Labour Relations Board
Saskatchewan

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

LRB File No. 026-04; January 15, 2010
Chairperson, Kenneth G. Love, Q.C.; Members: Kendra Cruson and John McCormick

For the Applicant: Ms. Susan Barber
For the Respondent: Mr. Drew Plaxton

Reconsideration – The Board previously determined to reconsider a decision of the Board. Between the time the Board heard an application for Certification and the time the decision was rendered by the Board, the Employer opened a new location which would have been subject to the Certification Order as granted by the Board. Wishes of the new Employees had not been considered.

Majority support – Board determined that support filed on original application did not show sufficient support for a certification under the former "card check" rules. Nor did support shown on original application meet the new threshold where the Board was required to conduct a vote.

Majority Support – Board had conducted vote among certain employees. That vote did not canvass sufficient employees to provide sufficient evidence of support of all affected employees.

***The Trade Union Act*, ss. 5(i), 5.3 and 13.**

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: United Food and Commercial Workers, Local No. 1400 (the "Union") filed an application with the Board on February 11, 2004, 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 Tora Regina (Tower) Limited operating as Giant Tiger, Regina (the "Employer") described as follows:

> *all employees of [the Employer] operating as Giant Tiger in the City of Regina, except the Store Manager.*

[2] By a decision dated July 4, 2007, the Board issued a certification Order in the following terms:

> ***THE LABOUR RELATIONS BOARD**, pursuant to Sections 5(a), (b) and (c) of The Trade Union Act, **HEREBY ORDERS:***
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> *(a) that all employees employed by Tora Regina (Tower) Limited operating as Giant Tiger in Regina, Saskatchewan, except the store manager and office associate, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *(b) that United Food and Commercial Workers Union, Local 1400, a trade union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set out in paragraph (a);*
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> *(c) Tora Regina (Tower) Limited, the employer, to bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set out in paragraph (a).*

[3] The Employer applied to the Court of Queen's Bench for judicial review of the Board's Order, which application was granted on October 25, 2007. The Court of Queen's Bench quashed the certification Order dated July 4, 2007.

[4] The Union appealed the decision of the Court of Queen's Bench to the Court of Appeal for Saskatchewan. By decision dated March 14, 2008, the Court of Appeal overturned the decision of the Court of Queen's Bench and restored the certification Order issue by the Board.

[5] On March 31, 2008, the Employer applied to the Board for a reconsideration of the certification Order pursuant to ss. 5(i) and 13 of the *Act*.

[6] By its decision dated June 2, 2008, the Board determined that it would reconsider the Board's decision of July 4, 2007, for the reasons stated therein. The Board also ordered the Employer to provide a Statement of Employment to the Union, to allow the Union access to its premises to permit the Union to meet with employees, and for the conduct of a secret ballot of employees who were employed on March 27, 2008.

[7] The secret ballot vote was conducted by an Agent of the Board. The Union objected to the conduct of the vote. The Board held a further hearing and issued a Reasons for Decision dated May 22, 2009. That decision directed the Board's Agent to count the votes cast, but restricted the dissemination of that vote to being transmitted to the Employer, the Union, and their respective counsel. The results of the vote were not to be communicated by those persons to anyone else.

[8] The reconsideration of the Board's July 4, 2007 decision was heard on November 30, 2007.

Facts:

[9] The material facts in this matter are not in dispute and were relied upon by both the Court of Queen's Bench and the Court of Appeal in reaching their decisions.

[10] The Board took 41 months to render its decision in respect of the certification application. It was agreed by both the Court of Queen's Bench and the Court of Appeal that this amount of time to render a decision was "inordinate and unreasonable."

