The Labour Relations Board
Saskatchewan

K.L.S, Applicant v. GRAIN AND GENERAL SERVICES UNION, Respondent and DAWN FOOD PRODUCTS (CANADA) LTD., Interested Party.

LRB File No. 055-11; April 25, 2012
Vice-Chairperson, Steven Schiefner; Members: Mick Grainger and Bert Ottenson

For the Applicant: Mr. Christopher (Chris) G. Veeman
For the Respondent: Ms. Ronalda (Ronnie) A. Nordal
For the Interested Party: Mr. Jeffrey N. Grubb, Q.C.

Constitutional Law – Jurisdiction of Board – Applicant files application with Saskatchewan Labour Relations Board alleging trade union failed to fairly represent her in relation to grievance proceedings involving employer - Trade union was certified to represent employees of employer by Canadian Industrial Relations Board – Basis of Federal jurisdiction over labour relations of affected employees was operation of flour mill pursuant to section 76 of The Canadian Wheat Board Act - Employer sells flour mill and ancillary facilities in February of 2007 – Board satisfied that, following sale, employer was no longer involved in the milling of flour – Board also satisfied that, after sale of flour mill, there was no nexus between normal and habitual activities of employer and operation of the flour mill by subsequent owners sufficient to justify continued Federal jurisdiction over employer's labour relations – Board satisfied that impugned actions of trade union occurred subsequent to change in activities and operation of employer – Board concludes that application ought to be determined pursuant to The Trade Union Act.

The Trade Union Act, s. 37.2

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: On April 11, 2011, the Applicant in these proceedings, K.L.S., filed an application with the Saskatchewan Labour Relations Board (the "Board") alleging that the Grain and General Services Union (the "Union") failed to fairly represent her in relations to grievance proceedings involving her former employer, Dawn Food Products (Canada) Ltd. (the "Employer"). However, being aware that the most recent certification Order involving the Union and the Employer had been issued by the Canada Industrial Relations Board, before accepting jurisdiction over the Applicant's application, we indicated to the parties our desire to hear evidence as to the operations and activities of the

Employer and argument from the parties on the issue of whether or not its labour relations now falls within Federal or Provincial jurisdiction. In the case of the later, this Board may well have jurisdiction to hear the Applicant's application (depending upon when the activities and operations of the Employer changed relative to the impugned conduct of the Union). In the event of the former, the Applicant has filed her application with the wrong tribunal; as her application must be filed with the Canada Industrial Relations Board.

[2] In its Reply, the Union did not dispute that this Board now has jurisdiction over the labour relations of the Employer. In fact, the Union filed its own application with the Board; an application asking the Board to summarily dismiss the Applicant's application on a variety of grounds (for reasons other than jurisdiction). The Employer took no position with respect to whether or not this Board has jurisdiction to hear the Applicant's application.

[3] The parties appeared before the Board on April 12, 2012. To facilitate the Board's determination as to jurisdiction, the Employer called Mr. Wilf McDougall, the Director of Operations for Parrish & Heimbecker in Saskatoon[1]. Mr. McDougall previously held similar positions with both the Employer and an intervening owner of the Saskatoon flour mill; the work place where the Applicant had been employed.

[4] At the conclusion of the hearing, the Board orally ruled that the operations and activities of the Employer changed effective February 1, 2007 and that, because of the change in the operations and activities of the Employer, the labour relations between the Employer and the Union now falls within the exclusive jurisdiction of the Provincial government. Furthermore, we were also satisfied that the events giving rise to the Applicant's allegations against the Union occurred after February 1, 2007. As such, we were satisfied that the Applicant's application falls within the jurisdiction of *The Trade Union Act*, R.S.S. 1978, c.T-17. These Reasons for Decision are limited solely to these determinations.

Facts:

[5] While the evidence in these proceedings was not in dispute, the corporate and labour relations history of the subject work place is a little complicated.

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[1] The Employer's cooperation in doing so expedited these proceedings considerably and is noted by the Board.

