

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SOBEYS WEST INC.

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

(the "UFCW" or "1518")

-and-

BAKERY, CONFECTIONERY, TOBACCO WORKERS AND
GRAIN MILLERS INTERNATIONAL UNION,
LOCAL NO. 468

(the "BCTGM")

PANEL: James Carwana, Vice-Chair

APPEARANCES: Andrea Zwack, for the Employer
Chris Buchanan, for the UFCW
Sandra Banister, Q.C. and Jonathan
Hanvelt, for the BCTGM

CASE NO.: 67597

DATE OF DECISION: February 13, 2015

DECISION OF THE BOARD

I. INTRODUCTION

1 This is an application (the "Application") by the UFCW pursuant to Sections 133 and 139 of the *Labour Relations Code* (the "Code"). It involves adjudicating claims relating to work jurisdiction under the UFCW Collective Agreement with the Employer. These matters come before the Board as a result of the tripartite nature of the dispute which includes the BCTGM whose members are also employed by the Employer.

2 The UFCW claims it has exclusive jurisdiction over certain work duties described as the "Disputed Duties". It says that the BCTGM members are performing such duties in violation of the UFCW Collective Agreement. The UFCW makes the following requests in relation to its Application:

The UFCW requests that the Board declare that the UFCW has exclusive jurisdiction over certain duties performed in relation to the Employer's in-store bakery operations including, packaging, labelling, dating and wrapping of baked goods, as well as the "freezer-pull" of frozen goods (the "Disputed Duties"). Further, the UFCW seeks an order that the Employer cease and desist allowing non-bargaining unit members to perform the Disputed Duties. The UFCW also seeks an order compensating it and its members for the breach of the collective agreement through the unlawful assignment of the Disputed Duties.

3 After receiving submissions from the parties, a conference call was held with counsel for the parties. Following the conference call, I wrote to the parties as follows:

This is further to the previous conference call with counsel for the parties. During the conference call, there was disagreement between counsel in terms of the sufficiency of the UFCW's application and the manner of proceeding. In particular, the Respondents (BCTGM and the Employer) take the position that the UFCW's application ought to be dismissed or, in the alternative, sufficient particulars be provided.

I have reviewed again the written submissions of the parties. I have determined that it would be helpful to have oral argument concerning the matters raised in the submissions and during the conference call. In this respect, I would anticipate having oral submissions relating to the presumptive legal framework to be used in analyzing this matter with reference to the applicable legal authorities. I would anticipate the Respondents to set out what they assert the UFCW needs to show in order to make its case and how what has been provided does not do so. In the alternative, I would anticipate the Respondents to indicate what particulars would be required from the UFCW. Similarly, I would anticipate the UFCW to set out what it asserts it needs to show to

make its case and demonstrate what has been provided does so. In addition, I would anticipate the UFCW responding to the Respondents' position regarding particulars.

4 On December 15, 2014, the parties attended at the Board for the oral submissions referred to in the above correspondence.

5 II. BACKGROUND

5 In its Application, the UFCW references past practice as well as certain provisions of its Collective Agreement with the Employer in arguing that it has exclusive jurisdiction over the Disputed Duties. However, at the attendance on December 15, 2014, counsel for the UFCW indicated that the UFCW was not relying on past practice to determine exclusivity and stated that this "case rests on the interpretation of the collective agreement".

6 In its written submissions, the UFCW quotes from Section 4.01 and Section 6.02 of the Collective Agreement. These provisions provide as follows:

4.01 Subject to exclusions in Section 1 of this Agreement, all work in the handling and selling of merchandise in the retail stores of the Employer shall be performed only by employees of the Employer who are in the Contract Area and who are members of the United Food and Commercial Workers Union, Local 1518, with the following exceptions...

6.02 Clerk Cashiers

-duties restricted to following:

* * *

F. Bakery Counter Duties

A Bakery operation succeeds where the employees work together to produce and display bakery products in as efficient a manner as possible, given this has to be a team concept.

Generally speaking, the items listed on the attached are performed by the Bakery Counter employees. Obviously, if the counter person is not available, another person must fill in, i.e., answering the telephone, dealing with a customer, filling an empty case or shelf, etc. Bakery production employees do perform these functions on an "as needed" basis. The same is true when a Baker or Decorator is not available to "write" a name on a cake, slice bread or overwrap product--the work is done by the other classification.

It should also be noted that Bakery Management may perform functions on the sales floor to assist in the merchandising of Bakery Department products.