[11] During the period of time that the Board's decision was reserved, considerable change occurred with respect to the workplace. As at February 11, 2004, when the application for certification was made, there were 65 employees in the proposed bargaining unit. As of July 20, 2007 (which was the date on which Karen Milani, Vice-President, Human Resources for the North West Company swore an Affidavit for use in the proceedings before the Court of Queen's Bench) there were only twelve of those employees who were still employed by the Employer. In addition, between February 11, 2004 and July 20, 2007, there had been a turnover of 220 employees in the certified bargaining unit. This turnover included employees at both Store 405 and Store 421.

[12] At the time of the application for certification, the Employer operated one Giant Tiger location in Regina, which was Store 405, located at 2735 Avonhurst Drive, Regina, Saskatchewan. On or about June 23, 2007, the Employer opened another

location in Regina, Store 421, at 2610 Victoria Avenue East, Regina, Saskatchewan. As of the date of the certification Order issued by the Board, Store 421 employed 50 people, including one manager, two department managers and one employee who was employed as an office associate and whom the Employer claimed acted in a confidential capacity.

[13] As at the date of the certification Order, there were a total of 112 people employed at both of the locations operated in Regina: 46 at Store 421 and 66 at Store 405, who could be within the scope of the bargaining unit description.

[14] Also in early June of 2007, prior to the opening of store 421, the North West Company, the parent company of the Employer, reorganized its Canadian operations for tax reasons. That reorganization resulted in Store 405 being transferred to a Limited Partnership known as the North West Company LP. Store 421 was opened by the North West Company LP and was not, at any time, operated by Tora Regina (Tower) Limited.

[15] The Union has applied to have the North West Company LP named as a successor to the Employer in respect of the employees named in the certification Order, but, at the request of the Union, that application has not been heard by the Board.

Proceedings before the Court of Queen's Bench:

[16] The Court of Queen's Bench, in its decision[1], stated that there was little merit in referring the matter back to the Board for reconsideration. The Court felt that given the whole of the circumstances, the only appropriate remedy "is to grant the application applied for and to quash the decision of the LRB and its resultant certification Order as issued."

[17] The Court also suggested that it was incumbent upon the parties to have informed "the LRB of the material changes in circumstances which it must have known about prior to the issuance of the LRB's certification Order."

[1] [2007] SKQB 385

Proceedings before the Court of Appeal:

[18] The Court of Appeal did not share the Court of Queen's Bench point of view. They took the view that the Board had no obligation to take the new fact situation into account in making its decision. At paragraph 11 of its decision[2], the Court says:

> *The reason for our conclusion in this regard is ultimately very simple. The Board was entitled, and indeed obliged, to make its decision on the basis of the facts before it. Those facts revealed majority support for the Union. The Board acted on that evidence and made the only decision open to it. It cannot be found to have erred for proceeding in that manner.*

[19] At paragraph 14, the Court also says:

> *The Board will not normally consider evidence of changes in employee support for a union after the date a certification application is filed. As explained in decisions such as U.S.A., Local 5917 v. Doepker Industries Ltd. [2000] Sask. L.R.B.R. 259 at paras. 47-48, there are compelling reasons for this approach. Nonetheless, we agree with the Chambers judge that there might be situations involving delay where the facts in relation to a certification application change so much between the date of the application and the date of the Board's decision that the decision, when it is ultimately made, will not be based on any meaningful evidence of employee support for the union seeking certification. In such circumstances, however, one or both of the parties, if they are concerned about the situation, should put the particulars of those developments before the Board so it can decide whether they should be taken into account. In opinion, the Board has not independent obligation to seek out such information, or to confirm its non-existence, before deciding a reserved application for certification. The Board is entitled, even in the event of a long delay between a hearing and its decision, to act on the basis of the facts put forward by the parties.*

[20] At paragraph 17 the Court held that delay in rendering a decision, in and of itself, would not be considered a denial of natural justice, and "the courts will intervene only where there is both unreasonable delay and the delay is shown to have caused prejudice to the applicant."

