

BRITISH COLUMBIA LABOUR RELATIONS BOARD

ECN HOTEL MANAGEMENT LTD. DOING BUSINESS AS
TALLY-HO HOTEL, TALLY-HO SPORTS BAR AND
HIDEAWAY CAFE

(the "Employer")

-and-

UNITE HERE, LOCAL 40

(the "Union")

-and-

CERTAIN EMPLOYEES OF ECN HOTEL MANAGEMENT
LTD. DOING BUSINESS AS TALLY-HO HOTEL, TALLY-HO
SPORTS BAR AND HIDEAWAY CAFE

("Certain Employees")

PANEL: Jennifer Glougie, Vice-Chair

APPEARANCES: Craig T. Munroe and David Penner, for
the Employer
Michael J. Prokosh, for the Union
Certain Employees, for themselves

CASE NO.: 70250

DATE OF DECISION: January 10, 2017

DECISION OF THE BOARD

I. **NATURE OF APPLICATION**

1 The Union applies under Sections 30, 33(3)(c) and 33(4)(b) of the *Labour Relations Code* (the "Code") for an order barring its members from applying to cancel its certification for a period of six months.

2 The Employer challenged certain facts asserted in the Union's application but took no position with respect to the Union's application on its merits.

3 Certain Employees were invited to participate but did not file a submission.

4 Because the material facts are not in dispute, I am able to decide the application on the basis of the written submissions filed.

II. **BACKGROUND**

5 The Union is certified to represent a bargaining unit comprised of the Employer's employees. The Union says, and the Employer does not challenge, that the Collective Agreement between the parties has expired but continues to operate pursuant to a continuation clause. The parties have, so far, been unable to schedule dates to bargain a replacement collective agreement and collective bargaining has not yet begun.

6 On June 7, 2016, Certain Employees applied to cancel the Union's certification. The Union and the Employer attended a hearing at the Board on June 14, 2016, at which point the Union indicated it was investigating whether any unfair labour practices had been committed in the course of the decertification drive. The Union ultimately filed an unfair labour practice complaint on June 17, 2016. The Employer and the Union filed submissions with respect to both Certain Employees' application for decertification and the Union's unfair labour practice complaint. After receiving those submissions, the Board made an interim ruling settling certain of the preliminary issues and set the remaining issues down for an oral hearing to commence on September 28, 2016. The parties ultimately met with a Board mediator on September 28, 2016, and, with his assistance, successfully resolved the dispute. Both the application for decertification and the Union's unfair labour practice complaint were withdrawn under the terms of the settlement agreement reached.

7 On November 7, 2016, Certain Employees filed a second application to cancel the Union's certification. The Union and the Employer attended a hearing at the Board on November 15, 2016. At that hearing, the Union raised a number of issues with respect to the Tentative Voters List. The Board determined that, if the Union were correct in its assessment of who should and should not be included on the voter's list, Certain Employees would not have achieved threshold for the purpose of scheduling a representation vote. Deadlines were set for the parties to make submissions on the

issues raised by the Union but before those submissions were filed, the parties again met with a Board mediator. The parties were again able to settle the bargaining unit constituency and voter list issues. As a result of that agreement, on November 21, 2016, Certain Employees withdrew the application for decertification with the Union's consent.

8 On November 23, 2016, Certain Employees filed a third application to cancel the Union's certification. The Union and the Employer attended a hearing on November 30, 2016, in person and a representative of Certain Employees attended by conference call. At the hearing, the Union again challenged the make-up of the Tentative Voters List. The Board determined that, even if the Union were correct, Certain Employees would have met threshold. The vote was ordered to proceed and the ballots were counted. Of the 27 individuals who cast a ballot, 16 voted in favour of continued Union representation and 11 voted against. As a result, Certain Employees' application for decertification was dismissed.

III. POSITIONS OF THE PARTIES

9 The Union says Certain Employees' repeated applications for decertification have resulted in a substantial and excessive interference with its rights and obligations under the Code. It says a six month time bar is appropriate in the circumstances. The Union points to the fact that Certain Employees have filed three applications for decertification in less than six months, the last two of which were filed within a three week period. It further notes the third application was filed only two days after the second application was withdrawn due to lack of threshold. The third application for decertification resulted in a representation vote and the employees' wishes were made clear; the majority supported continued representation by the Union.