[6] The Applicant was a member of a unit of employees represented by the Union when she worked at a flour mill located at 75 – 33rd Street in Saskatoon, Saskatchewan (herein referred to as the "Saskatoon flour mill"). The Saskatoon flour mill is located on a fifteen (15) acre parcel of land in Saskatoon and includes buildings, machinery and improvements for the handling, storage and milling into flour of a variety of grains, as well as for the storage, mixing and packaging of a variety of wet and dry products intended for human consumption (wherein at least one of the ingredients is flour). There were also facilities at this location for the handling, storage and cleaning of certain specialty crops for export. During the period of time relevant to these proceedings, the Applicant worked in the dry mixing side of the operations.

[7] The Union has been certified to represent various employees working at the Saskatoon flour mill. However, the Union's representational rights have, over the years, been granted pursuant to both Federal and Provincial statutes. For example, pursuant to an Order[2] of this Board dated June 21, 1996, the Union was certified to represent a unit of employees working at the Saskatoon flour mill working in the "*Wet Goods Plant*". On the other hand, the Union has also been certified by the Canadian Industrial Relations Board to represent various other employees working at this facility. At some point in time, a decision was made to consolidate all of the Union's certification Orders under Federal jurisdiction. As a result, the most recent certification Order, for the unit of employees of which the Applicant was a member, was issued by the Canada Industrial Relations Board.

[8] The Employer is the Canadian subsidiary of a large national bakery supplier selling a variety of baking products in both the retail and wholesale markets in Canada. In 2002, the Saskatchewan Wheat Pool (as it was known then) agreed to sell substantially all the assets of CSP Foods[3] to the Employer. The assets of CSP Foods included the Saskatoon flour mill and all associated operations on that property (including the operations where the Applicant was employed), together with a smaller flour mill located in the city of Humboldt that catered to the processing of organic grains.

[9] As indicated, the property acquired by the Employer in 2002 upon which the Saskatoon flour mill was located, including various ancillary components such as an office building, the dry and wet mixing machinery, and warehousing and docking facilities. Mr.

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2 See: LRB File No. 025-96.

3 At the time, CSP Foods was a wholly owned division of the Saskatchewan Wheat Pool.

McDougall testified that when the Employer took over the operations of CSP Foods, its long term plan was to sell many of the pieces of the company it had purchased that were outside its core business interests. The primary interest of the Employer in the assets of CSP Foods was in its dry and wet mixing operations that were being used or could be adapted for use in the preparation of a variety of dry mixes (such as cake mixes, etc.) and wet mixes (prepared icings, etc.) used in baking. For example, in 2004, the Employer subdivided and sold a portion of the property upon which the office building was located.

[10] In February of 2007, the Employer sold the Saskatoon flour mill, including the property upon which the mill was located (excluding the office building which had been previously sold) to Dover Industries Limited ("Dover"). The sale to Dover included all of the machinery and equipment located on the property, excluding the dry and wet mix equipment. Mr. McDougall testified that the Employer retained ownership of this equipment and made arrangements with Dover for the equipment to remain on the property for a period of time after the sale. The Employer also entered into contractual arrangements with Dover to purchase flour and to have Dover mix that flour together with other ingredients (dry mix ingredients) purchased by the Employer to make various bakery products. These products were made to the Employer's specifications, were delivered to the Employer pursuant to a supply agreement, and were subsequently sold by the Employer through its retail and wholesale operations, which until recently were also located in Saskatoon but operated out of another location.

[11] Concomitant with the sale of the Saskatoon flour mill to Dover in 2007, the Employer also ceased operating the Humboldt flour mill. Mr. McDougall testified that the Employer had no other milling operations in Canada and little interest in continuing to operate the Humboldt flour mill. Rather, the Employer intended to sell the Humboldt flour mill to Dover in 2007; however, contamination was discovered on this site during due diligent for that sale and, as a result, it was removed from the group of assets transferred from the Employer to Dover. Mr. McDougall testified that Dover leased the Humboldt flour mill from the Employer for a period of time after February of 2007; however, the facility has since closed and been decommissioned.

[12] In May of 2009, Dover sold its interest in the Saskatoon flour mill to Parrish and Heimbecker Grain Company ("P&H").

