

March 19, 2014

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Attention: Mr. Richard F. Steele

Dear Sirs:

RE: LRB File Nos. 202-13, 204-13 to 211-13; Applications for Successorship

1. The Construction and General Workers Union, Local No. 180, joined by the International Brotherhood of Boilermakers, Local 555, the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179, the United Brotherhood of Carpenters and Joiners of America, Local 179, the International Union of Operating Engineers, Hoisting and Portable & Stationary, Local 870, Teamsters Local Union No. 395 and Operative Plasterer's and Cement Mason's International Association, Local 222 (the

“Unions”) applied to be named as the successors for employees of Con Ops Construction Ltd., Flour Utah Engineers & Constructors, Inc., Con Ops Construction Ltd., and Con Ops Construction Ltd. (the “Employers”) and for a declaration that some or all of the Employers are common employers within the meaning of Section 37.3 of *The Trade Union Act*, R.S.S. 1978 c. T-17 (the “Act”).

2. The Unions, (particularly the Construction and General Workers Union, Local 180) requested pre-hearing production of documents and particulars from the Employers (particularly Flour Utah Engineers & Constructors Inc.) by letter dated September 27, 2013.
3. Following the request for documents and particulars, the parties attempted to negotiate a resolution of the issues, but were unsuccessful. On March 7, 2014, the Employers responded to the Unions’ request.
4. The Unions were not satisfied with the response provided. The Unions applied to the Board for an order requiring the Employers to provide additional documents and particulars.
5. A panel of the Board, comprised of Chairperson Kenneth Love, Q.C. and members Hugh Wagner and Mike Wainwright, conducted a telephone hearing with respect to the request for additional documents and particulars.

Decision

6. For the reasons that follow, we decline to order the extensive disclosure sought by the Unions. The documents and particulars requested are too

vague in nature and are, in our opinion, a “fishing expedition” on the part of the Unions. We are prepared to order production of the following:

The Articles of Incorporation, Minute Books, letters patent, bylaws, shareholder agreements, shareholder resolutions and/or shareholder registers for the Employers from January 1, 2010 to this date.

7. Furthermore, during the hearing, counsel for Flour Utah Engineers & Constructors, Inc. undertook to provide a witness at the hearing of this matter who could speak to the organization of the Employers and the history of their business operation since 1980.

Reasons for Decision

8. As noted by the Board in its decision in *Re: Saskatchewan Assn. of Health Organizations*,¹ the Board reviewed extensively its practices, procedures and jurisprudence concerning the production of documents. That review included pre-hearing production as is the case here, as well as production of documents following the commencement of a hearing, and by *Subpoena Duces Tecum*.

9. At paragraph 37 of that decision, the Board says in point 1:

1. ***Pre-hearing production:*** *A party to proceedings before the Board can now seek production of documents prior to the commencement of the hearing. Such applications are typically heard by the Board’s Executive Officer. The Board’s Executive Officer has delegated authority to grant Orders of production and typically does so based on broad and general principles of*

¹ [2012] S.L.R.B.D. No. 5, 210 C.L.R.B.R. (2d) 229

relevancy. Generally speaking, an applicant seeking pre-hearing production of documents must merely satisfy the Board's Executive Officer that the desired documents are arguably relevant and/or that there is some probative nexus between the documents or information sought and the matters in issue arising out of proceedings before the Board. However, the greater the number of documents sought, the stronger the probative nexus expected by the Board's Executive Officer, particularly so if considerable expense, time and effort is required to locate and produce the desired documents. In this regard, it is important to note that labour relations boards were established to provide an alternative to the formalistic procedures of courts of competent jurisdiction. While pre-hearing discovery and production of documents may be the norm in civil litigation, such procedures are not the norm in proceedings before tribunals, such as this Board. To which end, while a certain degree of "fishing" is permissible in a request for pre-hearing production of documents (i.e.: to seek out evidence in support of an allegation under the Act), it has not been the practice of this Board to grant broad-spectrum, non-specific or infinite production Orders to in essence, compel the kind of pre-hearing discovery of documents that occurs in civil courts. Similarly, s. 18(b) of the Act (as was the case with its predecessor provision) does not include authority to compel a party to "create" documents or things in response to a production request, such as a statement as to documents. See: Pyramid Electric Corporation v. International Brotherhood of Electrical Workers, Local 529, 2001 SKQB 216 (CanLII), 208 Sask. R. 118 (Q.B.). Simply put, the Board does not have the authority to invoke, nor does it desire to replicate the kind of discovery procedures or production of documents obligation commonly seen in a judicial setting.

It should also be noted that in a pre-hearing request for the production of documents, the Board's Executive Officer does not generally concern him/herself with issues of confidentiality or privilege; as the more common practice has been for disputes as the production of documents upon which a privilege is claimed to be resolved by a panel of the Board (either prior to or at the commencement of the hearing). In other words, parties are expected to locate and produce the documents set forth in any production Order of the Board's Executive Officer, save any documents upon which privilege may be claimed. Responsive documents upon which privilege are claimed are delivered to the Board (either the panel seized to hearing the proceedings or another) to determine whether or not production of the disputed documents is appropriate. This practice enables the parties to make representations to the Board on the claims asserted and enables the Board to have the benefit of viewing the disputed documents in rendering its decision. This practice was employed by the parties and the Board in International Brotherhood of Electrical Workers, Local 529 v. Sun Electric (1975) Ltd., et. al., [2002] Sask. L.R.B.R. 362, LRB File No. 216-01, and in subsequent proceedings, [2002] Sask. L.R.B.R. 698, LRB File No. 216-01.

This rationale has been applied in this case as well.

10. Much of what was requested was open ended. During the course of the hearing, counsel was asked to better define the additional documents he was seeking to have produced, but he was unable to provide anything more definitive than what had been set out in the original request. The requests for additional documents were, in our opinion, too broad in their spectrum, were not sufficiently specific, and/or would require the compiling of documents by the Employer.
11. Furthermore, the issue of production does not necessarily end with this determination. Should relevant documents be discovered during the course of the hearing of this matter, the Board retains authority to order production of those documents at that time.
12. An Order setting out the Board's direction as set out above will issue with these Reasons.

Yours truly,

Kenneth G. Love, Q.C.
Chairperson