

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

WESTFAIR FOODS LTD. (SHOP EASY DIVISION)

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL:	Laura Parkinson, Vice-Chair
COUNSEL:	Israel Chafetz and Roslyn Goldner, for the Employer Shona Moore, Q.C., for the Union
CASE NO.:	43703
DATE OF HEARING:	October 23 and 24, 2000
DATE OF DECISION:	November 1, 2000

## DECISION OF THE BOARD

### I. NATURE OF APPLICATION

1 Westfair applies under Sections 67, 133 and 143 of the *Labour Relations Code*  
(the "Code") for an order prohibiting the Union from engaging in what the Employer  
characterizes as picketing at various locations of its operations. The Union defends this  
application saying it is engaging in leafleting activity that the Supreme Court of Canada  
recognized in *KMart Canada Ltd. v. UFCW, Local 1518*, (1999) 176 D.L.R. (4<sup>th</sup>) 607 as  
a protected form of freedom of expression. Westfair disputes that claim and maintains  
that the Union has crossed the line from peaceful persuasion and engaged in coercive  
activity. It says the Union has interfered with the economic relations between it and one  
of its suppliers in an illegal manner through secondary picketing.

2 As that brief summary of the nature of this application reveals, this case turns on  
an interpretation of the *KMart* decision. It raises a number of interpretive and  
jurisdictional issues and requires the Board to decide whether the conduct amounts to  
picketing in the absence of any statutory definition to guide the analysis. To give an  
answer in an expedited way as the parties have asked, I am forced to offer these  
reasons in a more summary way than the significance of those issues would otherwise  
warrant.

### II. BACKGROUND

3 The Union is currently engaged in a lawful dispute with Fletcher's Fine Foods  
("Fletcher's").

4 Westfair operates a number of retail stores known as The Real Canadian Super  
Store. While Westfair's complaint asserted that five of its locations in the Lower  
Mainland were the subject of the activity complained of, Westfair led evidence relating  
only to two of those locations, Grandview Highway and Surrey.

5 Westfair has no bargaining relationship with the Union. Its employees are  
represented by another UFCW local, Local 777. There is a collective agreement in  
place between Westfair and Local 777.

6 Before the labour dispute between the Union and Fletcher's, Westfair offered  
Fletcher's products for sale in its stores. It continues to do so.

7 Evidence was led from two Westfair managers; the Union called no evidence.  
Peggy Soh, the Assistant Store Manager for the Surrey store, testified about her  
observations of the leafleting and the photographs she had taken of the leafleters at that  
location. She observed individuals distributing leaflets on a number of occasions at the  
Surrey store. That store is located in a shopping mall. Its entrance is not from the mall,  
but rather from the outside.

8           Soh first observed people distributing leaflets outside the Surrey store on Saturday, October 7. There were two people in attendance. She cannot recall the time at which they started leafleting. On Saturday, October 14 she again saw two individuals passing out leaflets. One was on the exit side and the other was located towards the side of the building. On Sunday, October 15 Soh observed three individuals passing out leaflets. Leafleters appeared again on Friday, October 20 at about 6 p.m. On this occasion there were about four of them standing in front of the store. The leafleters had gone by the time Soh left at about 6:45 p.m. On Sunday, October 22 there were again four leafleters in attendance. They arrived at about 3 p.m. Soh did not know how long they remained.

9           Soh's recollection is that the leafleters generally started at 10 a.m. and a different shift came on around 3 p.m. The group that arrived at 3 p.m. was usually still there when Soh left work at around 6:15 p.m.

10          Soh first spoke with one of the leafleters on October 15. She was paged to come to the customer service desk. When she arrived, a man was waiting for her with a leaflet. He asked her to pull Fletcher's product off of the shelves. Soh explained to him that she could not do so unless she had instructions from head office. In response, he said that he would be leafleting unless Westfair removed the product. Soh spoke to that man again later that day. She asked another man who was there handing out leaflets for his name; he referred her to the team captain. The team captain, who identified himself to her as Ian MacLean, was the same man Soh had spoken to earlier at the customer service desk. He again told her that they would like to have Fletcher's product removed from the shelves. Soh explained again that she could not do so and "that her hands were tied". That exchange ended their conversation.