[13] Until recently, approximately five to six percent of the flour milling capacity of the Saskatoon flour mill was being used for the production of baking supplies for the Employer. Mr. McDougall testified that the Employer recently terminated its dry mixing and packaging contract with P&H and thus the Employer was no longer obtaining flour from the Saskatoon flour mill. Mr. McDougall indicated that, prior to the termination of the Employer's contract, the Saskatoon flour mill was operating at full capacity, which meant the mill was operating seven (7) days a week. In response to the loss of this contract, P&H was seeking a new customer for the flour that it previously sold to the Employer and, in the interim, it intended to reduce production. Mr. McDougall testified that, in all other respects, the operation of the Saskatoon flour mill was unaffected by the termination of the contractual relations with the Employer other than the Employer's dry mixing equipment were removed from the property and P&H had laid off approximately twenty-seven (27) employees who had been operating this equipment. Mr. McDougall testified that the Employer's dry mixing equipment was never integrated into any of the other machinery associated with the milling of flour and that the removal of this equipment did not impede or affect the operation of the flour mill.

[14] The Applicant was a long term employee of the Saskatoon flour mill and became an employee of the Employer when it acquired the assets of CSP Foods in 2002. Mr. McDougall testified that the Applicant's position was that of Production and Inventory Supervisor (Dry Goods) and that her duties and responsibilities would have been to source and purchase the ingredients utilized in the dry mixing of the baking products prepared at the Saskatoon flour mill. Mr. McDougall testified that, when Dover took over operations of the Saskatoon flour mill from the Employer in 2007, it reviewed the Applicant's position and concluded that the duties and responsibilities of this position belonged with the Employer as they supported the mixing of baking products; an operation/function that remained with the Employer and was not acquired by Dover pursuant to the sale agreement between those parties.

[15] Finally, counsel on behalf of the Applicant confirmed that the impugned conduct of the Union that is the subject matter of the Applicant's application occurred subsequent to February 1, 2007.

Relevant Statutory Provisions:

[16] The relevant provision of *The Trade Union Act* is as follows:

> *37.2 Unless the board orders otherwise, if collective bargaining relating to a business is governed by the laws of Canada, and the business or part of its becomes subject to the laws of Saskatchewan, section 37 applies, with any necessary modification, and the person owning or acquiring the business or part of it is bound by any collective bargaining agreement in force when the business becomes subject to the laws of Saskatchewan.*

Analysis and Conclusion:

[17] From time to time, Labour Boards across Canada are called up to determine whether or not the labour relations between particular groups or units of employees and their respective employers fall within Federal or Provincial jurisdiction. In *Northern Telecom Canada Ltd. v. Communications Workers of Canada,* [1980] 1 S.C.R. 115, 98 D.L.R. (3rd) 1, the Supreme Court of Canada set forth the basic constitutional principles pertinent to such determinations as follows:

> *The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's Canadian Constitutional Law (4th ed., 1975) at p. 363:*
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> > *In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise ...*
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> *In an elaboration of the foregoing, Mr. Justice Beetz in Construction Montcalm Inc. v. Minimum Wage Commission [[1979] 1 S.C.R. 754] set out certain principles which I venture to summarize:*
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> > *(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.*
> >
> > *(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.*
> >
> > *(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.*
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> > *(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.*
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> > *(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.*

> *(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.*

A recent decision of the British Columbia Labour Relations Board, Arrow Transfer Co. Ltd. [[1974] 1 Can. L.R.B.R. 29], provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the Chairman of the Board phrased it, at pp. 34-5:

> *In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.*

[18] In *United Food and Commercial Workers, Local 1400 v. Canadian Corps of Commissionaires (North Saskatchewan) Inc.*, 2012 CanLII 8531 (Sk LRB), LRB File No. 114-11, this Board described the procedure for applying the *Constitutional* principles identified by the Supreme Court of Canada in *Northern Telecom, supra,* in determining whether Federal or Provincial jurisdiction applies to the labour relations between an employer and a particular group of employees as follows:

