Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. THE NORTH WEST COMPANY and TORA REGINA (TOWER) LIMITED o/a GIANT TIGER, REGINA, Respondent

LRB File No. 026-04; May 22, 2009
Chairperson, Kenneth G. Love, Q.C.; Members: Kendra Cruson and John McCormick

For the Applicant:	Drew Plaxton
For the Respondent:	Susan Barber, Q.C. and Amanda Quayle

Practice and Procedure – Objection to Conduct of Vote. Union challenges vote conducted by Board as part of reconsideration of Board order certifying Employees.

***The Trade Union Act*, ss. 18(v)**

***Regulations and Forms of the Labour Relations Board*, Sections 26 and 29.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local No. 1400 (the "Union") filed an application with the Saskatchewan Labour Relations Board (the "Board") on October 14, 2008 pursuant to Section 29 of the Regulations and Forms of the Saskatchewan Labour Relations Board, S.R. 163/72, as amended, objecting to the conduct of a vote among the employees of The North West Company LP formerly known as Tora Regina (Tower) Limited operating as Giant Tiger, (the "Employer") with stores in Regina, Saskatchewan. In its application, the Union challenged the conduct of the vote on the following grounds:

(a) Objection to the Voter's List

The Order for a Vote is vague and uncertain, it does not determine whether a vote is to be held amongst workers in one or two of the stores or the two stores combined. Further, it does not set forth the collective bargaining unit under consideration nor the employer concerned.

Objection to each name on the Proposed Voter's List

The board's reasons state a secret ballot of employees of Giant Tiger is to be conducted. Giant Tiger is only a trade or business name and has no employees. The Certification Order is in relation to Tora Regina (Tower) Ltd. The notice of vote is directed to the employees of Tora Regina (Tower) Ltd.
The union believes all of the employees on the voters list are employees of The North West Company LP. They have no right to determine the fate of a Certification Order involving employees of Tora Regina (Tower) Ltd. The original Certification Order was made in relation to Tora Regina (Tower) Ltd. The application for reconsideration was made by Tora Regina (Tower) Ltd.

There has been no hearing of a successorship application. Specifically the Board on the 10th of September adjourned the union's successorship application sine die. The union specifically objected to successorship being considered in the reconsideration application and no evidence was heard, nor argument made in relation to this matter. The only persons who should be on the Statement of Employment are employees of Tora Regina (Tower) Ltd. employed as at 27 March 2008. To the best of the union's belief, Tora Regina (Tower) Ltd. has no employees on this date.

If the employees of North West Company are allowed to determine this issue, this constitutes a de facto successorship order, contrary to the rules of natural justice and procedural fairness.

Certain employees

If the employees of The North West Company LP can determine the fate of the Certification Order in relation to Tora Regina (Tower) Ltd. (which is objected to by the union), or if employees on the list are employees of Tora Regina (Tower) Ltd. or otherwise entitled to vote, the union objects to certain names either included or not included on the voter's list on the following basis:

> ***Employees missing.***
>
> *The Board's Order directs all employees employed as of the 27th of March 2008 are entitled to vote. The union believes the voter's list does not include all employees employed as of that date and that some but not all persons who have left the employment since have been deleted. This is contrary to the Board's Order and the Direction for Vote. The Notice of Vote however states to be eligible to vote the employee must still be in the employ of the employer. This is also contrary to the Board's Order and the Direction for Vote.*
>
> *The union has been prevented access to employee information. This being so, the union does not have particulars of which names ought to be included. The union can advise however that if one compares the Voter's list to the Statement of Employment in the rescission application brought by a Ms. Doucette, (se4tting out employees employed as at June 2 of 2008), it appears that in Store 405, 54 persons are listed in the Statement of Employment and only 44 on the voter's list. Unless there has been a significant change in the employee composition, one would assume at least ten people (and likely more if one goes back to*

March) are missing from the list. Further, in Store 421, the number has gone from 26 down to 23. Again it is submitted there are at least these many people missing from the voter's list.

Person's on the list who should be deleted – hires contrary to the union security provisions.

The Board's original certification order was made on the 3rd day of July, 2007. The union delivered its union security demand on or about the 11th of July, 2007. Evidence before the Board is already shown the employer has refused to honour its obligations pursuant to The Trade Union Act, the Certification order and the union security clause. Since the union security demand was made, the employer has obtained union cards from no new hires.

The union objects to any new hires who have not signed union cards, as mandated by the union security provisions, being included on the voter's list or allowed to vote. Again, as the union does not have available to it sufficient information it can use to determine exactly who has not complied with the union security provisions, it is unable to specify the identity of the employees in question.

Further particulars of the union's objections concerning the voter's list are set out in correspondence from counsel to the Labour Relations Board dated October 1, 2008. The union repeats these particulars and adopts the same as part of its application within.

The union requested the employer provide appropriate evidence of employment to allow an appropriate voter's list be prepared. The employer has refused to do so. The union has further requested the board order the employer to provide appropriate payroll records to allow the union to properly address the issue of the voter's list. The Board declined to do so. The Labour Board has relied solely on information provided by the employer without allowing the union access to information to properly test same. The union says this constitutes a denial of natural justice and a breach of the principles of procedural fairness.

The union reserves the right to object to further specified individuals being omitted or included on the voters list, as the case may be, once it has been able to review payroll records and other information.

(b) Objections to the Vote

The union submits a vote is inappropriate in the circumstances at hand, for a number of reasons including the following:

The vote does not test support for the union as of the 27th of March 2008, due to a number of factors, including the effluxion of time and the union's inability to exercise its right to represent employees in the bargaining unit.

The employer or employers have and continue to refuse to comply with their obligations under by The Trade Union Act. They have further interfered with and prevented the union from receiving proper information in relation to employees and further prevented the union from being able to communicate with and properly represent employees. This has created a poisoned work environment and further undermined the union's authority as exclusive bargaining agent for the employees in question.

