**Labour Relations Board**
**Saskatchewan**

**UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v. TORA REGINA (TOWER) LIMITED operating as GIANT TIGER and CERTAIN EMPLOYEES, Respondents**

LRB File No. 026-24; March 17, 2004
Chairperson and Executive Officer, James Seibel

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| For the Applicant: | Rod Gillies |
| For the Unidentified Employees: | Gary Semenchuck, Q.C. |
| For the Employer: | No one appearing |

**Certification – Practice and procedure – Intervenor status – Board confirms and applies policy that employee who wishes to appear and give evidence at certification hearing with respect to union's organizing tactics must file reply to certification application and seek party status.**

***The Trade Union Act*, ss. 5(a), 5(b) and 5(c).**

## REASONS FOR DECISION

**[1]** On February 11, 2004, United Food and Commercial Workers Union, Local 1400 (the "Union") filed an application with the Board pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") to be designated as the certified bargaining agent for a unit of employees of Giant Tiger (the "Employer").

**[2]** By letter dated February 27, 2004, Mr. Semenchuck notified the Board, Mr. Gillies for the Union and Ms. Barber for the Employer, that he represented certain unidentified employees with concerns regarding the Union's organizing tactics, alleging that the Union interfered with the employees' decision as to whether to support the Union. Mr. Semenchuck requested that the hearing, originally scheduled for March 2, 2004, be adjourned to allow time for the collection of evidence to present at the hearing. At the time of Mr. Semenchuck's request, counsel for the Employer and counsel for the Union had already agreed to an adjournment of the hearing. The hearing was therefore adjourned.

**[3]** By letter dated March 4, 2004, addressed to the Board and copied to Ms. Barber and Mr. Semenchuck, counsel for the Union submitted that Mr. Semenchuk's clients ought to apply to the Board for status as parties to the application and file a reply; and, in any event, that they ought to provide particulars of their allegations. In support of this position, counsel cited the decision of the Board in *United Food and Commercial Workers, Local 1400 v. Prairie Lube Ltd. (Mr. Lube)*, [1994] 4th Quarter Sask. Labour Rep., LRB File No.147-94.

**[4]** By letter dated March 8, 2004, Mr. Semenchuck responded that his clients ought to be allowed to give evidence at the hearing of the application without applying for status as parties or filing a reply or notice of intervention. In support of this position, counsel referred to the Board's decision in *International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870 v. 665864 Alberta Inc. et al.*, [2002] Sask. L.R.B.R. 583, LRB File No. 180-02.

**[5]** Counsel for the Union applied for an order that Mr. Semenchuck's clients be directed to apply for status as parties or intervenors on the application and file a reply in the form of a statutory declaration. The application was heard by the Executive Officer of the Board by telephone conference call on March 12, 2004 pursuant to s. 4(12) of the *Act*. Counsel for the Employer, Ms. Barber, declined to be included on the hearing of the application.

**[6]** On the hearing of the application, Mr. Gillies and Mr. Semenchuck essentially made the arguments outlined in their respective correspondence referred to above. The Executive Officer of the Board reserved decision at that time.

**[7]** In *Prairie Lube*, *supra*, the union applied for certification of a particular bargaining unit. After the application and accompanying evidence of support was filed with the Board, an employee forwarded a letter to the Board purporting to revoke his support card. The Board iterated its policy to ignore such revocations, filed after the application, at 91, as follows:

> *There are very few of the Board's policies that enjoy virtually total support from both labour and management. One that does, is the Board's longstanding policy on certification applications of using*

> *the date that the application is filed with the Board as the cut off date for determining whether the union has the support of a majority of the employees and refusing to take into consideration any evidence concerning changes to the Union's level of support or to the total employee complement that post date the cut off date.*

**[8]** When the application for certification first came on for hearing in *Prairie Lube*, *supra*, counsel for the employer asserted that, as a matter of natural justice, the Board was obligated to provide employees with notice of the certification application in order that they might give evidence that the organizing union used coercion or misrepresentation to gather support. At that time, no such notice was specifically and separately provided to the employees but, because the issue was raised before the Board, notice of hearing was provided to the employee in question. The Board stated, however, that "the Board's decision was based on practical expediency rather than a conviction that it was necessary." The employee declined to respond and did not appear to testify when the application next came on for hearing.