[21] The Court of Appeal, in reversing the Court of Queen's Bench, suggested that there were a number of possible alternatives available to the parties who felt aggrieved by the certification. Those alternatives included:

(a) the employees may bring an application for decertification; or

(b) the Board might have accepted evidence of post-application developments, had they been brought to the Board's attention by the parties; or

(c) ordering a representation vote under s. 6 of the *Act*; or

(d) the Employer may have brought an application for reconsideration of the certification order pursuant to ss. 5(i) and 13 of the *Act* after the Board had issued its decision.

[22] Acting on the suggestion made by the Court of Appeal, the Employer made an application for reconsideration of the certification Order. In making that application, the Employer also made an application for an interim order that the certification Order be stayed. The Union also brought an application (LRB File No. 041-08) alleging an unfair labour practice by the Employer, an application for interim relief in respect of that unfair labour practice as well as an application for successorship under s. 37 of the *Act.*

[23] These Reasons for Decision relate to the Employer's application to have the Board's July 4, 2007 decision reconsidered. In the decision of June 2, 2008, The Board agreed that it would reconsider the decision because, in the Board's opinion, there was crucial evidence (the opening of the new store in Regina and the change in ownership structure), which were not considered by the previous Board in their decision.

Statutory Provisions:

[24] Relevant provisions of the *Act* include the following:

> *5 The board may make orders:*
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> *(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
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> . . .
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> *13 A certified copy of any order or decision of the board shall be filed in the office of a local registrar of the Court of Queen's Bench and shall*

[2] [2008] SKCA 38

thereupon be enforceable as a judgment or order of the court, and in the same manner as any other judgment or order of the court, but the board may nevertheless rescind or vary any such order.

18. The board has, for any matter before it, the power:

. . .

(v) to order, at any time before the proceedings has been finally disposed of by the board, that:

(i) a vote or an additional vote be taken among employees affected by the proceeding if the board considers that the taking of such a vote would assist the board to decide any question that has arisen or is likely to arise in the proceeding, whether or not such a vote is provided for elsewhere; and

(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;

. . .

19(1) No proceedings before or by the board shall be invalidated by reason of any irregularity or technical objection, but the board may, at any stage of proceedings before it, allow a party to alter or amend his application, reply, intervention or other process in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy in proceedings.

(2) The board may at any time and on such terms as the board may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

(3) For greater certainty but without limiting the generality of subsections (1) and (2), in any proceedings before it, the board may, upon such terms as it deems just, order that the proceedings be amended:

(a) by adding as a party to the proceedings any person or trade union that is not, but in the opinion of the board ought to be, a party to the proceedings;

(b) by striking out the name of a person or trade union improperly made a party to the proceedings;

(c) by substituting the name of a person or trade union that in the opinion of the board ought to be a party to the proceedings for the name of a person or trade union improperly made a party to the proceedings;

(d) correcting the name of a person or trade union that is incorrectly set forth in the proceedings.

> *(4) The board may at any time correct any clerical error in any order or decision made by the board or any officer or agent of the board.*
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> . . .
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> *42. 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.*

Analysis and Decision:

[25] In cases where the Board is reconsidering a decision based upon a failure of the Board to consider crucial evidence, such as is the case here, the Board must consider the crucial evidence which it has determined should have been considered by the Board.

[26] In its June 2, 2008 Reasons for Decision, the Board concluded that there were two crucial pieces of evidence which, had the Board been aware of then, would have lead them to a different conclusion. That evidence was:

1. The fact that a new store had opened in Regina with the result that an additional 47 employees were added to the group of employees which would have been subject to the certification Order; and

2. There had been a change of ownership of the two stores which would be subject to the certification Order, that was different from the ownership as set out in the certification Order the Board issued in its July 4, 2007 Reasons for Decision.