Particulars of this activity are set forth in the union' unfair labour practice application filed in April of 2008 (LRB File No. 041-08) and the union's reply to a rescission application filed by a Ms. Gail Doucette (LRB File No. 150-08). The union repeats these statements and adopts the same as part of its application within. The union says further these activities have continued to date.

These activities have created a poisoned atmosphere in the workplace and has prevented employees from freely deciding the question set forth in the vote. It is impossible at this time to have a free and fair vote in the workplace.

This situation has been further exacerbated by Orders of this Honourable Board effectively preventing the union from representing its members and fulfilling its obligations as exclusive bargaining agent.

It is further submitted a vote in the workplace is inappropriate, in that there is no reasonable connection between the question posed in the vote and the grounds set forth by this Honourable Board in allowing a reconsideration application to be made. The results of a vote are not relevant to the issues before the Board.

(c) Objections to the Conduct of the Vote

There are a number of persons on the voter's list who would not have received notice of the vote by reason of being absent from the workplace, being on leave or having left the employment of the employer. The union believes there has been a number of irregularities in the conduct of the vote that mandate the vote be set aside, included amongst these are the following:

The union believes there has been improper electioneering by employees and others who oppose the union in the workplace for the purpose of influencing the vote. The union believes further this activity has been condoned and/or encouraged by the employer.

Once specific incidence of this occurred at the Avonhurst Drive Location (Store 405) where an employee, Helen Koch, spoke to a number of employees at or near the polling place at this store just prior to these employees voting. Ms. Koch had with her a number of papers which she was either showing or reading to employees in an effort to influence the vote. These papers were later confiscated by the Board agent. After these materials were confiscated, Ms. Koch continued to electioneer in the hallway and/or other areas of the store in an effort to influence the vote.

> *The union further believes the employer encouraged and assisted this and/or other employees in attempting to influence the vote. To the best of the union's knowledge the employee Koch and or others had a voters list which would have been provided by the employer or the employer would have allowed this employee to make copies of same from the posting at the workplace.*
>
> *The union reserves the right to rely upon such further and other irregularities as may be discovered.*
>
> *The union reserves the right to argue the vote should fail for lack of quorum once a proper voters list has been created.*
>
> *The union asks for an Order the vote be declared a nullity, set aside and voided.*
>
> *The union further asks for an Order the ballot boxes be and remained sealed until all issues raised in conne4ction with the vote have been determined by the Board and that no count be conducted until all matters have been finally determined, if at all.*

[2] The vote which is the subject of this application arose from a decision of the Board dated June 2, 2008 wherein the Board determined to reconsider an application for certification by the Union (LRB File No. 026-04) and ordered a vote to determine support for the certification application under s. 6 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The Union applied to the Court of Queen's Bench to judicially review the Board's decision of June 2, 2008, which application was denied by Court of Queen's Bench Judgment 858/08 of Mr. Justice R. K. Ottenbreit dated July 16, 2008.

[3] The vote, as ordered by the Board, was conducted by the Agent of the Board on October 9 and 10, 2008. Because the Union and Employer had not been able to agree on a voter's list of those eligible to vote, the designated officer "double enveloped" all votes cast at both of the Giant Tiger locations in Regina and sealed the ballot box pending the determination of the Union's challenge to the conduct of the vote.

[4] The Direction for Vote which was issued by the Board to its agent was dated June 3, 2008, and directed as follows:

> *(1) that a vote by secret ballot be conducted among all employees, who where employed within the said unit as of March 27, 2008, to determine*

whether or not the said employees wish to continue to be represented by the Union, for the purposes of collective bargaining with their Employer.

(2) that the Agent of the Board shall conduct the said vote in accordance with Clause 26 of the Regulations of the Board subject to the following conditions:

(a) the form of the ballot shall be as follows:

SECRET BALLOT

Do you want to continue to be represented by United Food and Commercial Workers, Local 1400 for the purpose of bargaining collectively with your Employer?	*YES*	☐
	NO	☐

PLACE AN "X" IN ONE SQUARE ONLY

(b) A Notice of the Vote, together with a list of the employees eligible to vote, shall be posted in a conspicuous place or places where the employees eligible to vote are engaged about their duties, and shall be posted for a time agreed to by the parties, before the time fixed for the taking of the vote;

(c) Upon the completion of the vote the Agent of the Board shall file a report in accordance with Clause 27 of the Regulations of the Board.

[5] In accordance with Clause 26 of the Regulations of the Board, the Agent of the Board, as the Returning Officer for the vote, issued a Notice of Vote in Form 13 of the Regulations. As provided for in Form 13, under the heading “Eligible Voters”, the persons eligible to vote “shall be those persons whose names appear on the “Voter’s List” and who, at the time of voting, are still in the employment of the Employer referred to above.

[6] On July 17, 2008, the Employer, in accordance with the Board’s decision of June 2, 2008, provided the Board with a Statement of Employment which listed their employees employed as at March 27, 2008. That Statement of Employment, which was to form the basis of the voter’s list, was sent to the Union for review and comment by the Board’s Agent on September 25, 2008. In her correspondence, the Board’s Agent noted that the Employer’s representative, Karen Milani had indicated that she would get back

to her by the close of business on Monday, September 29, 2008. She further indicated that the Union representative, Ms. Brandi Tracksell, "has indicated that she is likely able to get back" to her by the close of business on Wednesday, October 1, 2008.

[7] Following the circulation of the draft voter's list by the Board Agent to the representatives of the Employer and the Union, the Board Agent circulated a revised list of employees to the representatives on October 7, 2008 which deleted certain employees (based on information supplied by the Employer) who had discontinued their employment with the Employer prior to that date.