11          Daniel Robinson is the Store Manager for the Grandview Highway store. Unlike the Surrey store, the Grandview Highway store is neither within nor part of a shopping mall, but rather is a freestanding store located on property owned by Westfair. That store has one entrance and one exit. Robinson first noticed leafleters at the Grandview Highway store sometime before noon on October 3. He received a page to attend to the customer service desk. When he answered the page, he encountered three individuals. They did not identify themselves by name, but they wore baseball caps bearing the name of the Union. They advised him that they were going to leaflet in front of the store. He advised them that it was private property and that Westfair would not allow them to leaflet on its property. One of the individuals then made a call on a cellular telephone to their team captain and spoke briefly to that individual. The telephone was handed over to Robinson so that he could speak with the team captain; that individual was identified to Robinson only as "Tony". After Robinson spoke to Tony, Robinson told them that he would not allow them to leaflet. Tony told Robinson that all they wanted was for Westfair to remove Fletcher's product from its shelves. Robinson told Tony that he could not do that; Tony responded by saying that they would be leafleting outside of the store. Robinson advised him that they could not be on Westfair's property. Tony then advised the leafleters to leaflet off of Westfair's

premises, and they proceeded to pass out leaflets at two automotive entrances on to the Westfair property off of Grandview Highway and Rupert Street. Robinson acknowledged that the leafleters did not prevent anyone from leaving or coming on to Westfair's property.

12 The next encounter Robinson had with the leafleters at the Grandview Highway store was on October 14. Robinson's assistant had been paged to come to the customer service desk. From the office upstairs, Robinson saw five people at the desk with leaflets. Robinson went down and stood with his assistant as the assistant introduced himself. The five indicated they wanted to distribute leaflets at the front of the store. Robinson told them that it was private property and he would have them removed from the property. One of the five spoke and said that all that the leafleters wanted Westfair to do was remove Fletcher's product from the shelves. Robinson repeated that he could not do that and the five said in response that they were going to proceed to leaflet. Robinson told them that if they did so, he would call the police. They began to distribute leaflets at the front of the store and Robinson called the police. Police officers from the City of Vancouver came and advised the leafleters that they were not welcome on Westfair property. The people distributing the leaflets then left.

13 Three leafleters reappeared on October 18 at the Grandview Highway store on Westfair's property. Two of the three individuals distributing leaflets were known to Westfair, Tony Evangelista and Ross Bremner. The third was not identified. The leafleters were within four feet of the store entrance. An RCMP officer came to the store and advised Robinson that the RCMP took the position that as a result of the Supreme Court of Canada decision in *KMart* the leafleters had a legal right to distribute leaflets on Westfair's property. The RCMP officer returned to the store later with a member of the City of Vancouver police and explained to Robinson that the police would not remove the leafleters from Westfair's property.

14 On October 19 Robinson encountered leafleters when he arrived at the Grandview Highway store at about noon. They were on Westfair's property by the front entrance to the store. There were about two or three leafleters again on October 20 at the entrance to the store. They appeared shortly after the store opened at 9:30 a.m. Robinson spoke to them. One of the leafleters recognized him as the store manager and informed him that they would be leafleting in front of the store. Robinson responded by asking them to clean up afterwards, as the previous day there had been a large number of leaflets left inside the store on the floor and throughout the parking lot.

15 Robinson acknowledged in cross-examination that, while at times the leafleters were as close as four feet to the entrance on other occasions they were further away than four feet. The distance varied as the leafleters walked around.

16 The leaflets that were distributed at the Surrey and Grandview Highway stores bore the name of the Union. The text of the distributed leaflet reads as follows:

PLEASE DON'T BUY FLETCHER'S FINE FOODS PRODUCTS

400 United Food and Commercial Workers Local 1518 Members  
are locked out by Fletcher's Fine Foods

For over 50 years, Fletcher's operated without a labour dispute.  
Now Fletcher's insists that 400 UFCW Local 1518 members have  
huge concessions forced upon them, including:

A 40 percent reduction on the basic labour rate from \$16.50  
per hour down to \$10 per hour.