[27] In its decision, the Court of Appeal,[3] in paragraph 14, recognized that the Board's usual policy, which was to act upon the state of facts presented at the time of the application for certification, was subject to possible "exceptional circumstances" where:

> *…there might be situations involving delay where the facts in relation to a certification application change so much between the date of the application and the date of the Board's decision that the decision when it is ultimately made, will not be based on any meaningful evidence of employee support for the union seeking certification.*

[28] In *Health Sciences Association of Saskatchewan v. Royal University Hospital*,[4] the Board recognized such exceptional circumstances. At p. 129, the Board says:

> *… The special circumstances that the applicant relies upon are the nearly two and one-half years between the date when the application was filed and the date the vote was conducted. During this interval there has been a significant turnover among the employee compliment to the extent that 35 of 81 employees who will be directly affected by the vote, would be ineligible if the Board applied its normal rule.*

[29] The *Royal University Hospital* case, *supra*, did not, however, deal with a certification application but rather was concerned with a situation where a vote had been ordered but, because of disagreements over the make up of the voter's list, the delay of two and one-half years developed.

[30] Similarly, in *Schan v. Little-Borland Ltd. and United Brotherhood of Carpenters and Joiners of America*[5], which case also dealt with a vote ordered by the Board and the composition of the voter's list, the Board ruled at 50:

> *The Board recognizes that it has seldom treated laid off tradesmen in any sector of the construction industry as employees eligible to participate in a representation vote. Nevertheless, every case obviously depends upon its own particular facts and circumstances. The Board's finding in this case that the long term relationship between the three employees in dispute and this contractor, and the intention by the employer and the employees to resume that relationship in the foreseeable future, does not constitute a general ruling with respect to the construction industry. Quite simply, the Board is satisfied that its decision to permit the three tradesmen to vote was fair and equitable on the facts and circumstances of this particular case.*

[31] Because this is a certification application, the Board must take into consideration all of the usual matters which it considers in an application for certification. This includes:

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[3] Supra at footnote 2
[4] [1993] 3rd Quarter Sask. Labour Rep. 128, LRB File No. 210-90
[5] [1986] Oct. Sask. Labour Rep. 48, LRB File No. 221-85.

(a) the appropriate unit of employees; and

(b) whether the applicant trade union represents a majority of employees within that appropriate unit.

[32] In his dissenting judgment[6], Mr. Justice Bayda of the Court of Appeal in *University of Saskatchewan v. Canadian Union of Public Employees Local Union No. 1975*[7] says the following at paragraph 24:

> *The question remains whether the Board dealt with the application as if it were one under Section 5(a), (b) and (c) of the Act, and considered matters relative thereto. If it did, then, as noted above, jurisdiction is preserved. If not, jurisdiction is exceeded. In view of the grounds for appeal and the argument presented to us, the answer to this question hinges primarily upon whether the Board was obligated to ascertain and consider the wishes of the employees respecting the composition and determination of the new appropriate bargaining unit and the determination of what Union represents the employees in that unit and if such and obligation exists whether the Board fulfilled that obligation. …It is, I think, now settled that to enable the Board to make and order under Section 5(a) of the Act, the Board is not required to ascertain the employees" wishes respecting the composition and determination of an appropriate bargaining unit. (Noranda Mines v. The Queen (1970), 7 D.L.R. (3rd) (1). That, however, is not true of an order Under [sic] Section 5(b) of the Act. The import of the provisions in Sections 3 and 5(b) of the Act, is such that where a new bargaining unit is established the employees of that unit have the right to choose the union they wish to represent them and the wishes of the employees in the unit shall prevail. These provisions impose a concomitant obligation upon the Board to ascertain those wishes before it can exercise its right to determine what union, if any, represents the majority in that unit. The Board may use whatever evidence of those wishes it deems appropriate evidence it must have…..**But, for the Board to make and order determining what Union represents the majority without any evidence of the majority's wishes, is to act in excess of jurisdiction**. [emphasis added]*

[33] In its original decision, based upon the unit applied for, the Board determined that a municipality wide (i.e.: the City of Regina) certification represented an appropriate unit of employees for the purposes of collective bargaining. There is nothing in the new evidence made available to the Board on reconsideration to change that determination. Rather, the new evidence of the opening of the second location supports

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[6] Mr. Justice Bayda's dissent was subsequently approved by the Supreme Court of Canada [1978] 2 S.C.R. 834, 22 N.R. 314, 78 C.L.L.C 14178

[7] [1977] S.J. No 361, 22 N.R. 316, 78 C.L.L.C. 176

that determination of an appropriate unit. The Board has concluded that the city wide unit remains appropriate for the purposes of collective bargaining with the Employer.