[8] No response was received by the Board's Agent to this correspondence. However, on October 8, 2008, counsel for the Union wrote to the Board's Agent confirming receipt of her correspondence. Without directly answering the Board's request for comment on the proposed voter's list, the Union's counsel did not agree to the proposed voter's list and sought to have the Board utilize payroll information to determine which employees were employed on March 27, 2008 and remained employed as of the date of the vote.

[9] Counsel for the Union also suggested to the Board's Agent that it was unable to confirm the Voter's list because it felt that it was restricted in using information which had been provided to it by the Employer, in accordance with the Board's Order of June 3, 2008.

Preliminary Issues:

[10] At the commencement of the proceedings, Counsel for the Union, Drew Plaxton, raised a number of preliminary issues related to production of payroll records and witnesses by the Employer. Mr. Plaxton argued that it was essential for the Union to have access to the complete personnel files of all of the employees, including T-4 slips and Records of Employment (ROE's) issued to employees upon termination. The Union had requested, and the Board had issued Subpoena Duces Tecums to the managers of both of the Giant Tiger stores in Regina. The documents sought to be produced pursuant to the Subpoenas were:

> *(a) Personnel files for all employees of Tora Regina (Tower) Limited and the Northwest Company LP … and payroll records and scheduling information for all of the said persons… for the months of February, March, April and May of 2008.; and*
>
> *(b) Payroll records and scheduling information for the month of October, 2008 for all employees of Tora Regina (Tower) Limited …and The Northwest Company LP as of October 9 & 10, 2008.*

[11] Prior to the hearing, the Employer, through its counsel, Susan Barber provided Mr. Plaxton with some of the records from the Employer as requested by the Subpoenas. Personnel files were not produced as requested.

[12] The Union argued that the personnel files should be produced in addition to the payroll records. The rationale given by the Union for its request for the personnel files in addition to the payroll records was given as twofold. Firstly, so that it could properly represent the employees in the bargaining unit, and secondly, so that it could check the list of employees on the Statement of Employment provided by the Employer.

[13] This was not the first attempt by the Union to seek additional information regarding the employees of Giant Tiger. After the Board ordered the secret vote to be taken by its Order of June 3, 2008, the Union wrote to the Board Agent on June 20, 2008 "asking for an order payroll records be produced for all employees employed at either of the stores on the date the application for certification was filed."

[14] The Union also sought additional production of documents by application to the Executive Officer of the Board on July 22, 2008. That application was denied by the Executive Officer. The Union then sought a reconsideration of the decision of the Executive Officer by the Board by application made July 30, 2008. That application was dismissed by the Board on September 10, 2008, with Reasons for Decision. In those Reasons, the Board said:

> *[21] The Union in its application requested orders of the Board compelling production of the following information from the Employer:*
>
> *1. all relevant information to allow the union to communicate with employees, including scheduling information for all of its employees; and*

2. payroll records for all of its employees; and

[22] The Union also requested an order "allowing the union to effectively communicate with employees" and an order "setting dates for the hearing of the actual reconsideration of the certification order."

[23] The Union's rationale for requesting the information it sought was on the basis that it required this information to be able to effectively contact employees to show them the benefit of union representation. It argued that it could not effectively communicate with the employees absent this information.

[24] The Board does not agree with the Union in respect to the need for the information requested. The original Order of the Board provided that the Employer was to provide the Union with "the names, addresses and telephone numbers of all employees of the Employer as at March 27, 2008." That list has been provided by the Employer to the Union and the Board. The Union, however, argues that its use of the list provided is embargoed by the Union. Again, the Board does not agree. The Order of the Board is very specific and allows the information to be used "to contact employees with respect to the vote to be conducted by the agent of the Board."

[25] The Union argued that the information was necessary for it to determine if the voters list for the ordered vote was accurate. However that responsibility falls under the Board's regulations to the agent of the Board who is appointed to conduct the vote. Section 26 of the Regulations of the Board specifies that the agent who conducts the vote must "(a) determine the list of employees eligible to vote." Furthermore, when the vote is conducted the Union will be permitted to have scrutineers present under s. 26(g). Those scrutineers may challenge any employee which they feel is not entitled to vote.

[26] There are well established practices and procedures at the Board with respect to the conduct of votes as ordered by the Board. The Union in its application would have the Board determine matters that have been left by regulation to the agent of the Board. If there are challenged votes when the vote is held, those challenges can be brought forward to the Board following the vote, when the results of the vote are being considered by the Board.

[27] The Board therefore declines to order the Employer to provide the additional information requested by the Union.

[28] Similarly, the Board declines to make the orders requested by the Union with respect to communication with the employees or an order setting dates for the reconsideration hearing.

[28] The Union, as ordered by the Board on June 3, 2008, has been provided the names, addresses and telephone numbers of the employees so as to allow the Union to lobby those employees in respect of the representation vote. In the opinion of the panel of the Board which heard the application for reconsideration, that information was sufficient. Also sufficient was the access provided to the Union to allow the Union to effectively contact the employees to state its case. If the Union seeks

> *a clarification of the Board's orders, the jurisdiction to clarify the original Order may be made under s. 5(j) of the Act. There is no such application before the Board regarding clarification of the earlier Order of the Board.*

[15] Previously, the Union had been requesting that the Employer provide payroll records regarding the employees. When that information was voluntarily produced by the Employer, the Union changed its request to a request for the full personnel file of the employees. At the hearing, counsel for the Employer undertook to supply the Board with any other information which the Board might require to determine the status of any employee and their eligibility to vote at the votes conducted by the Board.