Overall, the Bakers make the product and the Bakery Counter employees properly display the products and assist the customers as part of that function.

Duties of Bakery Counter Person to include:

1. Answering telephone, taking telephone orders and answering inquiries, etc., co-ordinating orders and timing upon consultation with Bakers.
2. Waiting on customers and regular customer-service type functions.
3. Pricing and labeling (where required) and filling the items for cream case, lay down ditch, bins, wall displays, racks and display tables (for production and/or purchased goods).
4. Putting up and taking down ads each week.
5. Reducing and/or repackaging product each evening and/or morning as required.
6. Cleaning of cases, tables, counters, displays and trays, etc. pertaining to bakery sales.
7. Wrapping and slicing of Bakery products to facilitate customer service within the Bakery department.
8. Obtaining supplies for Bakery Sales area.

7 With respect to bakery counter personnel, the UFCW's written submission states as follows:

What the collective agreement provides is that when a bakery counter person is otherwise engaged in bakery counter duties, other employees in the department may help out by performing certain duties. This "as needed basis" is meant to supplement the bakery counter personnel and not to replace them.

8 In its written submission, the UFCW has not provided specific instances of when members of the BCTGM have performed the Disputed Duties nor have specific instances been provided of when bakery counter personnel have been replaced by members of the BCTGM.

III. POSITIONS OF THE PARTIES

THE EMPLOYER

9 The Employer says the law is clear that express language is required to establish exclusive jurisdiction and that "1518 cannot establish exclusive jurisdiction based on the language of the collective agreement". It is the Employer's position that the language of the Collective Agreement does not prevent assignment of the Disputed Duties to the BCTGM members. The Employer says the Collective Agreement provides for the Disputed Duties to be shared and "assigned and performed in a manner which promotes efficiency and a team approach within the Bakery".

10 The Employer references the opening wording of Section 6.02F. It says this section provides "that employees need to 'work together to produce and display bakery products in as efficient a manner as possible' and that it must be a 'team concept'". The section goes on to state that the duties set out are only "generally speaking" performed by bakery counter staff and provides for others to be able to perform the bakery duties as well. With respect to some specific duties mentioned in the Collective Agreement, the Employer notes the bakery counter personnel have a "limitation on wrapping and slicing of bakery products 'to facilitate customer service'". It says this "echoes the language of the BCTGM collective agreement, which states in Article 23(8) that 'when Union [BCTGM] members are not available to slice bread, the counter employees may slice and wrap bread to facilitate customer service within the bakery department'".

11 Section 4.01 of the UFCW Collective Agreement is "subject to the exclusions in Section 1" of the Collective Agreement which deals with other bargaining units. The Employer notes that the BCTGM certifications involve units which include employees involved in the preparation for sale of bakery products as well as production. On its face, the preparation for sale of bakery products would involve duties such as wrapping and packaging which are parts of the Disputed Duties.

12 In terms of the Application, the Employer argues that there is a lack of sufficient information which establishes the "existence, nature and scope of the alleged dispute". According to the Employer, the UFCW must provide information about "the occasions upon which the Employer has allegedly assigned work inappropriately to BCTGM". The Employer says that "all we have is a bare assertion from 1518 that the Employer is making improper assignments of work", and particulars have not been provided of those allegedly improper assignments "such that it can be determined whether the work in question was ever in fact assigned to the BCTGM, much less that such an assignment was potentially improper".

THE BCTGM

13 The BCTGM argues that the UFCW does not have exclusive jurisdiction over the Disputed Duties. It references its own collective agreement with the Employer as well as the Collective Agreement of the UFCW. It says that such "collective agreements

create the framework for a collaborative effort between the BCTGM and Local 1518 members".

14 The BCTGM further argues that the Collective Agreement of the UFCW itself refutes any suggestion of exclusive jurisdiction. The BCTGM notes the same provisions of the UFCW Collective Agreement as the Employer to demonstrate a lack of exclusive jurisdiction. It says the parties are "to cooperate in the bakery" and that is why the UFCW Collective Agreement references the bakery operation as being one where "the employees work together" and "in as efficient a manner as possible". The duties which are referenced in Section 6.02F of the UFCW Collective Agreement are only "generally speaking" performed by bakery counter employees.