**[9]** In *Prairie Lube*, *supra*, the Board stated further, at 92 and 93 that acceptance of revocation letters prior to the filing of a certification application was an "exception to the general rule" and that:

> *anyone who wishes to present evidence or make submissions on an application, should apply for party status and file a reply.*
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> *Accepting these revocation letters is, however, the extent of the exception to the rule that only parties can present evidence. It does not make an employee who files a letter of revocation, timely or untimely, a party to the proceedings for any other purpose or entitled to notice of the hearing. If the employee wishes to participate in the hearing in any other way, for example, to allege improper conduct by the union or even to argue with the Board's policy regarding the cut off date for revocation letters, he has an obligation to make that known to the Board and follow the more formal process of securing party status under Section 1 9(3)(a) of the Act and filing a reply.*
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> *The Board does make an effort, of course, to accommodate persons who are not familiar with our proceedings and who have no legal training. We are sympathetic to legitimate requests for opportunities to make representations to the Board and we are prepared to give generous consideration to various procedural mechanisms through which these requests may be granted. The*

> *Board does not accept, however, that employees have the right to bypass procedural requirements of any kind, and simply show up on the day set for hearing an uncontested application and raise serious or contentious issues that completely alter the nature of the case that was set down for hearing. Neither do we accept the view expressed by Counsel for the Employer that it is incumbent on the Board to second guess employees with respect to the possible concerns which might lie behind a letter of revocation, or to speculate about possible allegations which have not been put before us.*
>
> *If any of the employees of Prairie Lube Ltd. had wished to make allegations to the effect that this Union has used improper methods to gather employee support for this application, the appropriate course would have been to apply for party status in a timely fashion and then file a Reply which would give the Union details of the charges made against it. Those employees would then get notice of hearing as parties to the proceedings. If an employee simply files a letter of revocation and does nothing more, then the Board will conclude that he is not interested in participating other than to have his letter noted by the Board according to its usual policy.*

**[10]** In contrast, in *Focus Construction*, *supra,* an employee alleging improper organizing tactics had filed a reply but, because the reply was deemed to have been made as a result of influence by the employer (the reply having been prepared by employer's counsel), the Board disregarded it. As a matter of expediency, however, the employee was granted intervenor status at the hearing and allowed to give *viva voce* evidence. The Board stated, at 586:

> *Despite the Board's ruling that it would disregard Mr. Love's reply as being improperly influenced by the Employer, the Board permitted Mr. Love to present evidence as an ordinary employee who had complaints about the Union's organizing campaign. The Board normally allows employees who attend a certification hearing to give evidence regarding their allegations of unfair organizing tactics without first filing a reply or notice of intervention.*

**[11]** The determinations in the two cases referred to above appear to be at odds. However, I accept the Board's statement in *Prairie Lube*, *supra*, as a statement of the longstanding policy of the Board. The nature of policy, however, is that it shall not be applied in an overly rigid fashion nor adhered to slavishly such as to fetter discretion. In my opinion, the decision in *Focus Construction*, *supra*, is an example of such exercise of

discretion. In that case, a reply had been filed on behalf of the employee purporting to set forth the basis for the allegations against the union. Notwithstanding that the reply was disallowed, the union could prepare to meet those allegations prior to the hearing. Apparently there was no objection to the employee being granted status and testifying without having filed another reply not tainted by employer influence.

**[12]** In the present case, in accordance with the policy of the Board, notice of the certification application was posted in the workplace. The hearing of the application has been set for some six weeks hence on April 29 and 30, 2004. The employees that wish to make the allegations against the Union are ably represented by counsel. If the employees were allowed to simply appear at the hearing and adduce their evidence without disclosing the nature of their allegations with sufficient particularity, the Union would be in the position of having to request a further adjournment of the hearing to a date that, in view of the summer holiday period on the horizon, may result in a delay of six months from the date the application was filed to the date of hearing.

**[13]** Mr. Semenchuck did not assert that his clients would in any way be prejudiced if they were required to file a reply to the application, other than that their identities would be disclosed. Given the large number of employees estimated to be in the proposed bargaining unit, it is not too much to say that the Union would have a most difficult time preparing to answer the evidence proposed to be given by a few unidentified individuals if they were simply to show up and testify. It is a very real likelihood that the Union and its supporters may be prejudiced by an inordinate delay in the determination of the certification application. Any problems that might be occasioned by the disclosure of the identities of Mr. Semenchuck's clients may be dealt with by the Board on very short notice.

**[14]** In accordance with what I perceive to be the general policy of the Board, and in the interests of the administration of justice, the employees represented by Mr. Semenchuck are directed to file a reply to the application and to seek status as parties at the hearing if they expect to adduce evidence thereon. To preclude the necessity of a further application to the Executive Officer of the Board, it is recommended that the reply contain sufficient particularity to identify the transactions complained of as forming a basis for the allegations and the identity of the persons involved.

**[15]** The reply or replies shall be filed within ten (10) days of the date of these Reasons for Decision.

**DATED** at Saskatoon, Saskatchewan**,** this **17th** day of **March, 2004.**

**LABOUR RELATIONS BOARD**

James Seibel, Chairperson and
Executive Officer