Mandatory overtime at the company's discretion.

Elimination of negotiated scheduled hours.

In the interest of fairness and justice for working people and  
their families, we respectfully ask:

PLEASE DON'T BUY FLETCHER'S FINE FOODS PRODUCTS

III. POSITIONS OF PARTIES

17 Westfair submits that while the activity complained of superficially resembles  
permissible leafleting, its actual purpose is to force Westfair to remove Fletcher's  
product from its shelves in order to place pressure on the struck employer. It argues  
that this imparts a coercive element to the activity that is inconsistent with any  
characterization of the activity as permissible leafleting. Westfair contends that the  
Union is hiding behind the cloak of freedom of expression to mask its illegal pressuring  
of a secondary employer.

18 Westfair seeks a declaration that the Union is engaging in impermissible  
picketing under the Code. It also asks for an order prohibiting the Union from engaging  
in similar picketing activity at its various locations in the Lower Mainland. In the  
alternative, if the Board finds that the activity is in fact permissible consumer leafleting,  
Westfair asks the Board to direct that the leafleting take place off of its property.

19 The Union argues that the leafleting in this case did not impede access to the  
stores and was conducted in a peaceful manner. It maintains that the focus should not  
be on the motivation underlying the use of the leaflets, but rather on the nature of the  
leaflet and its method of distribution. The Union notes that the motivation to inflict  
economic pressure did not render the leafleting unlawful in *KMart, supra*, at paras. 46 -  
47. It also points out the absence of evidence to suggest any disruption to Westfair  
resulting from the distribution of leaflets to its customers. The comments made by the  
leafleters to the store managers about their continued presence while the Fletcher's  
product remained on its shelves does not alter the fact that the distribution of leaflets  
was carried out in a non-coercive way.

20 In reply to Westfair's submission that the leafleting amounts to secondary picketing, the Union argues that in *KMart* the distribution of leaflets at what the court characterized as "secondary" non-union locations of the employer was found to be constitutionally protected. The Union notes that the facts in *KMart* were even more extreme than here as the *KMart* leaflets urged consumers not to enter the KMart store and instead to shop elsewhere, not just to refrain from buying a particular product.

#### IV. ANALYSIS

21 As that summary of evidence and argument shows, there is no issue taken in this case that the individuals conducting the activity were acting on behalf of the Union. The leaflets bore the name of the Union and those handing them out wore Union insignia.

22 There is also no issue that the actual distribution of the leaflets to the consumers was conducted in a proper manner. I have before me no evidence as to what was said by the leafleters to the customers as they were handed the leaflets when entering the premises, but there is no dispute that the leafleting was carried out peacefully. Distribution of leaflets was also not accompanied by any overt acts that would suggest conventional picketing, such as placarding or barricading. There is no evidence of access to the stores being impeded. Nor is there any evidence that the leafleting interfered with any deliveries or led to any work stoppage by the employees of Westfair. There is also no quarrel with the general accuracy of the leaflet with one qualification. That qualification was that Westfair was not in a position to know whether the Union was in fact locked out versus being on strike against Fletcher's.

23 Westfair candidly admitted that had the leafleting not been accompanied by the comments made to the store managers about removing Fletcher's product from the shelves, it likely would have no basis for seeking relief as the leafleting was otherwise confined to consumers. There is merit to that concession. On its face, the leaflet is an appeal to customers not to buy Fletcher's product. The content of the leaflet by itself shows only an attempt to persuade consumers not to buy that product. Considered from the perspective of content alone, this is an instance of consumer oriented leafleting. The Supreme Court of Canada in *KMart* has recognized this type of consumer leafleting as a legitimate form of expressive activity that is worthy of constitutional protection and falls outside of the realm of regulation as a form of picketing. As that Court has ruled, a union may communicate to consumers the fact of a labour dispute and may attempt to persuade them not to purchase the employer's goods through leaflets.