[34] Even though the Court in the *University of Saskatchewan* case, *supra,* was dealing with an application to amend a certification Order, the statements of the Court concerning the requirement for evidence of the wishes of a majority of the employees, remain applicable to this case.

[35] In the present case, there has been a delay of almost six (6) years from the time the application for certification was made and the date of the hearing with respect to this matter. As was the case in the *Royal University Hospital* case, *supra*, there has been a significant turnover among the employee compliment.

[36] Nothing in the evidence presented by the witnesses suggests that the turnover of employees in this case was exceptional. The parties seemed to accept the level of turnover in this sector of the economy as normal. Karen Milani's evidence, as noted in her affidavit which was filed in respect of the interim application said at para 12:

> *As at February 11, 2004, there were 65 employees in the proposed bargaining unit for Store 405. Since that time 53 employees have either quit or been terminated from their employment such that only 12 of the employees continue to be employed at Store 405. … I am advised by the manager of store 405, Kirk Coates, that since the date of the Application for Certification there has been a turnover of 220 employees. High turnover in the retail industry is not unusual….*

[37] The Board attempted to capture the wishes of the employees by ordering a vote to be conducted as a part of its Reasons for Decision in June of 2008. However, that vote is also inconclusive as a test of the current wishes of a majority of the employees as to whether they wish to be represented for the purposes of collective bargaining by the Union. The vote which was ordered attempted to judge the wishes of those employees who were employed as at the date that the Court of Appeal re-instated the Board's certification Order and who remained employed on the date of the vote. At that time there were only 47 eligible voters, 37 of whom actually voted. This representation did not provide the Board with evidence of majority support upon which it could determine the true wishes of the employees. The Board has, therefore,

determined that that vote would not properly represent the true wishes of the present employees of the two stores.

[38] Also, since the filing of the application in February, 2004, there have been changes in legislation[8] that require the Board to conduct a secret ballot vote where a Union can demonstrate that 45% or more of the employees in the proposed bargaining unit support the application for certification.

[39] At the time of the application for certification, there were 65 employees in the proposed bargaining unit and the Union filed majority support with respect to those employees. As at the date of the Board's certification Order, an additional 47 employees were employed at Store 421. However, the evidence of support filed by the Union with its original application, while representing a majority of the original 65 employees, did not represent a majority of the employees in both stores. As such, if the employees of the Store 421 had been considered by the Board in its July 4, 2007 decision, the Union did not demonstrate sufficient support in this larger bargaining unit to allow the Board to certify the Union as the bargaining agent for the unit of employees which it applied to represent, which was "all employees employed by Tora Regina (Tower) Limited, operating as Giant Tiger in Regina, Saskatchewan.

[40] Furthermore, the Union did not file sufficient support from the appropriate unit to meet the threshold of support which is now required for the Board to authorize a secret ballot vote pursuant to s. 6(1.1) of the *Act.*

[41] According, as required by the *University of Saskatchewan* decision, *supra*, the Board does not have evidence of support from a majority of the employees within the appropriate unit upon which to act to certify the Union as the collective bargaining representative for the employees in the appropriate unit. As noted by Justice Bayda (as he then was) in that case, "for the Board to make an order determining what Union represents the majority without any evidence of the majority's wishes, is to act in excess of jurisdiction."

[8] SS 2008 c. 26 effective May 14, 2008.