[16] The Board did not have the benefit of having received the information that the Employer had provided to the Union prior to the hearing. The Board ruled that it would proceed with the hearing based on the information voluntarily produced by the Employer. The Board cautioned, however, that if it appears during the course of the hearing that further information is necessary for the Board to determine the status of an employee, then the Board would rely upon the undertaking given by the Employer to provide additional information which the Board felt would be necessary for it to determine the eligibility of any employee to vote.

[17] It was unnecessary for the Board to rely upon the Employer's undertaking to provide further information to the Board. The Board was satisfied that the information provided by the Employer and produced through witnesses called by the Employer was sufficient for it to determine the eligibility of employees to vote at the vote ordered by the Board on June 3, 2008.

[18] It is noteworthy, as well, that the evidence lead at the hearing, through all of the witnesses called by the Employer, was that the personnel files sought to be produced by the Union did not contain T-4 slips or ROEs. Accordingly, even if they had been ordered produced, they would not have contained the information that the Union felt it required to both properly represent the Giant Tiger employees or to verify the Statement of Employment.

Statutory Provisions:

[19] Relevant provisions of the *Regulations and Forms,* include the following:

> *26 Where, pursuant to the provisions of the Act, the board directs a vote to be taken by secret ballot, the chairman shall appoint an agent to conduct a vote, and such agent shall, subject to such conditions as may be prescribed in the direction and with reasonable dispatch:*
>
> *(a) determine the list of employees eligible to vote;*
> *(b) determine the form of the ballot;*
> *(c) determine the date or dates and hours for taking the vote;*
> *(d) determine the number and location of the polling places;*
> *(e) prepare a notice or notices of the vote according to Form 13 and direct posting thereof;*
> *(f) act as returning officer and appoint such deputy returning officer or officers and poll clerk or clerks as may be necessary;*
> *(g) invite the employer affected and any trade union whose name appears on the ballot each to appoint one scrutineer for each polling place and permit each scrutineer to be present at the polling place during the hours for the taking of the vote and while the ballots are being counted;*
> *(h) give special directions or instructions as he may deem necessary for the proper conduct of the vote.*
>
> *. . .*
>
> *29(1) Any trade union or any person directly affected having any objection to the conduct of the vote or to the counting of the votes or to the report shall, within three days after the last date on which such voting took place, file with the secretary a written statement of objections in Form 15 and verified by statutory declaration together with two copies thereof, and no other objections may be argued before the board except by leave of the board.*
>
> *(2) The secretary shall cause all statements of objections and all copies thereof, when filed, to be stamped with the date on which they were received in the office of the board.*

Analysis and Decision:

[20] The Union's application raised objections to the vote under three (3) broad categories. These were:

(a) Objections to the Voter's List;

(b) Objections to the Vote; and

(c) Objections to the Conduct of the Vote.

We will deal with each of the complaints raised by the Union under each of these categories in turn.

Objections to the Voter's List

[21] The Union's primary objection was that the Order for a Vote is "vague and uncertain." However, the Order for a Vote being the Direction for Vote issued by the Board is in its usual form. In their objection, the Union has overlooked the function of the Board Agent who is directed, "subject to such conditions as may be prescribed in the direction and with reasonable dispatch" as referred to in s. 26(a), (b) and (h) of the *Regulations.*

[22] The practical details of the conduct of the ballot as ordered by the Board, is the role of the Board Agent charged with the responsibility of conducting the vote.

[23] The Union argued that the bargaining unit and the Employer concerned are not specifically set out in the Order. They also provided that who the proper Employer is has not as yet been determined by the Board as the Union has brought a successorship application to determine successorship of the bargaining unit. Further, counsel for the Union submitted that there were no employees of Tora Regina (Tower) Ltd., who was the Employer at the time of application, and consequently there were no employees eligible to vote as directed by the Board.

[24] The Board is unable to accept the Union's arguments with respect to this "phantom Employer." To do so, would require the Board to ignore s. 3 of the *Act* which provides that the rights provided are granted not to Employers or trade unions, but to employees. Clearly, there are employees within the bargaining unit. It is their wishes that the Board seeks to determine. Who the Employer may ultimately be determined to be, and who will be required to bargain collectively with the Union is not, at this stage of particular moment or import, should the certification Order remain in effect following reconsideration by the Board.

[25] The Union also suggested in its application that the voter's list "does not include all employees employed" as at March 27, 2008, the date established by the Board in its Order of June 3, 2008. However, the evidence lead by the Employer and

the payroll records provided by the Employer clearly show that the voter's list included all employees who were employed as at March 27, 2008.

[26] The Union also argued that there were persons on the voter's list who had been hired contrary to the union security provisions contained in s. 36 of the *Act*. The Union delivered a security demand on or about the July 11, 2007, following the Board granting the Union's application for certification on July 3, 2007. However, the Employer challenged that Order by applying for judicial review before the Court of Queen's Bench. The judicial review application was successful and the certification Order quashed. The Union appealed that decision with the Court of Appeal, who ultimately restored the certification Order in its decision dated March 14, 2008.

[27] By correspondence dated March 31, 2008, the Union reiterated its s. 36 maintenance of membership request, following the reinstatement of the certification Order. On that date, the Employer also applied to the Board for reconsideration of the certification Order made July 4, 2007. By its Reasons for Decision of June 2, 2008, the Board agreed to reconsider its decision and ordered that "pending the outcome of the secret ballot of employees, the Union shall be restrained from enforcing any of its rights under the certification Order save and except as provided herein."

[28] It was acknowledged by the Employer, through testimony of their witnesses that it has not required any employees hired after July 4, 2007 to "apply for and maintain membership in the Union" as required by s. 36 of the *Act*. As a result, the Union argues that any employees hired since July 4, 2007 should not be eligible to participate in the vote as they were hired contrary s. 36.

[29] The Employer argues that the effect of the various court proceedings and the Board's Order of July 4, 2007 had the effect of suspending the provisions of s. 36 and that any alleged failure by employees to comply with them is unfounded and should not be a bar to their participation in the secret vote.