24 Westfair argues that the statements of the leafleters to the managers as to their desire to have them remove the product from the shelves illustrate the true reason for the leafleting. It argues that the leafleting here is not an attempt to influence behaviour through rational persuasion, but rather by coercion of a third party. It asserts that leafleting that has a coercive element directed to a third party is impermissible secondary picketing.

25 As a beginning point for analysis, I note that the jurisdiction of the Board is limited to regulating picketing, and does not extend to any accompanying tortious activity. The Board regulates the time and place requirements of picketing, but the manner in which picketing is conducted remains a matter for the courts. The courts retain jurisdiction to deal with any tortious conduct that may accompany picketing (subject to any immunity provided by Sections 66 and 69): *Canex Placer Limited v. C.A.I.M.A.W.* (1975) 1 CLRBR 269; *G & L Transfer Ltd. v. General Truck Drivers & Helpers Union, Local 31* (1981), 30 B.C.L.R. 258 (S.C.) and *Better Value Furniture (CHWK) Ltd. v. Gen. Truck Drivers & Helpers Union, Local 31*, (1981), 26 B.C.L.R. 277 (C.A.). The particular economic torts of interference with contractual relations and conspiracy to injure are also within the traditional domain of the courts, and the Board does not have any statutory mandate to regulate the economic effects of boycott activity apart from applications for relief under Section 70.

26 Given that divided jurisdiction, my task is thus only to decide whether the leafleting activity complained of, when considered in the context of the comments made by the leafleters to the managers inside the store, amounts to picketing for the purposes of the Code. As the former Section 1(1) definition of picketing has now been struck down by the Supreme Court of Canada in *KMart* as unconstitutional, there is no longer any statutory definition of picketing set out in the Code. In the absence of any express definition of picketing, it is not clear that the Board should treat coercive conduct as the critical factor in distinguishing between permissible leafleting and picketing that is subject to regulation and prohibition under the Code.

27 I note that the Court in *KMart* did not deal directly with the issue of coercion. The issue before it was rather the constitutional validity of the definition of picketing under the Code and whether leafleting as a form of freedom of expression could be validly restricted. In the course of the analysis under Section 1 of the *Charter*, the Court suggests possible forms of regulation that could pass constitutional scrutiny. Included within the scope of activity that could potentially be regulated without offending the *Charter* were such types of conduct as defamation, intimidation, obstruction, coercion, inducement to commit unlawful acts, and interference with employment contracts or supply contracts: at para. 58. I do not read those comments about permissible forms of regulation as expanding the authority conferred on the Board in regulating picketing; those observations as to what could be properly regulated do not answer the question of who could regulate it. I reiterate the observation made in *Sony of Canada Ltd.*, BCLRB No. B519/99 that the remarks offered by the Court in *KMart* were intended to give guidance not only for the BC legislative regime, but for other jurisdictions as well where picketing matters are dealt with by the courts which have broad jurisdiction to consider tortious activity that may accompany leafleting. By contrast, in B.C. there is a divided jurisdiction between the Courts and the Board over picketing. As already stated, the Board has the authority to deal with the act of picketing as to time and place restrictions, but the manner of picketing has been for the courts. Torts such as intimidation and coercion, along with the related economic torts of conspiracy to injure and interference with economic relations, have traditionally been within the domain of the courts. Given that bifurcated process, there is some question as to whether it is the role of the Board to deal with all types of coercive conduct in the context of picketing.

28 In light of that uncertainty and in the absence of a statutory definition of picketing, I take guidance from the Supreme Court of Canada's decision as to the characteristics of conventional picketing which distinguish it from leafleting. In *KMart* the Court noted that a picket line has a signal effect attracting an automatic reflex response from workers, suppliers and consumers. Its existence impedes access and that impediment may discourage some people from making rational choices (at para. 38). As the Court indicated, the decision not to cross a picket line is a reflex response to the presence of the line, rather than a reflection of persuasive force (at para. 42).