[42] It is not the interests of the Union or the Employer the Board must consider in this decision, but rather the interests of the employees and their right to choose whether they wish to be represented for the purposes of collective bargaining or not. Since the thresholds for "card check" certification under the old rules have not been met, and the threshold for the Board to order a vote under the amendments to the *Act* have not been met, the Board must, in the absence of any evidence of the wishes of the majority of employees, deal with the application on that basis.

[43] One option open to the Board would be to dismiss the application for certification on the basis that there was insufficient support demonstrated within the appropriate unit by the Union for either certification under the law which was applicable at the time of the application or as it now stands.

[44] However, had there been no change in the workforce, or no challenge by employees to the actions of the Union in gaining support, the Union would have been certified under the rules of the Board then in effect. Had the Board not delayed its decision until after the Employer opened the new Regina location, the Union would have been certified and the Employer could have determined if it wished to open the new location and have the certification applied to the employees in the new location.

[45] The Board cannot, however, deal with "what might have been" and must deal with the facts as they present themselves in this case. On those facts, the Union is not entitled to the certification which it seeks. The unit it applied for is a citywide unit, that is, for all employees of the Employer in the City of Regina. The support filed did not reach the threshold for "card check" certification of the total 112 employees. However, under the legislation in force at the time of the application, and the original decision of the Board, under s. 6 of the *Act* the Board had the discretion to "direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question." The Board maintains that same ability to order a vote even under the revised legislative scheme now in effect pursuant to s. 18(v) of the *Act*.

[46] In the circumstances of this case, as was done in *Royal University Hospital*[9] and *Little-Borland*[10], the Board will exercise its discretion to order a vote of all employees employed by the Employer, Giant Tiger (be it Tora Regina (Tower) Limited or North West Company LP). That vote shall be conducted in accordance with the Direction to Vote which accompanies these Reasons for Decision. All employees of the Employer who were employed at both of the Regina locations on the date of this decision and who remain employed as of the date of the vote shall be entitled to vote.

[47] There remains one other issue to be dealt with. That is the proper Employer of the affected employees. Throughout the proceedings, the Employer has been quite open as to the change in the ownership of the businesses impacted. It has not attempted to hide the fact (and disclosed it as a part of these proceedings) that the ownership had been changed.

[48] Furthermore, as noted in the Board's Reasons for Decision of June 2, 2008, the Order issued by the Board on July 4, 2008, insofar as it was directed to a now non-existent Employer, is arguably ineffective. As we noted in that decision:[11]

> *It could be argued (and the Board asked the parties at the outset of the hearing on April 16, 2008 to consider these matters), that the Order issued by the Board on July 4, 2008, insofar as it was directed to a now non-existent employer, was ineffective, or that a further order of the Board was required under s. 37 of the Act, with respect to the new employer.*

[49] The Board has on numerous occasions corrected or amended the name of the Employer on applications for certification where the Union has applied for certification in a name that is not totally accurate. Had the Board been aware of the change of ownership, at the time of the original decision, they could have acted under s. 19 or 42 of the *Act* to correct that deficiency. The evidence of Ms. Milani concerning the re-organization was clear. It was not motivated by any attempt to avoid certification, in fact, the prospect of certification was not considered. It was a reorganization motivated by tax planning only. Accordingly, should the employees ultimately chose representation by the Union, following the determination of the wishes of the majority or the employees,

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[9] *Supra*
[10] *Supra*

the certification Order will be issued in the name of the North West Company LP as the Employer, unless, of course, there has been any other change of which we are unaware.

[50] The Union did make an application for successorship under s. 37, but asked that that application not be dealt with pending the Board's determination of the matter before it. That application appears to have been unnecessary, but we will leave it to the Union to deal with that application as it sees fit.