[30] The most recent case dealing with this issue was the Board's decision in *Robert Flaman v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Western Automatic*

Sprinklers (1983) Ltd., [1989] Spring Sask. Labour Rep. 45, LRB File No. 045-88, to support their positions with respect to whether or not persons hired after July 4, 2007 should be eligible to participate in the vote.

[31] The decision in *Flaman, supra,* dealt with a rescission application filed by Mr. Flaman. One of the issues for the Board to determine in this case was:

> *[W]hether eligibility to participate in a representation vote depended upon the applicant, Flaman, and any or all of the other employees doing bargaining unit work to have been hired and retain in compliance with the union security provisions of the collective bargaining agreement.*

[32] In its Reasons, the Board reviewed other Board cases on point, as well as the leading cases in the area from Ontario, being *April Waterproofing Ltd.* [1980] O.L.R.B. Rep. November 1577 and *Schade and Culliton Brothers Limited et al* [1983] 2 CLRBR (N.S.) 258.

[33] In the *Flaman* case, *supra*, the Board ultimately concluded that it would not order a vote while discussing the eligibility issue, finding that s. 9 of the *Act* applied in respect of the application for decertification.

[34] Based on the evidence provided by the Employer, there are seven (7) employees who were hired after July 4, 2007 who were included upon the voters list who did not comply with s. 36 of the *Act* and who the Union says should therefore be ineligible to cast a ballot.

[35] All of the cases cited by the Board in *Flaman, supra,* and especially the decisions in *Schade, supra,* and *April Waterproofing, supra,* were directed toward the prevention of any mischief on the part of an Employer in hiring persons in contravention to terms of a collective agreement and allowing such employees to be involved in determining the outcome of a vote which might determine union certification. In *Schade*, supra, at p. 269 the Ontario Board provided:

> *The problem raised in April Waterproofing is understandably a difficult one given the transitory nature of employment in the construction industry, and the ease with which an employer's hiring practices can alter the composition of the bargaining unit, and undermine established bargaining rights. If an employer intentionally or unintentionally fails to*

> *abide by its legal obligation to hire union members, it is relatively easy to create a situation where non-members – albeit perhaps only temporarily – will be in a position to seek termination of the union's bargaining rights or representation by another union. Union members may be denied the opportunity for present and future employment because of the activities of individuals who should not have been hired at all.* ***The potential for abuse****, and the obvious unfairness of putting a union's rights at risk because of the views of individuals who should not even be there, underlies the Board's decision in April Waterproofing. Why should the rights of union members turn on the speed with which the union can compel enforcement of the collective agreement to eliminate non-members whom the employer has unlawfully employed? [Emphasis added]*

[36] The Board, as noted in *Flaman, supra*, has consistently applied this view in cases dealing with union raids and decertifications. In doing so, it has sought to uphold the rights of employees granted by s. 3 of the *Act* and to insure that those rights are not "easily rendered meaningless by an Employer."

[37] That having been said, however, the Board is of the view that these cases are not applicable to the current situation. Firstly, the vote which was ordered was ordered by the Board under its authority contained in s. 6 and s. 18(v) to assist the Board to determine if there was support for the certification after a lapse of 37 months between the date of the hearing of the application for certification and the date of the decision. Furthermore, the time during which the matter was under consideration by the Board, had another store being opened and the wishes of those employees had not been canvassed by the original application. This would result in those employees being swept into the bargaining unit without reference to their wishes.

[38] Additionally, there is less concern about the potential for mischief on the part of the Employer in this case. The date on which employees must have been hired was determined by the Board based upon the date on which the decision of the Court of Appeal restored the certification Order. There would not have been any opportunity for the Employer to have "manipulated" the workforce as at that date would have been unknown to them.

[39] Additionally, the vote is not a binding vote. It is one which the Board has directed to be taken to "assist the board to decide any question that has arisen", in this case the application for reconsideration.

[40] For those reasons, the Board distinguishes the current case from those previously decided by the Board where the Board was considering the eligibility to vote for a decertification or for an amendment to a certification which would allow another trade union to represent the employees (a "raid"). The vote which was ordered by the Board was ordered specifically among employees of Giant Tiger employed as of March 27, 2008, being the date the certification Order was reinstated by the Court of Appeal to test and determine the employees wishes as at that date.

[41] In its Order, the Board did not distinguish between persons employed at the original Giant Tiger location which was the subject of the original certification application or those employees which would be swept in to the bargaining unit. Nor did it distinguish between persons who may have been required to join the union by virtue of s. 36 of the *Act*.

[42] Alternatively, the previous decisions of the Board may also be distinguished on the basis that there was a good deal of uncertainty over the period during which this certification has been under consideration as to whether or not the provisions of s. 36 were applicable.

[43] Even though the Union, upon receipt of its certification Order on July 3, 2007, took steps to invoke its rights under s. 36 of the *Act* by its correspondence to the Employer on July 11, 2007, those rights were suspended by virtue of the decision of the Court of Queen's Bench when the certification Order was quashed. Those rights remained suspended until the Court of Appeal ruled in favour of the Union on March 27, 2008. The rights granted to the Union then remained in force until this Board's order on July 3, 2008.

[44] It is illogical to suggest that the Employer should have been so prescient as to realize that the Court of Appeal would reinstate the certification Order and that it should, therefore, have been complying with the provisions of s. 36 during the period during which the certification Order had been quashed by the Court of Queen's Bench. Furthermore, it moved swiftly, in accordance with comments made by the Court of Appeal to apply to have the certification application reconsidered by the Board following

the decision of the Court of Appeal and also applied to have the Board's Order stayed in the interim. That application was successful, insofar as the Board has agreed to reconsider its decision and in the interim has enjoined the Union from enforcing its rights under the certification Order.

