I am satisfied that my concerns regarding the *Yorkton O.K. Economy/Superstore* case would not have affected the result in these proceedings as I am satisfied that Loblaw's contracted-out the operation of the Regina Distribution Centre to Canadian Logistic Services and that Canadian Logistic Services, as a contractor, was not a successor to any collective bargaining obligations on either Loblaw's or Westfair Foods arising out of RWDSU's 1984 Certification Order.

John McCormick,
Board Member