29 Westfair focuses on the Court's reference to the "coercive effect" of picketing and casts its argument using the term "coercive" in its economic sense. However, in *KMart* the Court appears to refer to coercion more in the sense of obstruction or intimidation. In the immediately preceding passage to its reference in paragraph 42 to "coercive effect", the Court refers to physically coercive conduct that has the effect of preventing access, such as a barricade preventing entry to the store (at paras. 40 and 41). Elsewhere in the decision, it also refers to picketing as using coercion and obedience to a picket line to impede public access to an enterprise (at para. 47). It describes picketing as impeding access to the premises and encouraging employees to break their contract of employment (at para. 74). On one reading, those passages may suggest that coercion is used in a more limited sense than that advocated by Westfair. The coercion referred to in those passages appears to be directed more to activity that impedes. That may be the form of coercion those comments were directed to, rather than economic forms of pressure aimed at third parties.

30 Without deciding the point, I will assume for the purposes of argument that it is open to the Board to conclude that leafleting accompanied by "coercion" is conduct that amounts to "picketing" for the purposes of the Code. I will also assume for purposes of argument that coercion could be more broadly cast than the context of impeding discussed above. To decide this case, I will rely on the definition of coercion commonly used by the Board for other purposes.

31 The definition of coercion in the labour relations context was considered in a fact pattern somewhat analogous to this case in *Delta Hotels Ltd.*, BCLRB No. B433/95. In that case, the B.C. Federation of Labour had advised a group of employees that if they changed their bargaining representative to another union which was not an affiliate of the Federation that the hotel they worked at would no longer be patronized by Federation affiliates. The Board found that it was lawful for the Federation to adopt that policy and to inform others of its existence. The Federation's reminder to the hotel employees of its policy, and the consequences that might result from the application of that policy should the employees decide to go with a non-affiliated union, was not found to be intimidation or coercion (at paras. 43 and 44). In effect, the Board found that it is not coercive to inform someone that one plans to exercise a legal right dependent on the other party's conduct.

32 Although I prefer to rest my analysis on the definition of coercion commonly used by the Board in past cases, I note as an aside that the analysis in *Delta Hotels* is consistent with some common law authority. As noted in *North Shore Association for*

*the Mentally Handicapped*, BCLRB No. B474/99 the legality of threats at common law depends not on the label, but upon the legality of what is threatened: at para. 54. At common law, there is nothing unlawful in warning a party that if it pursues a certain course of conduct, others may respond by acting in a manner prejudicial to that party's interests, so long as nothing unlawful is threatened or done: *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435, at 467.

33 Leaving aside the common law approach, I turn to assess the evidence and argument against the test of coercion articulated by the Board in *Delta Hotels*. Westfair's case is that it is coercive for the Union to say in effect: "Pull the product or we will continue to leaflet". It says the Union's "invitation" to the secondary employer to stop doing business with the struck employer amounts to secondary picketing because of that coercive "or else" element.

34 If there is any "threat" in this case, it is a "threat" to continue to leaflet. If Westfair removes Fletcher's product, the leafleters would withdraw as there would no longer be any purpose for their presence. If the product remains, the leafleters will remain and the leafleting will continue. The continuance of the activity is tied to the presence of the product. The Union's position does not, either expressly or implicitly, amount to a threat to do an unlawful act. In substance, its comments to Westfair managers are simply an assertion of a right to be there and to engage in leafleting, coupled with an acknowledgement that the leafleters will forego their exercise of that right if Westfair removes that product. Is it a "threat" for the Union to say simply that it will do what it is legally entitled to do, namely leaflet to inform consumers of the labour dispute with Fletcher's? Under the reasoning employed in *Delta Hotels*, I do not consider it is coercion for the Union to inform Westfair of the practical consequences of its decision to keep the product on the shelves.