[45] The Board's Order would, we can speculate, but make no ruling in that regard, suspend the Union's right to rely upon s. 36 to have an employee terminated for failure to comply with the provisions of s. 36. That being the case, there should be no interdiction against such employee being entitled to vote in respect of a vote such as that ordered by the Board in this case.

[46] The Union's application on this ground must therefore fail.

Objections to the Vote

[47] The Union submits that the vote as ordered does not test support for the Union as of March 27, 2008 because of effluxion of time and the inability of the Union to exercise it right to represent employees in the bargaining unit.

[48] With respect, the Board finds no merit in the Union's arguments in this regard. While recognizing that it is generally desirable to have votes conducted as quickly as possible, the delays in the holding of the vote can be attributed for the most part to the activities of the Union in making applications to the Board regarding provision of particulars, its refusal to agree to the content of the voter's list, and its application for judicial review of the board's decision of June 2, 2008.

[49] Furthermore, the Board did provide opportunity for the Union to campaign with respect to the vote and fashioned an unusual Order to allow that to happen. The Employer offered access to its employees, which the Union did not take advantage of, and it was necessary for the Executive Officer of the Board to eventually specify dates on which the Union would be permitted to canvass employees on the Employer's premises due to an inability to obtain agreement from the Union as to what dates it would chose to engage employees on.

[50] The Union also failed to take advantage of information provided to it by the Employer as ordered by the Board which was to be provided to enable it to contact employees to enlist their support for the Union. Based upon its narrow view of the Board's Order, and without making any application for clarification of the Order, the Union chose not to utilize that information to contact employees.

[51] The Union's application on this ground also fails.

Objections to the Conduct of the Vote

[52] The Union alleged that there were a number of irregularities in the conduct of the vote. These include:

(a) persons not receiving notice of the vote by reason of being absent from the workplace, being on leave, or having left the employment of the Employer;

(b) that there was improper electioneering at one of the polling places.

[53] No evidence was provided by the Union with respect to the allegations in (a) above. The voter's list and Notice of Vote were posted in accordance with the Board's *Regulations*.

[54] In respect of the allegations contained in (b) above, there was evidence from both a Union witness, Darren Piper and an Employer witness, Roger Coates. Mr. Piper and Mr. Coates were the scrutineers for the vote that was conducted on October 9, 2008 at Giant Tiger store 405 on Avonhurst Drive in Regina.

[55] Both witnesses described an incident involving an employee named Helen Koch which occurred during the vote. Ms. Koch was the first employee to vote. She had worked that day and stayed after her shift to vote when the poll opened. After she voted she was seen to be speaking to other employees who were lined up to vote outside the polling place. The Board agent spoke to Mr. Koch with respect to her

speaking to employees in words to the effect that she should not be electioneering in the hallway.

[56] The evidence established that the Board agent spoke to Ms. Koch, without going out into the hall, with respect to her speaking to employees in words to the effect that she should not be electioneering in the hallway. A second incident occurred where the Board agent left the polling place and went out into the hallway returning with a copy of the voter's list which she had taken from Ms. Koch.

[57] Neither of the witnesses that described this incident where able to hear what was being said by Ms. Koch or the other employees. There was no direct evidence of her electioneering other than the comment which was made by the Board agent that she should not be electioneering.

[58] The evidence established that that following the confiscation of the voter's list by the Board agent that Ms. Koch left the area. There was no evidence to suggest that she stayed at the store after the incident or went home as her shift had ended.

[59] There was no similar incident at the other Giant Tiger location on Victoria Avenue the following day went the vote was conducted there.

[60] The regulations respecting the conduct of votes by the Board contains no provisions regarding what is or is not permitted by way of electioneering during the conduct of or prior to votes being conducted by the Board. Nor has the Board provided guidance with respect to the range of permitted activities in respect of campaigns for support of employees when votes are ordered. Given the recent changes to the *Act* which require that votes be held among employees where sufficient support is tendered to the Board, this topic is one which the Board feels should be addressed for the benefit of the labour relations community.

[61] However, before embarking on that issue, the Board needs to address the specific issue raised in this case respecting the activities of Ms. Koch at the polling place when the vote was being conducted.

[62] With respect to her possession of the voter's list, the Board dealt with a similar incident in *Cavanagh v. Canadian Union of Public Employees Local 1975 and University of Saskatchewan Students' Union,* [2003] Sask. L.R.B.R. 226, LRB File No. 047-03. In that case, the Employer provided a seniority list to the organizer of the application for decertification. That list, like the list in this case, was generally available to employees. In that case, the Board followed its earlier decision in *Saranchuk v. United Steelworkers of America and Capital Pontiac Buick Cadillac GMC Ltd.*, [1998] Sask. L.R.B.R. 756, LRB File No. 152-98 where it quoted from that case at 763 as follows:

> *USWA was also concerned that Capital influenced or interfered with the making of this application by providing Mr. Saranchuk with the list of employees including occupations, addresses and telephone numbers. Mr. Saranchuk testified that he simply asked for a list without explaining why he needed a list of employees. Mr. Lunn testified that he thought it was proper to provide employees with the seniority list when there was no shop steward in the workplace. Mr. Lunn acknowledged, however, that he suspected the list was being used by Mr. Saranchuk to obtain support for the rescission application although he denied having any direct knowledge of the application. Mr. Saranchuk testified that the list was not totally up-to-date, in any event, as it contained the names of employees whom he knew had resigned their employment.*
>
> *The Board does not conclude from this evidence that Capital improperly influenced or interfered with the application. Normally, the seniority list would be posted in the workplace and would be available on a bulletin board for employees to copy. Mr. Lunn concluded that, in the absence of a shop steward, he was required to provide the information to USWA members who requested it. In the absence of a shop steward, Mr. Lunn's conclusion does not appear to be unreasonable. There is no evidence that he was selective in choosing which employees he would assist by providing them with the seniority list. We would assume that USWA, on request, would be provided with the same information.*

[63] That rationale was adopted by the Board in *Cavanagh*, *supra.* At para [35] the Board says:

> *[35] We are of the same view in this instance. The seniority list is generally available to employees and can be used by them for a variety of purposes. The provision of the list to employees in the circumstances of a rescission application does not, in itself, constitute advice or influence.*

[64] In this case, the obtaining of the list by Ms. Koch is even less concerning. The list was posted on the employee bulletin board pursuant to the Direction for Vote by the Board Agent, which is done in the normal course of a vote conducted by the Board.

