

"Subtle but effective threat" to close store leads to certification of Wal-Mart outlet

The Ontario Labour Relations Board, in *United Steelworkers of America v. Wal-Mart Canada* (February 10, 1997) has ordered the certification of a union to represent employees at a Wal-Mart Windsor location. The union had alleged several violations by Wal-Mart of the *Labour Relations Act* following a 151-43 vote by employees against certification.

The union's organizing drive had initially moved quickly, with 84 members being signed up in 14 days. But then it stalled badly, obtaining only seven more cards over five days. The decline in the union's fortunes coincided with Wal-Mart management's intervention to counter the union in ways that a majority of the Board was to hold unlawful.

A CULTURE OF OPENNESS, A CONTROVERSIAL STAFF MEETING

The Board described an important aspect of Wal-Mart's corporate culture: its commitment to communicating with its employees. Two aspects of this policy are its "open door" rule, designed to encourage employees to speak freely to management without fear of reprisal, and the "sundown rule", intended to ensure that management respond to questions the same day. In support of this commitment, Wal-Mart holds regular information-sharing meetings with its employees at the beginning and end of each day.

At one of these meetings, on April 30, 1996, an anti-union associate was given permission to speak. In the presence of the Store Manager and Regional Manager, she criticized both the employees behind the organizing drive, and the union movement in general which, she claimed, was good only for "people who don't like to work". She assured those present that a union would lead to strife at the store, that Wal-Mart "will not put up with this". Neither manager distanced the company from her remarks and, with the store about to open, pro-union employees were denied permission to respond.

AN UNANSWERED QUESTION

In the days before the vote on May 9, 1996, four senior outside managers circulated among the employees, approaching them to see if they had any questions about the unionization drive. The managers had been told that they could not threaten, intimidate or unduly influence employees, nor could they make promises or lie. They were advised that if anyone asked whether the store might close if the union were to win, they should indicate that it would not be appropriate to answer the question. This was the approach which management adopted, and which it maintained despite being advised by union organizers on at least two occasions that its refusal to answer this question was causing employees to fear for their jobs.

BOARD: THREE VIOLATIONS OF THE ACT

A majority of the Board held that Wal-Mart's conduct of the April 30 meeting constituted a breach of the Act, as the employees present could reasonably have believed that the speaker's stated concerns about her job security should the union succeed were endorsed by the company. While the company had not itself made any threats, its failure to distance itself from her remarks, and its "silencing" of pro-union employees "had a chilling effect on the union's organizing drive".

The four managers circulating among staff to solicit questions in the days leading up to the vote was also cited by the Board as a contravention of the Act. Their actions went far beyond making resources available to answer employees' questions, and became "an extremely effective tactic of intimidation or undue influence", as well as being designed to identify union supporters.

However, the conduct which most concerned the majority of the Board, and persuaded it to certify the union, was Wal-Mart's refusal to respond to questions about a possible store closure. This was a key employee concern, and this fact was known in advance to management. The refusal, in the context of Wal-Mart's openness policy and its solicitation of employee questions before the vote, could only cause most employees to assume that the store would close:

"If you adopt the approach of constantly soliciting questions in [this environment], you have to answer them.... By not reassuring people that the store would not close the managers knew what conclusions the associates would come to. Manipulating the circumstances in this fashion allowed the seed to be planted and grow in the minds of the associates that if they supported the union they might lose their jobs."

The Board majority concluded that Wal-Mart had subtly but effectively transformed the question that employees were to answer in the certification vote from whether they wished to be represented by the union to whether they wished to keep their jobs. It then expressed the view that, given Wal-Mart's actions, the remedy of a second vote was inappropriate. As the union had demonstrated membership evidence of about 44 per cent of the bargaining unit, the majority concluded it had support adequate for collective bargaining, and ordered the union's certification.

IN OUR VIEW

Under Ontario labour legislation, employers have the right to speak out in opposition to a union. However, they are barred from making statements that have a coercive impact on employees. As this case shows, such statements need not be overt, or even be made by management, to run afoul of the Act, where it is reasonable for employees to interpret them as a threat from management.

Although, since the 1995 changes to the *Labour Relations Act*, the Board has had the power to consider remedies for unfair labour practices other than automatic certification, in this case it found that no other remedy, including the taking of another representation vote, would be sufficient. The Board's limited consideration of other remedies comes as a disappointment to those hoping for insight into the Board's thinking on this relatively new provision.

A group of employees opposed to the union have applied to the Board for reconsideration of the certification decision. Wal-Mart has filed an application for judicial review of the Board's decision with the Divisional Court. We will keep readers advised of any developments (see ["Court dismisses Wal-Mart appeal"](#) and ["Ontario "Wal-Mart" Bill now law"](#)).

The Board's policy of holding certification votes very quickly if a union can show it has the support of 40% of employees has resulted in a trend towards less visible union organizing activity. Emond Harnden has compiled a list of what employers can and cannot do during a union organizing drive.

For more information on this subject, please contact [Andrew Tremayne](#) at (613) 563-7660, Extension 236.

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