15 The BCTGM also references Section 7, item F of the UFCW Collective Agreement. That provision deals with in-store bakeries where UFCW members perform bakery production duties as well as bakery counter duties. It provides that "the wrapping, boxing and slicing of product may be performed either by the Bakery Production Staff or the Clerks employed at the Bakery sales counter". The BCTGM further states that this section indicates production staff are to "have primary rights to wrapping and packaging" and that the UFCW is not taking the position that "where the BCTGM is involved, this primary responsibility inexplicably transfers to the counter clerks".

16 The BCTGM agrees with the Employer that the Application ought to be dismissed. It relies on Section 133(4) of the Code and says that the entire argument of the UFCW claiming exclusive jurisdiction "rests on inaccurate readings of the collective agreements" as well as "bald assertions that are completely without merit". In support of its position it cites the decision in *Westfair Foods Ltd.*, BCLRB No. B27/2005 and "the interests of expedient and efficient decision-making" (para. 29).

THE UFCW

17 The UFCW argues that this "case rests on the interpretation of the collective agreement". The UFCW disagrees with the interpretation of the Collective Agreement put forward by the Employer and the BCTGM (the "Respondents"). It cites Section 4.01 and Section 6.02F in support of its position and argues these sections establish exclusive jurisdiction. The UFCW also relies on the cases of *Coast 2000 Terminals Ltd. and Teamsters Local Union No. 31 (Snow Removal Grievance)*, Ministry No. A-089/09, [2009] B.C.C.A.A.A. No. 120 (McPhillips) and *Donohue Forest Products Inc.*, BCLRB No. B287/2001 ("*Donohue Forest Products*") and says that job descriptions can be used to establish work jurisdiction. In this case, the UFCW says that job description language is set out in Section 6.02F of the Collective Agreement.

18 The UFCW says that BCTGM members can perform the Disputed Duties in some circumstances, but claims that it nevertheless has exclusive jurisdiction over the Disputed Duties.

19 In terms of the sufficiency of its Application, the UFCW says that the Board must accept what has been asserted by the UFCW, including the interpretation of the Collective Agreement it asserts, in examining whether there is a *prima facie* case. The UFCW says that it is clear the Employer is assigning the Disputed Duties to both members of the BCTGM and the UFCW. Although the Employer may say it is doing so on an as-needed basis, the UFCW says doing it at all establishes a *prima facie* case. The UFCW says that it is not relying on past practice as an aid to interpretation or to establish exclusive jurisdiction and therefore it does not need to set out any such matters.

20 With respect to the specific information the Employer has said is lacking, the UFCW takes the position that the occasions on which the Employer is alleged to have improperly assigned any or all of the Disputed Duties to members of the BCTGM is only relevant to remedy and the proceedings can be bifurcated.

REPLY

21 The Employer says the onus is on the UFCW to establish exclusive jurisdiction and the Collective Agreement does not do so on its face. The interpretation of the Collective Agreement is a matter of law and the UFCW's assertion as to its meaning need not be accepted. The provisions of the Collective Agreement need to be read together and do not demonstrate exclusive jurisdiction.

22 The Employer says its position is that the duties have always been shared and the UFCW must respond to that. Otherwise, if the UFCW says nothing in that regard then it accepts the Employer's position on the sharing of duties. Further, the Board can dismiss the Application on the basis that no breach has occurred because the UFCW has not alleged any particular occasion when and where a breach has occurred.

23 The BCTGM says that the Collective Agreement cannot be read to grant exclusive jurisdiction. As with the Employer, the BCTGM asserts that the Collective Agreement provisions need to be read together, the interpretation of the Collective Agreement is a matter of law, and the Board need not accept the UFCW's interpretation simply because the UFCW makes a legal assertion. The BCTGM also says that there is extensive evidence of past practice in support of its position relating to the various duties at issue.

IV. ANALYSIS AND DECISION

24 I will proceed with my analysis of this matter by first examining the wording of the Collective Agreement. I will subsequently review the question of whether the allegations in the Application are sufficient to establish a violation of the Collective Agreement.

A. The Collective Agreement

25 As previously noted, the UFCW indicated at the attendance before the Board on December 15, 2014, that it is relying on its interpretation of the Collective Agreement to establish exclusive work jurisdiction and it is not relying on past practice in that regard. I agree with the Respondents that the interpretation of the Collective Agreement here is a matter of law for which the legal assertions of the UFCW need not be accepted.