> ***[37]*** *Generally speaking, the determination as to which constitutional authority prevails is arrived at by following a four (4) stage enquiry intended to elicit certain facts relevant to the determination (i.e.: the "Constitutional facts" described by the Supreme Court in Northern Telecom, supra) and to provide a road map to the analysis of those facts:*
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> *1. The identification of the area of exclusive Federal jurisdiction that gives rise to the potential that labour relations for a particular group of employees may fall under Federal authority. Because provincial regulatory authority over labour relations is the general rule, the specific area of Federal constitutional competence must be precisely understood and narrowly applied.*
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> *2. The identification and a consideration of the normal and habitual operations of the employer of the subject group of employees as a whole or, in the alternative, the subsidiary of the employer's operations within which the subject group of employees is located if that subsidiary is identifiable and severable from the larger operations of the employer. The question of whether the labour relations of an employer or identifiable subsidiary thereof, as the case may be, falls under Federal or Provincial jurisdiction is based on the normal or habitual activities of that business as a going concern without regard to exceptional or casual factors. See: Quebec (Minimum Wage Commission) v. Construction Montcalm Inc., [1979] 1 S.C.R. 754, 93 D.L.R. (3rd) 641.*

> *3. A function analysis of the operational connection or nexus between the work performed by the employees of the employer or an identifiable subsidiary operation thereof, as the case may be, and the core area of Federal competence. It is trite law to say that provincial regulatory authority over labour relations is the general rule and Federal regulatory authority is the exception. However, Federal constitutional jurisdiction over a given subject (such as "aeronautics") can displace the application of provincial laws relating to labour relations (to avoid the patchwork Provincial regulation of an area of national interest) but only if a functional analysis of the operations of an entity indicates that it is a Federal undertaking or work or an essential, vital or integral part of a Federal undertaking or work. See: Construction Montcalm Inc., supra. See also: Four B. Manufacturing Ltd. v. United Garment Works of America, [1980] 1 S.C.R. 1031, 1979 CanLII 11 (SCC). To be "essential, vital or integral", something more than a physical connection and/or a mutually beneficial commercial relationship must exist. To be "essential, vital or integral", there must be functional integration such that the effective performance of the core Federal undertaking's business must be dependent upon the functions performed by the employer or the identifiable subsidiary thereof. See: Letter Carriers' Union of Canada v. Canadian Union of Postal Workers, [1975] S.C.R. 178, 1973 CanLII 183 (SCC). See also: United Transportation Union v. Central Western Railway Corp. [1990] 3 S.C.R. 1112, 1990 CanLII 30 (SCC).*
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> *4. If the functional analysis described in step #3 is inconclusive, then the inquiry turns to whether or not the Provincial regulation (in this case, the regulation of labour relations) would impair the core of the Federal constitutional competence (in this case, the regulation of "aeronautics"). See: NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, et. al., [2010] 2 S.C.R. 696, 2010 SCC 45 (CanLII).*

[19] Federal jurisdiction over the labour relations of the Employer arose prior to 2007 because of the Employer's involvement in the "milling of flour". Section 76 of the *Canada Wheat Board Act*, R.S.C. 1985, c.C-24, provides as follows:

> *76. For greater certainty, but not so as to restrict the generality of any declaration in the Canada Grain Act that any elevator is a work for the greater advantage of Canada, it is hereby declared that all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore constructed or hereafter to be constructed, are and each of them is hereby declared to be works or a work for the general advantage of Canada and, without limiting the generality of the foregoing, every mill or warehouse mentioned or described in the schedule is a work for the general advantage of Canada.*

[20] We take notice of the fact that both the Saskatoon and Humboldt flour mills were at one time listed in the schedule to the *Canada Wheat Board Act, supra*. As such, the operation of these two (2) flour mills are deemed to be Federal works for the general advantage of Canada. Therefore, the labour relations between the operators of these facilities and the

employees working thereat falls within exclusive Federal jurisdiction; at least with respect to those employees engaged in the milling of flour (and potentially other employees depending on the circumstances).

[21] However, having considered the evidence, we are satisfied that the operations and activities of the Employer changed in 2007. Firstly, the Employer sold the Saskatoon flour mill to Dover effective February 1, 2007 and with that action ceased being directly involved in the operation of the Saskatoon flour mill and/or the milling of flour generally in Saskatoon.