It is to be posted so that employees may be aware of who might be entitled to vote in order that they can present themselves at the appropriate time to mark their ballot. There was no evidence of the Employer having been any way involved in Ms. Koch obtaining the list, nor was there any evidence of how the list was obtained or how, if it had been copied from the list posted on the bulletin board, how that copy was made. As the voter's list was a public document in the sense that it was posted by the Board, there can be no inference drawn that it was obtained in any improper fashion, nor that it was being used for any improper person other than intended to inform employees who might be eligible to cast ballots.

[65] As for the allegation of electioneering, while there is not direct evidence of what Ms. Koch was discussing with her co-workers, the Board is unable to conclude that this communication was in any way being done as agent for the Employer. Employees certainly have the right to campaign for or against a union and to engage with their co-workers to attempt to influence them in casting their vote. While we are unable to say with any confidence that this was what Ms. Koch was doing, there is certainly no evidence to suggest that her discussions with her co-workers were in any way threatening, coercive, or were interfering with any employees right to the free exercise of their conscience when voting by secret ballot.

[66] Accordingly, the Board finds that the incident as described did not interfere with the proper conduct of the vote.

[67] The Union, in argument, suggested that it might be appropriate for the Board to attempt to prescribe rules with respect to conduct at the polling place for the future benefit of both those who might support the outcome of a vote and those who might oppose the issue.

[68] Counsel for the Union brought to the Board's attention the provisions of the *Manitoba Labour Relations Act* C.C.S.M., c. L10 and the *Alberta Labour Relations Code* RSA 2000, c. L-1 dealing with this issue. In Manitoba, s. 48 of their governing statute provides as follows:

> *48.1(1) Where the board conducts or orders a vote under this Part, an employer or union or any person acting on behalf of an employer or union who, on the day of the vote, at the place of work or polling place'*
> *(a) distributes printed material, or*
> *(b) engages in electioneering;*
>
> *for the purpose of influencing the vote, commits an unfair labour practice.*
>
> *48.1(2) Any person, other than a person referred to in subsection (1) who does anything that would be an unfair labour practice under subsection (1) if done by an employer or union is guilty of an offence.*

[69] Under the Manitoba statute, prohibited activities are an unfair labour practice if committed by a Union or Employer, but an offence under the *Act* if committed by someone other than a Union or Employer.

[70] In Alberta, s. 15(4)(f) allows the Board to "direct all interested persons to refrain or desist from electioneering or from issuing any propaganda, or both, for any period of time prior to the date of a vote that the Board fixes."

[71] This Board does not have the specific authority with respect to electioneering which is provided for in the Manitoba and Alberta legislation. The Board however, has a general power provided for in s. 42 of the *Act* which provides:

> *The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the Board.*

[72] While this power is not as specific as the authority granted to the Alberta Board or as specific as the Manitoba legislation, it is sufficiently broad to encompass the Board making an order of general application concerning electioneering or the issuance of propaganda prior to or on the date of a vote ordered by the Board.

[73] The Alberta Board has made the following rules regarding campaigning under the authority granted to it by its *Act*:

> *3. (1) No person shall electioneer, issue propaganda or interfere with voters at or in the immediate vicinity of a polling station while a vote is in progress.*
>
> *(2) The Board may in any case make such further direction with respect to electioneering under section 15(4)(f) of the Code as it deems appropriate.*

[74] Contrary to the suggestions made by counsel for the Union, the Board Agent applies these rules, and other similar rules as may be necessary or appropriate, from time to time, when conducting votes. Clause 26(h) of the Board's *Regulations* allows that the agent appointed by the Board may "give special directions or instructions as he may deem necessary for the proper conduct of the vote." This would include directions concerning electioneering both before and during the conduct of a vote.

[75] The Union also alleged that the conduct of the Employer and the Orders of the Board in this case, have prevented it from properly representing the employees covered by the certification application and that the activities of the Employer have so poisoned the atmosphere at the workplace that the results of the vote should be disregarded. In support of its position, the Union cited the Board's decisions in *Panasiuk v. Service Employees' International Union, Local 299 and Beautiful Plains Villa Ltd.*, [1989] Summer Sask. Labour Rep. 42, LRB File No. 221-88 and *Bressers v. United Food and Commercial Workers, Local 1400 and Sobey's Capital Inc.*, [2005] Sask. L.R.B.R. 68, LRB File Nos. 181-04 & 227-04.

[76] In each of the cases cited, the Board did not altogether disregard the results of the vote. In *Panasiuk, supra*, the Board found the Employer's conduct to be an unfair labour practice and set aside the results of the vote because in their view, the Employer's pre-vote conduct "was likely to critically interfere with their [the employees] judgment. The Board went on to say, however, "that employees are not without fortitude and that, given a fair opportunity to weigh and consider both sides of a question, they can and will intelligently decide according to their own best interests."

[77] In the end result, while disregarding the results of the vote which had been conducted, they ordered a second vote to be held and provided "at least three weeks" for the union to communicate with the effected employees.