26 In interpreting the Collective Agreement, I have examined the agreement as a whole with a view to determining the intention of the parties. With respect to the law regarding what is required to establish exclusive jurisdiction, in *Donohue Forest Products*, the Board quoted from *British Columbia Hydro and Power Authority*, BCLRB No. B64/98 as follows:

Exclusive jurisdiction to work will not be inferred absent express language in the collective agreement: *Board of School Trustees of School District No. 43 (Coquitlam)*, BCLRB No. B62/93. *In addition, work that is performed by both bargaining unit and non-bargaining unit employees will defeat a claim that the work is bargaining unit work because it is not exclusively performed by the bargaining unit. B.C. Hydro, January 31, 1986, unreported (Hope). (Donohue Forest Products at para. 57, emphasis in original)*

27 A review of the Collective Agreement reveals language contrary to the concept of exclusive jurisdiction and a number of aspects which indicate there is to be a sharing of duties in the bakery:

- the Collective Agreement speaks of the bakery operation being a "team concept";
- the parties have recognized the need for the bakery to operate "in as efficient a manner as possible";
- the items listed for bakery counter employees are only "generally speaking" performed by such individuals;
- the duties need not be performed by bakery counter staff;
- others can "obviously" perform the duties when bakery counter personnel are not available;
- bakery production employees "do perform these functions on an 'as needed' basis";
- bakery management personnel, which can include members of the BCTGM, may "perform functions on the sales floor to assist in the merchandising of Bakery Department products";

- in item 7 of the duties in Section 6.02F, the reference to the "wrapping and slicing of Bakery products" by bakery counter personnel carries the additional language of being to "facilitate customer service within the Bakery Department"; and
- Section 4.01 is subject to the exclusion of employees under separate certificate, which for the BCTGM are those employees involved in the production of and preparation for sale of the products in the bakery.

28 Examining the UFCW Collective Agreement as a whole, I agree with the BCTGM that the Collective Agreement evidences an "agreement among the parties to cooperate in the bakery". The intention is to have the operation run "in as efficient a manner as possible", recognizing the "team concept". The use of such terms indicates an intention different than an intention to provide the UFCW with exclusive jurisdiction over the duties claimed in the bakery or to create a workplace that would be susceptible to ongoing jurisdictional disputes about who can perform what duties.

29 The UFCW Collective Agreement does not provide for the Disputed Duties to be exclusively performed by UFCW members. It does not prevent BCTGM members from performing the Disputed Duties and, in fact, the UFCW Collective Agreement allows them to perform such duties. There is not express language in the UFCW Collective Agreement establishing exclusive jurisdiction.

30 The UFCW has cited the decision in *Donohue Forest Products* for the proposition that, absent express language providing for exclusive jurisdiction, exclusive jurisdiction can also arise by "necessary implication arising from" other express language in the collective agreement (at para. 81). The UFCW argues that the Bakery Counter Clerk job classification set out in Section 6 is similar to a job description and provides such language from which exclusive jurisdiction can be implied. However, the wording of Section 6.02F specifically provides that the work is to be performed by both bargaining unit and non-bargaining unit employees and the language indicates the work "is not exclusively performed by the bargaining unit" (*Donohue Forest Products* at para. 57). It is not express language evidencing an underlying intention to establish exclusive jurisdiction, but rather indicates an intention to share the work. The necessary implication is not exclusive jurisdiction as asserted by the UFCW.

31 One of the specific duties for which the UFCW claims exclusive jurisdiction is wrapping. Section 7, item F specifically provides for the sharing of wrapping work as well as language about the bakery counter clerks not performing the duties set out there "to the extent that Bakery Production Workers will be replaced". Although Section 7, item F relates to bakeries where the UFCW members work in production, the UFCW is not taking the position, as the BCTGM argues, that "where the BCTGM is involved, this primary responsibility inexplicably transfers to the counter clerks".

32 With respect to Section 4.01, that provision is subject to the exclusions in Section 1 of the Collective Agreement. The exclusions include "employees under separate certificate" granted to the BCTGM. That certificate references employees involved in the "preparation for sale" of bakery products as well as "production" work. In my view,

this exception covers a wide range of duties, like wrapping and packaging, which entail the handling of merchandise. Furthermore, Section 4.01 is to be read together with the other sections of the UFCW Collective Agreement which, taken as a whole, evidence a sharing of duties and an overall "agreement among the parties to cooperate in the bakery" and have the operation run "in as efficient a manner as possible".