[51] There will be an Order or Orders of the Board as follows:

(a) That within twenty-four (24) hours of its receipt of the Board's Order and these Reasons for Decision, the Employer shall post a copy of the Board's Order and these Reasons for Decision in both of the Giant Tiger workplaces in a location where the documents are visible to, and may be read by, as many employees as possible. Such posting is to remain until the final determination of this matter following the vote of the employees;

(b) Directing, pursuant to s. 6 and 18(v) of the *Act*, that an Agent of the Board conduct a secret ballot vote of employees of Giant Tiger who were employed on the date of this decision and who remain employed as of the date of the Vote;

(c) Directing the Employer to provide to the Board and the Union with a list of the employees, except the store managers, and office associates, employed at both of the Giant Tiger locations in Regina, Saskatchewan, as of the date of this decision. The list of employees shall be provided to the Board on or before 5:00 P.M. C.S.T. on January 22, 2010 . Such list of employees shall be subject to verification or audit by the Board Agent who shall be entitled to view such employment records as may be reasonably necessary for that purpose. The list of employees shall be verified by statutory declaration of an officer or senior manager of the

[11] At paragraph 53

employer. No signatures of listed employees need be provided with the list of employees;

(d) A representative of the Union and the Employer shall be entitled to meet with the Agent of the Board on January 25th, 2010 for the purpose of determining a list of those employees who shall be entitled to vote as set out above. Where there is any dispute as to an employee's entitlement to vote, that persons may vote, however, that vote shall be "double enveloped" at the time the ballot is cast;

(e) That the vote shall be held as follows:

1. At store 405 from 9:30 AM to 11:30 AM on Friday, January 29, 2010; and

2. At store 421 from 1:30 PM to 3:30 PM on Friday, January 29, 2010.

(f) That immediately following the conclusion of the vote at Store 421, the Board Agent shall count the ballots cast and provide a report to the Board as to the outcome of the vote;

(g) 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;

(h) That pending the outcome of the secret ballot vote by the Board Agent, the Employer shall be restrained from communication with its employees with a view to encouraging or discouraging membership or representation by the Union; and

(i) That the Board shall remain seized of this matter for the purposes of determining any issues associated with the implementation of this Order, or arising out of the vote as herein directed.

[52] The time lines which the Board has set for the conduct of this vote have been set deliberately tight. This has been done so as to limit, as much as possible the potential interference by either the Employer or the Union in the conduct of the vote, so that the true wishes of the majority of the employees will be make known to the Board. That vote will be determinative of the application. Following the report of the Board Agent, the Board will consider the results of the vote *in camera* and will either confirm the existing Order, or rescind the existing Order.

[53] John McCormick, Board Member, dissents in this matter for the following reasons:

[54] On February 11, 2004, UFCW Local 1400 applied for a certification Order of Tora Regina Limited operating as “Giant Tiger” in the City of Regina.

[55] On July 4, 2007 the certification was ordered by the panel that heard the matter.

[56] Although the excess time of (3) three years is abnormal, it still was based on the facts known at the time of the hearing. There was a clear majority and, as was the case at that time, if there was a fifty percent plus one vote in favor of the Union, it *was* an automatic certification. This would have been the case had it not been for the fact that the Employer encouraged employees to make application to withdraw their support for the Union. The Board heard the concerns of the employees for withdrawal of card support. However, the Board also discovered that the Employer had orchestrated the applications for withdrawal by telling employees where they could call for help to withdraw the support that they had signed.

[57] During the three year delay in the decision, the Employer had every opportunity to bring forward anything that may have been missed or changed in regard to the structure of Giant Tiger. They never raised any concerns during that period.

[58] The Union never had the opportunity to represent the employees of Giant Tiger during that three year period. For the Union, nothing had changed, they had applied for a regional certification which included all of the City of Regina.

[59] The Employer continued to try and have the certification Order quashed by applying to the Court of Queens Bench (October 25, 2007). This application was upheld and the certification was quashed.

[60] This decision was overturned on March 14, 2008 in the Court of Appeal. The certification was restored for UFCW, Local 1400.