10 The Union says it was required to expend considerable resources defending the decertification applications because the Board's processes were engaged for all three. Specifically, it says it was required to: prepare for and attend the hearing on June 14, 2016; draft the written submissions in response to that application; investigate whether unfair labour practices were committed and draft its own application to the Board; prepare for and attend a case management conference call on September 19, 2016; prepare for and attend the hearing on September 28, 2016, which ended up being a mediation; prepare for and attend the November 15, 2016 hearing; and prepare for and attend the November 30, 2016 hearing. The Union says the repeated applications for decertification have required it to devote its attention and resources to defending those applications and communicating with its membership and have prevented it from focussing on bargaining a replacement collective agreement. For these reasons, the Union says, Certain Employees' repeated applications for decertification have amounted to a substantial and excessive interference with its rights and obligations under the Code.

11 The Employer takes no position with respect to the substance of the Union's application. Certain Employees did not file a submission despite being invited to do so.

IV. ANALYSIS AND DECISION

12 The Board has the discretion, under Section 30 of the Code, to prohibit employees from filing repeated applications for decertification for a specified period of time. Section 30 provides as follows:

Repeated applications for certification

30 If the trade union is not certified as the bargaining agent under section 25, or a cancellation of certification is refused under section 33(4)(b), the board may designate the length of time, not less than 90 days, that must elapse before a new application by the same applicant may be considered.

Sections 33(3)(c) and 33(4)(b) together provide that the Board may impose a time bar under Section 30 where the employees' application for decertification is dismissed as a result of a representation vote.

13 The Board exercises its discretion under Section 30 sparingly: *Thompson Creek Mining Ltd. and Sojitz Moly Resources, Inc. a joint venture operating as Endako Mines*, BCLRB No. B73/2012, 209 C.L.R.B.R. (2d) 195 ("*Thompson Creek*"), at para. 22. A time bar curtails the employees' right to cancel their union representation for a period of not less than 90 days and, as such, interferes with employee rights guaranteed by the Code. Therefore, the Board will only exercise its discretion to impose one where a valid labour relations purpose exists for doing so. As the Board held in *Thompson Creek*, at paragraphs 23-24:

In the context of Section 33(3)(c), the Board evaluates the disruption occasioned by repeated decertification applications in view of the rights and duties the Union has acquired under the Code as well as the collective bargaining relationship as a whole. The Employer's rights and legitimate interests are also a relevant consideration: Section 2(a). The Board then balances those considerations against the employees' rights under the Code.

The question often boils down to whether the applicant has shown a compelling justification to limit employees' rights based on *substantial and excessive* interference with the applicant's rights under the Code. That is the thrust of the Union's position in the present case. This determination is made in view of all the circumstances, including the number of applications, considerations of timing and the recognition that disruption is inevitable in decertification proceedings. (emphasis in original)

14 In the present case, Certain Employees filed three applications for decertification in less than six months, the last of which was filed only two days after the second was withdrawn for lack of threshold. I am satisfied that the Union has had to devote considerable attention and resources to investigating and defending the applications for decertification. As the Union points out, all three applications resulted in hearing days

before the Board. The first and second applications were only resolved with the assistance of a Board mediator and after multiple days of mediation. I find Certain Employees' repeated applications for decertification amount to a substantial and excessive interference in the Union's rights and obligations under the Code in the circumstances.

15 Further, as the Board noted in *Thompson Creek*, the timing of the applications for decertification is relevant to a determination of whether a time bar is appropriate. In the present case, the Collective Agreement has expired and negotiations for a replacement agreement have not yet begun. The Board has a duty under Section 2(c) of the Code to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees. The employees' wishes are now known; Certain Employees' third application resulted in a representation vote the results of which demonstrated that the majority of employees favoured continued union representation. In the circumstances, I find the Union is entitled to a period of time to focus its attention and resources on bargaining rather than defending repeated applications for decertification.

16 I exercise my discretion and order that a six month time bar be imposed pursuant to Sections 30, 33(3)(c) and (34)(4)(b) of the Code.

V. CONCLUSION

17 The Union's application is allowed. Certain Employees are barred from applying to cancel the Union's certification under Section 33(2) of the Code for a period of six months from the date on which the third application (Case No. 70225/16L) was dismissed.

LABOUR RELATIONS BOARD


JENNIFER GLOUGIE
VICE-CHAIR