[22] Secondly, with respect to the Humboldt flour mill, we are satisfied that the Employer's direct involvement in the milling of flour at this facility also ceased on or about February 1, 2007. While the Employer retained ownership of this facility, it did not continue to operate this facility. In any event, the employees of this facility did not fall within the scope of the Union's bargaining unit (of which the Applicant was a member). Even if the Employer had continued to operate this facility after February 1, 2007, the milling of flour by the Employer at the Humboldt flour mill would not justify the conclusion that the unit of employees of which the Applicant was a member ought to fall within Federal jurisdiction as these were two (2) separate operations of the Employer, with only the Saskatoon facility being certified. Furthermore, there was no evidence that the Employer's dry (or wet) mixing operations in Saskatoon had any involvement or relationship with the Humboldt flour mill; let alone a relationship of the intensity and functional dependency necessary to support the conclusion that the labour relations of the unit of employees, of which the Applicant was a member, ought to fall within Federal jurisdiction.

[23] Finally, in our opinion, the residual contractual relations that the Employer maintained with Dover and then P&H were not "*essential, vital or integral*" to the continued operation of the Saskatoon flour mill by its subsequent owners. The evidence clearly establishes that the involvement of the Employer in these facilities was that of a customer purchasing milled flour, that of a tenant leasing space, and that of a principle purchasing mixing and packaging services from an independent contractor. None of these arrangements created a sufficient nexus between the normal and habitual activities of the Employer and the operation of the Saskatoon flour mill to satisfy the requirements for maintaining Federal jurisdiction over the labour relations of the Employer. We saw no evidence that the operation of the Saskatoon flour mill was in any way dependent upon the actions of the Employer. Furthermore, the contractual relations between the Employer and the subsequent owners of the Saskatoon flour mill were not

in any way essential, vital or integral to the subsequent owners' ability to comply with applicable Federal regulations. Simply put, the uninterrupted and continued operation of the Saskatoon flour mill following the recent termination of the Employer's contractual relations is indicative of the functional separation that occurred when the Employer sold this facility to Dover in 2007.

[24] Having considered the evidence, we are satisfied that, effective February 1, 2007, the Employer ceased operating the Saskatoon flour mill. After February 1, 2007, no members of the unit of employees of which the Applicant was a member were involved in the "milling of flour". Furthermore, we saw no evidence that the normal or habitual activities of any employees of the Employer, or alternatively the group of employees that the Applicant would have been a member (i.e.: being the employees of the Employer involving in dry mixing of baking products in Saskatoon), were essential, vital or integral to the flour milling activities of the subsequent owners of the Saskatoon flour mill. Simply put, with the sale of the Saskatoon flour mill to Dover in 2007, the Employer's involvement in the milling of flour ceased.

[25] For the foregoing reasons, we were satisfied that the operations and activities of the Employer changed effective February 1, 2007 and that, because of this change in the operations and activities of the Employer, the labour relations between the Employer and the Union now fall within the exclusive jurisdiction of the Provincial government. Furthermore, we were also satisfied that the events giving rise to the Applicant's allegations against the Union occurred after February 1, 2007. As such, we are satisfied that the Applicant's application falls within the jurisdiction of *The Trade Union Act*, R.S.S. 1978, c.T-17.

[26] Citing reasons of privacy and the anticipation that subsequent proceedings before this Board would involve evidence containing personal information, the Applicant asked this Board to anonymise our Reasons for Decision. Having considered the Applicant's request, we have elected to replace the Applicant's name with the initials "K.L.S." in these Reasons for Decision.

[27] To aid the Board in understanding the facts relevant to our determination, the Employer tendered as evidence, a document entitled "DAWN FOOD PRODUCTS (CANADA) LTD. – Co-Packing Agreement". This document was accepted and marked as Exhibit "R-2" in these proceedings. The Employer noted, however, that this document contained proprietary information, including the formulary for the preparation of certain bakery products; information

that the Employer considered to be trade secrets. The Employer asked that this document be sealed by the Board following the conclusion of these proceedings to protect the proprietary information contained therein. In our opinion, the Employer's request, subject to certain exceptions, is reasonable and appropriate. An Order sealing this document shall be issued concomitant with these Reasons for Decision.

DATED at Regina, Saskatchewan, this **25th** day of **April, 2012.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson