

December 17, 2019

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Dear Mr. Wilson, Ms. Norbeck and Mr. Thebaud:

**Re: LRB File No. 133-19: Application for Production
Saskatoon Co-operative Association Limited v United Food and
Commercial Workers, Local 1400 and C. Thebaud**

[1] This matter originates in the Employer's unfair labour practice application, as amended, filed on June 11, 2019. The Employer seeks clarification of the Board's Decision and resulting Order, dated July 22, 2019. In that Decision, the Board considered the Employer's production application, and further to that application, ordered the production of certain documents by the Union and Thebaud. The Employer seeks clarification about two categories of documents ordered, being the correspondence between Union staff and Thebaud, and selected contents of certain Facebook pages (or groups).

[2] The Employer suggests that the underlying unfair labour practice claim alleges wrongful acts both by the Union and Thebaud together, and by the Union independently. Therefore, the Board, in ordering the production of all hard copy and digital correspondence between Union staff and Thebaud, must have intended to include hard copy and digital correspondence between (or among) Union staff. Furthermore, when the Board ordered the production of any and all posts by an administrator on the timelines of the Election Facebook Group and the Petition Facebook Group, not including the comments in reply to those posts, the Board must have intended to include the production of the contents of the private Facebook group.

[3] The Board provides this clarification to remove any doubt as to the Respondents' obligations pursuant to the Order. First, the Board's choice of language, in the Reasons and the Order, was deliberate. The Employer came to the Board with a production request that, as outlined in detail at paragraph 34 of the Board's Reasons, fell short of the particularization expected by this Board. As explained at paragraph 25 of the Reasons, in an effort to promote and balance the twin

objectives of expediency and fair process, the Board exercised its discretion to narrow the request instead of dismissing it in its entirety.

[4] The Board, in narrowing the request, was guided by the *Air Canada* principles, and by the extent to which the resulting production Order could have been anticipated by the Respondents. The Board determined that the correspondence between Union staff and Thebaud should be produced. That is where it drew the line. The Board decided that extending its Order beyond correspondence between Union staff and Thebaud would be an unwarranted exercise of its discretion. In the Board's assessment, the breadth and practicality of producing all hard copy and digital correspondence among staff regarding the petition outweighed the potential probative value.

[5] The Board notes that it used the language "between Union staff and Thebaud" throughout the Order. This was deliberate.

[6] Second, the Board's specific reference to the two Facebook Groups was deliberate, and the omission of the private Facebook group not inadvertent. The private group is mentioned in the Board's Reasons at paragraph 9. The Board chose not to order the production of the contents of the private Facebook group. The Employer, in the hearing, relied primarily on the Union's admission that the group existed and the Union's failure to deny the potential relevancy of the page. In the Board's assessment, the impracticality of ordering the production of even selected contents of this private page outweighed the potential probative value.

[7] Lastly, the Employer raises an issue with Thebaud's compliance, or more accurately alleged non-compliance, with the Order. The Employer states that Thebaud has failed to produce the contents of the Petition Facebook Group, of which he was the administrator. Thebaud states that the two groups, the Petition and the Election Facebook Groups, were merged on June 24, 2019, two days prior to the hearing on the Employer's production application. As a result of that merger, Thebaud is no longer an administrator of the Petition Facebook Group.

[8] The Board has reviewed the record and based on that review, observes that, at the hearing on June 24, 2019, Thebaud made no mention of not having access to the Petition Facebook Group. Even so, if Thebaud had removed his administrator's access prior to the hearing, knowing that the Employer had made an application for production, that would have been highly inappropriate. An Order to produce has been issued and Thebaud is expected to comply with said Order. At a substantive hearing, it is within the Board's discretion to make an adverse inference about the merits of a party's case, based on a demonstrated lack of compliance with an Order for production, just as it is within the Board's discretion to make a negative inference arising from a failure to call a witness. The Board will not pre-determine this issue, but Thebaud should be aware that non-

compliance is a serious matter. However, an initial Order has been issued, a second Order for compliance has been made, and Thebaud will have to govern himself accordingly.

[9] The Board trusts that the foregoing provides the clarification that the Employer was seeking. In the circumstances, it is unnecessary to issue an accompanying Order.

[10] This is a unanimous decision of the Board.

Yours truly,

Barbara Mysko, Vice-Chairperson
Labour Relations Board