33 The parties here have been involved in bargaining for many years. The case law is clear about what is required to establish exclusive jurisdiction over work. If the intention was to create exclusive jurisdiction, they could have said so. The parties would not have described the duties for union members in the UFCW Collective Agreement as being "generally speaking" performed by such individuals, nor would they have made provision for others to "obviously" perform such duties or recognized that the bakery operation "has to be a team concept". In my view, the Collective Agreement does not contain the express language required by the jurisprudence to establish exclusive jurisdiction to perform the Disputed Duties, and does not provide a basis for "an order that the Employer cease and desist allowing non-bargaining unit members to perform the Disputed Duties", as sought by the UFCW.

34 I find that the UFCW Collective Agreement does not provide for the UFCW to have exclusive jurisdiction over the Disputed Duties as alleged by the UFCW. As such, I dismiss the Application for a declaration that the UFCW has exclusive jurisdiction to perform the Disputed Duties.

B. The Allegations in the Application

35 If I did not dismiss the Application on the foregoing ground, I would dismiss it on the ground that the allegations in the Application are insufficient to establish a violation of the Collective Agreement in the circumstances.

36 Section 133(4) of the Code provides as follows:

If in the board's opinion an application or complaint is without merit, it may reject the application or complaint at any time.

37 Rule 2(2)(f) of the Labour Relations Board's Rules requires that an application shall contain:

...an outline of the facts and circumstances upon which the applicant intends to rely, including when and where the relevant facts occurred and, where known, by whom any actions alleged were taken...

38 In *Farmer Construction Ltd. et al.*, BCLRB No. B217/2004, 108 C.L.R.B.R. (2d) 161, the Board's approach regarding Section 133(4) was described as follows (at para. 11):

The Board will not accept bald assertions or basic allegations unaccompanied by relevant particulars. There must be information and details such that the Board would be satisfied that

the claim is made out in the absence of contrary evidence. As the Board found in *Re: Fraser* BCLRB No.404/2000[:]

Applicants are required by the Labour Relations Board Rules to outline the particulars, that is, the facts and circumstances upon which they rely: Rule 2(2)(f). These rules are not particularly onerous, but neither are they simply technical requirements (*Mark D. Bridge*, BCLRB No. B227/99). An applicant must set out its allegations in such a way so that a respondent knows the case it has to meet. This requirement is necessary in order to ensure that the parties receive a fair hearing. ... As noted in *Kamloops Forest Products Ltd.*, BCLRB No. B379/2000:

Assertions based on speculation, conjecture or without any particulars will not provide a sufficient basis upon which to proceed to a hearing. It is not appropriate to proceed to a hearing for the purpose of permitting a party the opportunity of establishing its case or testing its suspicions by way of cross-examination: see *Status Electrical Corporation*, BCLRB No. B378/98.

In keeping with the Board's requirement set out in Rules 2(2) and 4(2), that full particulars be provided, the Board has the jurisdiction to dismiss any application or claim that fails to disclose a *prima facie* case or to provide sufficient particulars: see *North Shore Home Support Services Society*, BCLRB No. B366/95 (Leave for Reconsideration of BCLRB No. B307/95) and *Simon Fraser Lodge Inc.*, BCLRB No. B58/99. (paras. 29-30) ...

39 As previously noted, the case before me is based on an alleged violation of the Collective Agreement. In the Summary section of its written submission, the UFCW summarizes its position as follows:

... The Employer by assigning the Disputed Duties to members of the Bakers [BCTGM], except in the limited circumstances permitted in the collective agreement, has violated the collective agreement.

40 In my view, the alleged violation of the Collective Agreement requires a factual matrix in which to adjudicate the matter. This factual matrix must include sufficient details regarding the incident(s) alleged to constitute the breach as set out in Rule

2(2)(f) (e.g., when and where the relevant facts occurred, and what happened). This is particularly so since the UFCW accepts that the Disputed Duties can be assigned to BCTGM members in some circumstances without a violation occurring. I agree with the Respondents that the Application here does not contain sufficient details about the alleged breach of the Collective Agreement and does not comply with Rule 2(2)(f). The deficiencies go to the basis for the Application and, as indicated earlier, if I did not dismiss the Application based on my interpretation of the UFCW Collective Agreement, I would dismiss it under Section 133(4) as without merit.

V. CONCLUSION

41 For the reasons given, the Application is dismissed.

LABOUR RELATIONS BOARD

"JAMES CARWANA"

JAMES CARWANA
VICE-CHAIR