35 Neither the leaflet itself nor the Union's advice to Westfair managers has the trigger or signal effect of conventional picketing. Consumers may or may not read the leaflet; they may or may not be persuaded by it. Alternatively, Westfair may elect to take Fletcher's product off of the shelves in order to make the leaflet redundant because it would prefer not to have the Union leaflet at its stores. Whether the Union is indifferent to which alternative results, or whether it prefers one over the other does not dictate the legality of the result. Westfair's argument of an improper motive to place pressure upon it as a secondary body does not persuade me that this motive transforms otherwise lawful leafleting activity into picketing. The focus on the objective of leafleting is misplaced; leafleting and picketing may seek to achieve the same objective to bring economic pressure on the employer involved in the dispute to bring a favourable end to the collective bargaining dispute, but it is the means used to achieve that pressure which distinguishes these actions: *KMart, supra*, at paras. 45 and 46. I consider the means adopted in this case to be lawful.

36 Given my conclusion that the statements to the store manager were not coercive, it is unnecessary for me to consider the further argument that this conduct amounts to "secondary" picketing. However, I offer these observations in passing. The leafleting endorsed by the Court in *KMart* was conducted at KMart's non-struck operations; those

operations were treated by the court as "secondary" locations. The *KMart* case proceeded as if it were "secondary consumer leafleting" at a "neutral site". Although the union there was engaged in a labour dispute with only some of the *KMart* locations, the non-union stores of *KMart* were considered as separate and distinct operations of the employer for purposes of picketing under Section 65(8) of the Code (at para. 9). The non-union stores were thus considered as secondary employers, yet that secondary nature was not seen as a ground for disentitlement. The purpose of leafleting to place pressure on the secondary sites of the struck employer was seen as legitimate. The Court recognized that the exercise of free speech may cause some economic harm to the targeted employer, but it also acknowledged that third parties may be subject to economic pressures flowing from successful boycott campaigns conducted through the media and "other permissible means" (at para. 60).

37 Without being definitive on this point, as it is unnecessary to do so in light of my conclusion on the absence of coercion, I comment only that Westfair's arguments on the secondary nature of the leaflets may misconceive the effect of the Court's ruling in *KMart*. For Board purposes, the activity is either leafleting or picketing. If it is permissible leafleting within the guidelines in *KMart*, whether secondary in its aim or not, it is not picketing.

38 In closing on this point, I find that the leafleting and accompanying conduct inside the store does not amount to picketing. Although the relief sought is denied, I acknowledge Westfair's complaint that it is caught in the middle of the dispute between the Union and Fletcher's. The leafleting may have a potential economic impact on Westfair. If the customer responds to the Union's request for a boycott, it is possible, but not inevitable, that some harm may be caused to Westfair if less product is sold. But, it is also possible that the customers would instead buy alternative product offered by Westfair. There is no evidence before me either way on that point as to how the customers have elected to make their decision once inside the store. Although I accept that the boycott of Fletcher's products could potentially cause Westfair some economic harm, it may be the result of completely lawful leafleting activity. I add that while this activity is not picketing, it may nonetheless be subject to regulation under Section 70 of the Code, a matter which is not before me.

39 As for the alternative relief sought, I find that the Board does not have jurisdiction to give directions on where the leaflets can be distributed. As Westfair properly acknowledged in argument, there is no provision in the Code that gives any authority to the Board to regulate any conduct relating directly to trespass. The only express reference to trespass in the Code is the prohibition provided in Section 66 against actions or proceedings brought for petty trespass to land to which a member of the public ordinarily has access arising out of strikes, lockouts or picketing permitted under this Code. Beyond that statement, there is no provision in the Code that speaks directly to this issue. If the leafleting were in substance picketing, then the Board could regulate it as to time and place and say when and where it should occur. But, whereas here it is not picketing, the Board has no authority over whether it occurs on public or private property.

V. CONCLUSION

40 Westfair's application to restrain picketing is dismissed as the leafleting that occurred in this case meets the criteria in *KMart* for permissible consumer leafleting. The alternative relief sought of prohibiting access to Westfair's property and redirecting the leafleters to public property is denied as issues of trespass are beyond the jurisdiction of the Board.

LABOUR RELATIONS BOARD

**"LAURA PARKINSON"**

LAURA PARKINSON  
VICE-CHAIR