

March 29, 2022

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Dear Mr. Blackstone, Mr. Stromdahl and Mr. Matkowski:

**Re: LRB File No. 037-22
Application for Pre-hearing Production of Particulars or Documents or Things
Amalgamated Transit Union, Local 615 v Battlefords Transit System**

Background:

[1] The Amalgamated Transit Union, Local 615 [“Union”] has recently filed three applications with the Board with respect to the Battlefords Transit System [“Employer”]. First, on January 26, 2022, the Union filed an Application for Bargaining Rights¹ [“Certification Application”]. Then on February 4, 2022, the Union filed an Unfair Labour Practice Application² [“ULP Application”] alleging that the Employer was engaging in conduct contrary to section 6-5 and clauses 6-62(1)(a), (b), (g), (i) and (l) of *The Saskatchewan Employment Act* [“Act”]. At Motions Day on March 1, 2022, these two applications were set for hearing on April 21 and 22, 2022.

[2] In the ULP Application the Union requested production of documents and attached documents on which it intends to rely, as Exhibits A to E. At Motions Day the Union was advised that *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* [“Regulations”] required it to file a separate Application for Production of Documents. Employer’s counsel asked Union counsel to make its application for production of documents sooner rather than later, to accommodate his schedule. On March 3, 2022 the Union filed an Application for Pre-hearing Production of Particulars or Documents or Things³ [“Production Application”]. It is this third application that is the subject of these Reasons.

¹ LRB File No. 010-22.

² LRB File No. 016-22.

³ LRB File No. 037-22.

[3] In the Production Application the Union requested that the Board order the Employer to produce all documents, internal correspondence, notes, text messages, memos, reports, etc., electronic or otherwise [“Requested Documents”], related to:

- a. *The Union’s organizing drive including, but not limited to, communications from employees regarding concerns that their private contact information was shared with the Union as per paragraph 5(i) of the Employer’s reply;*
- b. *Communications to BTS employees related to the Employer’s “efforts to implement a health care plan” which were pled to have been “communicated to employees prior to the filing of the Certification Application or any indication of unionization” as per paragraph 4(d) of the Employer’s reply;*
- c. *The “real steps” taken by the Employer towards implementing a health care plan prior to the filing of the Union’s certification application as per the pleadings at paragraph 5(p) of the Employer’s reply;*
- d. *The questionnaire provided to employees on January 27, 2020 [sic] including any and all correspondence with the chamber of commerce;*
- e. *The Employer’s decision to hire Mr. Logan, inclusive of any posting or advertisement in relation to the vacancy, Mr. Logan’s application for the position and any materials in relation to his interview and subsequent hire;*
- f. *The employer being ostensibly “short staffed” prior to January 25, 2022 as pled in paragraph 5(e) of the Employer’s reply;*
- g. *The Employer’s January 26, 2022 communication to its employees threatening discipline for sharing information with third parties;*
- h. *The Employer’s decision to purchase its employees coffee on January 26, 2022;*
- i. *The Employer’s “long-standing practice of providing food and drinks to its employees on certain occasions” as pled by the Employer at paragraph 4(c) of its reply;*
- j. *The Employer’s decision to strip hours from three of its employees on January 28, 2022;*
- k. *The employer’s ostensible “operational needs” and Ms. Keller’s scheduling accommodation that lead the Employer to change the work schedule on or about January 28, 2022 as per the Employer’s pleadings at paragraph 5(v) of its reply;*
- l. *Any other document which is arguably relevant; and*
- m. *Any other document on which the Employer intends to rely.*

[4] On March 21, 2022, the Employer provided the Union with a list of documents it was prepared to disclose, but only if the Union agreed to a reciprocal exchange of documents. In response the Union withdrew the requests identified in paragraphs (b), (h), (i), (l) and (m).

[5] The Union argues that all of its Requested Documents directly relate to one of the allegations in the ULP Application and/or to facts pled by the Employer in its Reply to the ULP Application. The Union also notes that it set out the list of Requested Documents in the ULP Application, thereby providing the Employer with sufficient time to have located and disclosed the Requested Documents.

[6] The Employer argues first that the Production Application should be dismissed because it was made prematurely. The Employer states that it is willing to engage in a reciprocal exchange of documents with the Union, and that should have occurred first, before the Production Application was filed. Alternatively, the Production Application should be dismissed because the scope of the requests go beyond arguably relevant documents; the requests are not sufficiently particularized; and the requests are in the nature of a fishing expedition.

