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Attention: Ms. Heather Jensen

Attention: Mr. Kevin C. Wilson, Q.C.

Dear Madam & Sir:

RE: LRB File No.: 160-17

Background:

1. Workers United Canada Council (the “Union”) applied to the Board to require Amenity Health Care LP (“Amenity”), who had filed an unfair labour practice application against the union, alleging that the Union interfered with, restrained, intimidated, threatened or coerced certain employees in respect of the representation vote regarding their representation by the Union. The Union requested the Board order:
 - a) That the Board order Amenity to provide it with a list of witnesses that it intends to call at the hearing;
 - b) That the Board order Amenity to provide to it, copies of documents which it intended to produce as exhibits in the proceeding; and

- c) Particulars of the events referenced in paragraphs 4 and 5 of Amenity's application to the Board.
2. The Union argued that it required production to allow it to be properly prepared for the hearing and not to be subjected to surprise, or as counsel for the Union stated, "trial by ambush". The Union argued that the Executive Officer had the authority to make the requested Orders pursuant to section 6-11 of *The Saskatchewan Employment Act* (the "SEA"). The Union also referenced this Board's recent decision in *International Brotherhood of Electrical Workers, Local 2038 v. Aecom Production Services Ltd.* (2017 CanLII 72972 (SK LRB)).
 3. Amenity responded that the requests needed to be placed into the context of the case, that is, that the matter revolved around a workplace employing (8) eight persons who were the subject of a certification campaign by the Union. Amenity argued that the case was simple and straight forward.
 4. Amenity raised a concern with respect to release of the witness list and the list of documents to be produced at the hearing that due to the small workforce and the allegations that employees had been intimidated by the Union, releasing the names of proposed witnesses as well as those documents had the potential for those witnesses (or those mentioned in documents) to be again subject to pressure in respect of their testimony.
 5. In respect of particulars, Amenity argued that the request came far too late in the proceedings insofar as no similar request was made prior to the Union filing its Reply, nor prior to an application which it made for summary dismissal of the unfair labour practice.
 6. Amenity also argued that the Executive Officer did not have the authority to make the Orders requested.

The Test for Production:

7. In the Board's decision in *International Brotherhood of Electrical Workers, Local 2038 v. Aecom Production Services Ltd.* (2017 CanLII 72972 (SK LRB)), the Board confirmed its earlier jurisprudence which adopted what are known as the "Air Canada" criteria for analysis of such requests. Those criteria are:
1. *Requests for production are not automatic and must be assessed in each case;*
 2. *The information requested must be arguably relevant to the issue to be decided;*
 3. *The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time-frame and the content;*
 4. *The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case;*
 5. *The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested;*
 6. *The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.*

Union Request for Witness Names and Documents to be Produced

8. Of these criteria, point #6 is, in the Board's opinion, the most relevant. We take very seriously any concerns, as expressed by Amenity, that disclosure of witnesses names and documents which they intend to rely upon could, and the Board stresses

that this is not suggesting that such would occur, have the effect of affecting those witnesses and their testimony.

9. In this era of social media, it is difficult to control information once it has been released and may be the subject of wide dissemination. While we have no evidence that this will or may occur, the Board has always been diligent to ensure that individual support, or non-support, for a representative union is kept as confidential. Additionally, the Board should also protect and will protect employee's free right to choose a union of their own choice and that that choice remains free from interference of any sort and reflects the employee's true conscience and belief.
10. The Board does not, therefore, think that it advances the interests of employees and their right to freely associate by making the Order requested by the Union for the names of witnesses and documents they intend to produce.
11. Should any of the witnesses or the documents which they intend to produce come as a surprise to the Union, they can, of course, at that time make an appropriate request for time to investigate.

Particulars Requested:

12. In her letter of December 21, 2017, counsel for the Union requested particulars with respect to all of the allegations made by Amenity regarding its allegations of an unfair labour practice being committed and the loss of secrecy of the vote conducted by the Board related to the certification application. It also requested particulars regarding point 5 of the application which was a statement that; "[T]he Employer is unaware if the Union did or did not direct, encourage, or fail to disclose the behavior of the Employee Respondents".

13. This later point can be easily disposed of since it would be difficult, if not impossible, for Amenity to disclose particulars in respect to actions of which it is “unaware”.
14. The Union has requested that the particulars disclose “dates, names of individuals present, locations, and all events, circumstances, documents, recordings, images, and information the employer relies on in characterizing such events as ‘coercive’”. In its argument before me, Amenity noted that what amounts to coercion under the *SEA* is a question of law.
15. From a reading of the application, as filed, there is, we believe, sufficient particulars provided to allow the Union to properly formulate a defence to the allegations. As noted by counsel for Amenity, there was ample opportunity for the Union to request greater detail prior to the Union filing its Reply to the allegations or prior to the Board’s ruling in which the Union’s summary dismissal application was dismissed.
16. However, more importantly, the request as framed offends the “*Air Canada*” criteria as being a “fishing expedition”. It amounts to a general request with insufficient detail regarding what specific information is being requested in respect of each of the subparagraphs of paragraph 4 of the application.
17. It would not be difficult, the Board submits for the Union, based upon the level of detail provided in the application, including the names of some of the persons present at various events, to determine if such event had occurred and who might have been present at that event. The Application, in the Board’s opinion, contains sufficient detail to allow the Union to understand the case which it needs to meet.

18. Also, in light of this decision, there is no necessity to inquire into my authority to make the requested Order.

19. For these reasons, the Union's application is denied. No Order will be required.

Yours truly,

Kenneth G. Love, Q.C.
Executive Officer