[61] On March 31, 2008 the Employer "Giant Tiger" applied for reconsideration and proceeded to argue that there were many changes that had happened at "Giant Tiger."

[62] Giant Tiger argued that there was a major turnover of employees that had originally made application (only (12) twelve remained) for certification, therefore they further argued the Board should reconsider its Order for certification.

[63] Giant Tiger also opened another store in the east end of Regina, on or about June 23, 2007. The Employer (Giant Tiger) argued that this new store was never owned by the group called Tora Regina (Tower) Limited. This new store was transferred to a company called North West Company LP and was never owned by Tora Regina (Tower) Ltd., but both stores are called Giant Tiger.

Summary of events that should be considered:

- The Employer was guilty of assisting employees to withdraw their support for certification;
- The Employer made sure that the Union representatives were asked to leave the store any time they showed up to talk to its members;
- Had it not been for the interference by the Employer, the automatic certification rules would have applied;
- The Employer allowed employees to discuss decertification and its process at the workplace and even promoted decertification;

- The Employer opened a new store and attempted to argue that it was not owned by the same organization. In my view, this was just another attempt to avoid certification; and
- The Employer refused to share information on employees with the Union so they could represent its members.

[64] This Employer, Giant Tiger (Tora Regina) would have us believe that they no longer are the owners of the east Regina store, this store is now owned by North West Company LP (Giant Tiger).

[65] I would suggest all employees of both stores believe they are employed by Giant Tiger; any reasonable person would believe Giant Tiger is Giant Tiger.

[66] It is my view Giant Tiger has tried to avoid certification by changing company names. They stated changes were for tax purposes. They still remain Giant Tiger, located in the City of Regina which should have fallen under the certification Order dated July 4, 2007.

[67] Reconsideration is a serious matter and the Employer has not met any of the thresholds to be allowed reconsideration. The criteria are as follows:

1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*

2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*

3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*

4. *if the original decision turned on a conclusion of law of [sic] general policy under the code which law or policy was not properly interpreted by the original panel; or,*

5. *if the original decision is tainted by a breach of natural justice; or,*

6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[68] The Employer has not met any of these six points.

[69] The original panel based its decisions on a clear majority of support and issued a city wide certification.

[70] The Employer knew it was going to build a new store and would have been subject to the certification Order. The building of this new store was not just planned on June 23, 2007 and built that day, therefore I believe they (Employer Giant Tiger) had the opportunity to bring this forward prior to the certification Order being signed.

[71] All parties knew what a city wide certification means.

[72] I disagree with paragraphs 43 and 45 of this Reasons for Decision as there was clear majority support at the time of application. Majority support was the fact of this case from the outset, and this should not be ignored.

[73] A vote of any type right now is tainted by the Employer's consistent contempt for the employees' wishes to be certified with UFCW, Local 1400. This Employer has led the drive to decertify from the very beginning of the certification application on February 11, 2004. If the employees want to decertify, they may do so under the *Act*.

[74] It is my view that the Union should be given an opportunity to represent its members (both stores) as difficult as it may be, given the actions taken by this Employer.

[75] The Union and employees have been undermined by this Employer, and we should allow a proper period of time for the Union to attempt a period of negotiations with the Employer. If the parties cannot agree to a First Collective Agreement, then a mediator should be appointed. This mediator should give a detailed report outlining the achievements in collective bargaining and the problems associated during bargaining.

[76] I do not support a new vote as the Employer has had since February 11, 2004 to undermine the Union. The employees who signed a majority of the cards have not been given their fair right to be certified. The Employer has had far too long to discourage new and old employees not to support the Union.

[77] There is nothing to be gained by allowing a new vote. There was a clear majority for certification and the original panel never erred in any manner, except for timeliness.

[78] In my view certification should be sustained.

DATED at Regina, Saskatchewan, this **15th** day of **January , 2010**.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.,
Chairperson