Relevant Legislative Provisions:

[7] Section 6-111 of the Act sets out the powers of the Board to order pre-hearing disclosure:

- 6-111(1) With respect to any matter before it, the board has the power:*
- (a) to require any party to provide particulars before or during a hearing or proceeding;*
 - (b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing or proceeding.*

[8] Section 21 of the Regulations provides:

- 21(1) In this section, "original application" means an application made to the board pursuant to the Act and these regulations that is the subject of an application for pre-hearing production of particulars or documents or things.*
- (2) An employer, union or other person that intends to apply to the board for an order for pre-hearing production of particulars or documents or things pursuant to section 6-111 of the Act shall:*
- (a) file an application in Form 19 (Application for Pre-hearing Production of Particulars or Documents or Things), including evidence that the applicant has*

served the respondent with a sufficiently particularized request for production and that the respondent has failed, refused or objected to comply with that request; and (b) serve a copy of the application on all other parties to the original application, at least 20 business days before the date set for hearing the original application.

Analysis and Decision:

[9] The Board has confirmed on numerous occasions⁴ that on a production application it will apply the criteria established by the Canada Industrial Relations Board in *Air Canada*⁵:

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.*

[10] Applying the *Air Canada* criteria to this matter, the Board finds that they lead to a conclusion that disclosure of all of the Requested Documents will be ordered.

[11] The Employer argued first that the Application should be dismissed because of what it describes as the Union’s “procedural conduct”. It is of the view that Union counsel should have attempted to negotiate an agreement with Employer counsel on a reciprocal exchange of

⁴ For example, in the decisions relied on by the Union and the Employer: *Application for Disclosure and Production of Documents and Things United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*, 2019 CanLII 107250 (SK LRB); *Saskatoon Co-operative Association Limited v United Food and Commercial Workers*, 2019 CanLII 76933 (SK LRB); *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2012 CanLII 18139 (SK LRB); *SEIU-West, Applicant v Atria Management Canada*, 2016 CanLII 74281 (SK LRB); *SEIU-West v Voyager Retirement V Genpar Inc.*, 2016 CanLII 79627 (SK LRB).

⁵ 1999 CIRB 3 (CanLII) at para 28.

documents prior to filing the Production Application. Normally, that is the process that the Board would expect counsel to engage in. However, the Board's finding on this issue is that, given that one of the underlying applications is a Certification Application, and the timeframe between the date when the hearing was set (March 1st) and the date for the hearing of the Applications (April 21st and 22nd) was, accordingly, so short, the approach adopted by the Union in this matter was the only practical approach. It allowed an opportunity for the Employer to file a Reply (March 17th), and for the Application to be heard with respect to unresolved production issues (March 24th), with sufficient time for the Board to issue a decision and the Employer to provide the required disclosure and still allow for the hearing of the underlying Applications to proceed as scheduled. To comply with the deadline in clause 21(2)(b) of the Regulations, the Production Application needed to be filed no later than March 23rd. By filing it sooner, the Application could be heard in advance of the hearing of the underlying Applications. This is the preferred process, to ensure the hearing can proceed without delay. The Board further notes that responsibility for the lack of the necessary and expected communication with respect to appropriate disclosure falls on both counsel's shoulders, not just those of Union counsel.

[12] The Board turns now to a review of each of the specific Requested Documents. In each case, it is to be remembered that the request is prefaced by "all documents, internal correspondence, notes, text messages, memos, reports, etc., electronic or otherwise, related to:".

Paragraph (a): The Union's organizing drive including, but not limited to, communications from employees regarding concerns that their private contact information was shared with the Union as per paragraph 5(i) of the Employer's reply:

[13] This request is relevant to the issues raised in paragraphs 3 to 11 of the ULP Application and paragraph 5(i) of the Employer's Reply. It is sufficiently particularized, being all Requested Documents related to the Union's organizing drive. The Employer has not agreed to voluntarily disclose any documents relevant to this issue.

Paragraph (c): The "real steps" taken by the Employer towards implementing a health care plan prior to the filing of the Union's certification application as per the pleadings at paragraph 5(p) of the Employer's reply:

[14] This request is relevant to the issues raised in paragraphs 20 and 21 of the ULP Application and paragraphs 5(p) and (q) of the Employer’s Reply. It is sufficiently particularized, being all Requested Documents related to what the Employer has described as the real steps taken by it toward implementing a health care plan prior to the filing of the Certification Application. The Employer has not agreed to voluntarily disclose any documents relevant to this issue.

Paragraph (d): The questionnaire provided to employees on January 27, 2022⁶ including any and all correspondence with the chamber of commerce:

[15] This request is relevant to the issues raised in paragraphs 20 and 21 of the ULP Application and paragraphs 5(p) and (q) of the Employer’s Reply. It is sufficiently particularized, being all Requested Documents related to the questionnaire provided to employees on January 27, 2022 including correspondence with the Chamber of Commerce. The Employer has not agreed to voluntarily disclose any documents relevant to this issue, not even the correspondence that it refers to in paragraph 5(p) of its Reply to the ULP Application.