[78] *Bressers, supra,* dealt more with the conduct of the parties in their campaigning for the rescission vote. In that case, the Employer, the Board felt, took a "consistent approach in relation to the union's and the applicant's campaign prior to a secret vote." In that case, the Board declined to interfere, concluding that "the Union has failed to establish that the conduct of the vote was improper and, as such, the vote results can be conveyed to the parties."

[79] The Board can see no reason, based on the decisions cited above to disregard the results of the vote.

[80] The Board does not wish to exacerbate the situation which exists in the workplace as a result of the protracted wrangling over this certification. As a result, the Board has determined that it will instruct the Board Agent to count the votes of the following employees who the Board finds are eligible to vote, having been employed on March 27, 2008 and who remained employed as of the dates of the vote, being October 9 and 10, 2008:

Store 405

Leslie Ang	Sara Ashdohonk
Brian Beasley	Ashley Denkert
Mona Dorcas	Larry Duesrerbeck
Desiree Duncan	Rod Dyke
Barbara Fernell	Brandon Friesen
Verna Griffin	Danae Bree Hanna
Catherine Hansen	Terry Hovanes
Gladys Ireland	Alannah Jans
Kayla Jones	Vanessa Kennedy
Helen Koch	Donna Laroque
Shawna McLellan	Melinda Normand
Nicole Prosper	Evan Robinson
Krista Rusk	Maureen Schindler
Dawn Schwan	Jenna-Rae Sturm
Amber Swalm	Rebecca Turgeon
Tony Vindevoghez	Angela Yaremchuk

Store 421

Brandon Bohn	Lisa Ebenal
Samantha Gallant	Gloria Gherasim

Tiffany Hill	Rob Kasprick
Austin Lubenow	Elizabeth Madigan
Tammy Miniou	Meghan South
Shirley Sundquist	Tyler Toppings
Amanda Walker	Marissa Walker
Dana Yee	

[81] The results of the vote, once counted shall be communicated by the Board Agent to the Employer, the Union and their respective counsel. The results of the vote may not be communicated by the Employer, the Union or their counsel to any of the store managers, shop stewards, or any employee of Giant Tiger. Prior to the release of any such information, the Employer, the Union, or their counsel shall ensure that the person who is in receipt of such information shall undertake to maintain the confidentiality of the information pending the final determination of the application for reconsideration of the Board's certification Order.

DATED at Regina, Saskatchewan, this **22nd** day of **May, 2009**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

DISSENT

Having given full consideration to the evidence in this matter, I respectfully dissent from the decision of the majority of the Board for the following reasons:

Conduct of Vote

[1] The ballot for the vote is for a decertification and not a representative vote, as would normally be conducted by the LRB under s. 18(v) of the *Trade Union Act*. There has been no hearing so far about a decertification. The ballot asks:

SECRET BALLOT

Do you want to continue to be represented by United Food and Commercial Workers, Local 1400 for the purpose of bargaining collectively with your Employer?	YES [ ] NO [ ]

PLACE AN "X" IN ONE SQUARE ONLY

[2] The wording used on the ballot confirms that UFCW, Local 1400 is the certified bargaining unit. This vote will serve no purpose as it will only create more uncertainty. This vote has been orchestrated by the Employer, who wants to avoid the Union.

[3] It is my opinion that Giant Tiger has undermined the wishes of the employees (original application for cert) and continues to set up road blocks, stopping the Union from representing their members.

[4] The vote results should be only viewed by the LRB panel, no one else.

Reconsideration

[5] I continue ***not*** to support reconsideration, as the matters brought forward by the Employer have in my view been an abuse of process.

[6] It matters not, in my opinion that Giant Tiger has changed their corporate structure. It is my opinion that Giant Tiger only did so to avoid the Union.

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> *[23] As a final point, the Employer contends the decision of the Chambers judge was the only one which could possibly have been made in the situation at hand and that, as a result, it made no difference whether its concerns were raised with the Board or taken directly to the Court of Queen's Bench. We do not agree with this submission. On one hand, if the changing circumstances of the Employer's workforce had been drawn to the Board's attention it might have chosen, nonetheless, to issue a certification order on the basis of the material filed as of the date of the application. Its reasons for doing so might or might not have been compelling. We do not know because we do not have the benefit of seeing them. On the other hand, the Board might have chosen other courses of action such as accepting evidence of post-application developments pursuant to s. 10 of the Act or*

> *ordering a representation vote pursuant to s. 6. Further, it might have been open to the Employer, after the Board had released its decision, to seek a reconsideration of that ruling pursuant to ss. 5(i) and 13 of the Act. In short, we cannot accept the Employer's contention that the Board would necessarily have been obliged to deny certification if the Employer had come forward with evidence of what were said to be material changes in the factual underpinnings of the certification application.*

[7] I agree with the Court of Appeal, I do not believe we would have been obliged to reconsider the certification even if the facts were presented after the date of the original application for certification. In this case, Giant Tiger remains Giant Tiger to the Employees, the public, and any other reasonable persons.

[8] This Employer has been found guilty of an unfair labour practice and continues to abuse the Labour Relations Board and their processes.

[9] We must not forget that the Applicant had clear majority support from Giant Tiger employees. If we allow this type of abuse by Employers, then the message from us as a Board shows little regard for the wishes of any employees. This is not something I can support. The wishes of the employees that applied for certification have been ignored.

[10] The Courts have said that the original panel never erred in their decision. They also said we could only deal with the evidence of support on the day the application came in, which showed clear majority for the Union.

[11] The Employer attempted to have the support for the Applicant withdrawn and was found guilty of an unfair labour practice. I strongly believe we must end this abuse by this Employer, and allow the Union to represent its members.

DATED at Regina, Saskatchewan, this **22nd** day of **May, 2009**.

John McCormick, Board Member