Paragraph (e): The Employer’s decision to hire Mr. Logan, inclusive of any posting or advertisement in relation to the vacancy, Mr. Logan’s application for the position and any materials in relation to his interview and subsequent hire:

[16] This request is relevant to the issues raised in paragraphs 12 to 15 of the ULP Application and paragraphs 5(e) to (g) of the Employer’s Reply. It is sufficiently particularized, being all Requested Documents related to the Employer’s decision to hire Mr. Logan. The information that the Employer has agreed to voluntarily disclose respecting this issue falls far short of what has been requested or what the Board would expect to be disclosed.

Paragraph (f): The employer being ostensibly “short staffed” prior to January 25, 2022 as pled in paragraph 5(e) of the Employer’s reply:

[17] This request is relevant to the issues raised in paragraphs 12 to 15 of the ULP Application and paragraph 5(e) of the Employer’s Reply. It is sufficiently particularized, being all Requested

⁶ Schedule A of the Production Application refers to January 27, 2020. It is clear from the ULP Application that this is a typographical error, and that it should actually refer to January 27, 2022.

Documents related to the Employer's allegation that it was short staffed prior to January 25, 2022. None of the documents that the Employer has agreed to voluntarily disclose address this issue.

Paragraph (g): The Employer's January 26, 2022 communication to its employees threatening discipline for sharing information with third parties:

[18] This request is relevant to the issues raised in paragraphs 16 to 18 of the ULP Application and paragraphs 5(h) to (k) of the Employer's Reply. It is sufficiently particularized, being all Requested Documents related to the Employer's January 26, 2022 communication to its employees. The Employer has not agreed to voluntarily disclose any documents that address this request.

Paragraph (j): The Employer's decision to strip hours from three of its employees on January 28, 2022:

[19] This request is relevant to the issues raised in paragraphs 22 to 24 of the ULP Application and paragraphs 5(r) to (w) of the Employer's Reply. It is sufficiently particularized, being all Requested Documents related to the Employer's decision to reduce hours of work of three of its employees on January 28, 2022. The Board does not accept the Employer's objection to this request based on its protestation that it does not agree that it stripped hours from any employees. The Board does not accept the Employer's argument that it does not know what the Union is referring to in making this request. None of the documents that the Employer has agreed to voluntarily disclose address this issue.

Paragraph (k): The employer's ostensible "operational needs" and Ms. Keller's scheduling accommodation that lead the Employer to change the work schedule on or about January 28, 2022 as per the Employer's pleadings at paragraph 5(v) of its reply:

[20] This request is relevant to the issues raised in paragraphs 22 to 24 of the ULP Application and paragraph 5(v) of the Employer's Reply. It is sufficiently particularized, being all Requested Documents related to the Employer's operational needs and Ms. Keller's scheduling accommodation identified by the Employer in paragraphs 5(u) and (v) of its Reply. None of the documents that the Employer has agreed to voluntarily disclose address these issues.

[21] In addition to the paragraphs of the ULP Application identified above, further elaboration on many of these requests was provided in the paragraphs of the ULP Application under the heading “Submissions” (paragraphs 25 to 43).

[22] The Board finds that the Union has established that all of the Requested Documents meet the test of being arguably relevant to the issues to be decided by the Board in the Certification Application and the ULP Application.

[23] The Board is satisfied that the requests are sufficiently particularized. This is not a broad, generic request. It is precise and detailed. It is narrow and targeted to the issues raised in the Applications before the Board. In its Application for Production, the Union initially asked for an Order for “any other document which is arguably relevant”. That request was withdrawn. The Employer argues that the Union would not have been entitled to such a broad Order. The Board agrees: that request was the epitome of a fishing expedition. The Employer argues that by asking for production that covers every aspect of its pleadings, the Union is trying to do indirectly what it cannot do directly. The effect is the same. The Board does not accept that argument. The Board encourages the particularization of the requests as provided by the Union. This leads to a request that is specific and targeted. The Employer can readily determine the nature of the requests, the documents sought, the relevant timeframe and the content. The approach taken by the Employer in its offered production confirms that the detailed extensive request by the Union was unfortunately necessary in this matter to ensure the Employer complies with its disclosure duty.

[24] The Union’s requests cannot reasonably be characterized as a fishing expedition. In *Saskatoon Co-operative Association Limited v United Food and Commercial Workers*⁷, the Board stated:

The Respondents characterize this Application, on the whole, as a fishing expedition. However, it is not the case that every hint of a fishing expedition will attract the Board’s wholesale denial of a production request. The Board has observed that a certain degree of fishing is permitted, as it will most often be the case that the applicant will be at least partially unaware of the contents of the materials requested. On the other hand, the applicant is not entitled, through the operation of a production order, to build a fresh case against a respondent.

⁷ *Supra* note 4 at para 32.

[25] The references to specific paragraphs of the ULP Application and the Employer's Reply to that Application confirm that the Union is not attempting to build a fresh case against the Employer. It is asking for the production to which it is entitled, with respect to the issues currently before the Board.

[26] The Board does not accept the Employer's argument that since Ms. Clinton is the only manager in the employ of the Employer, the correspondence the Union is looking for might not exist. The Board notes that Clinton is not a sole proprietor of the Employer. According to the ULP Application, she reports to a Board. There is also reference to correspondence with other people in the Application and the Employer's Reply. At this point the Board has not made a determination as to whether any other employees also fall outside an appropriate bargaining unit.

[27] The Board also rejects the Employer's submission that it is only required to produce the documents on which it intends to rely at the hearing. The Union described the documents the Employer offered to disclose as being only material on which the Employer intends to rely. Employer's counsel agreed with this characterization. This is a shocking admission. It should go without saying that parties are required to produce all documents that are relevant to the issues before the Board, not only those that support their position. This attitude was apparent in the Employer's correspondence of March 21, 2022, and led to the need for the hearing of the Production Application to proceed on March 24, 2022.

[28] The Board is satisfied that the Union has established a probative nexus between its position in the ULP Application and the Requested Documents. The Board made the following comments in *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*⁸, in describing the Board's process on an application for pre-hearing production of documents:

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 relevancy. Generally speaking, an applicant seeking pre-hearing production of documents must

⁸ *Supra* note 4 at para 37.

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.

[29] The Board's reference in this passage to a requirement that the documents be arguably relevant is consistent with clause 6-111(1)(b) of the Act, which grants the Board the power to require any party to produce documents "that may be relevant to a matter before it"⁹. The Union is not asking for, and the Board is not ordering, a broad-spectrum, non-specific or infinite production Order. The Employer does not argue that considerable expense, time and effort will be required to locate and produce the Requested Documents. Given the size of the Employer, the specificity of the requests, and that these requests were brought to the Employer's attention on February 7, 2022¹⁰, any such argument would not have been accepted by the Board in any event. There is a clear probative nexus between the allegations in the Certification Application, the ULP Application, the Employer's Replies to those Applications, and the Requested Documents. While the material the Employer has offered to disclose may be responsive to the Union's requests, the Board is not satisfied that they represent all of the material in the Employer's possession relevant to the pending Applications.

[30] The probative value of the evidence outweighs any prejudice to the Employer. The Requested Documents go to the heart of the matters at issue in the Certification Application and the ULP Application. The Employer has not raised prejudice as a response to this Application.

⁹ The wording of clause 18(b) of *The Trade Union Act*, being interpreted in that decision, is almost identical to the wording of clause 6-111(1)(b) of the Act.

¹⁰ The date the ULP Application was provided to the Employer by the Board.

[31] The dates for the hearing of the Certification Application and ULP Application are fast approaching. Therefore, with these Reasons, the Board will issue an Order requiring the Employer to provide the Requested Documents within one week of the date of the Order. Given that the Employer was first alerted to these requests on February 7, 2022, the Board is satisfied that this will provide the Employer with sufficient time to gather the Requested Documents and send them to the Union.

[32] In closing, the Board provides the following comments on the attitudes that led to this situation. The Union's position in this matter was: "My understanding of standard practices with regard to pre-hearing production is that parties are to produce arguably relevant materials to each other upon request"¹¹. The Employer's position was: "If the Union does not agree to reciprocal exchange of anticipated documents the Employer will not be providing any documents absent a Board order"¹². Both of these positions are wrong in law, and both led to the requirement for a potentially unnecessary hearing before the Board.

[33] To be clear, it is the expectation of the Board that both parties will participate in pre-hearing disclosure of documents to each other. While a request is not required to trigger this duty, a proposal for a reciprocal exchange of documents is a request. A refusal to comply with a professional obligation in the face of presumed non-compliance by the other party is also inappropriate. The proper procedure for the Union to have followed in this matter would have been to approach the Employer first with its request for production of documents. Only if any required information was not provided would it be appropriate to make an application to the Board for its assistance. It was the lack of any discussion between counsel that led to the confusion in this matter.

[34] With these Reasons, the Board will issue an Order requiring the Employer to provide all of the Requested Documents to the Union, on or before April 5, 2022. The Board makes this Order on the basis that the Employer will also provide to the Union, on or before April 1, 2022, all of the documents outlined in its counsel's letter of March 21, 2022.

¹¹ Email Simon Blackstone to Brent Matkowski dated March 18, 2022.

¹² Letter Brent Matkowski to Simon Blackstone dated March 21, 2022.

[35] The Board thanks counsel for their very helpful written and oral submissions in this matter.

Yours truly,

Susan C. Amrud, Q.C., Chairperson
Labour Relations Board