

BRITISH COLUMBIA LABOUR RELATIONS BOARD

PORT TRANSPORT INC.

(the "Employer")

-and-

NATIONAL AUTOMOBILE, AEROSPACE,
TRANSPORTATION AND GENERAL WORKERS UNION
OF CANADA (CAW-CANADA), LOCAL 2006

(the "Union")

PANEL:	Philip Topalian, Vice-Chair
APPEARANCES:	Donald J. Jordan, Q.C., for the Employer Peter Shklanka and Gavin McGarrigle, for the Union
CASE NO.:	61125
DATE OF HEARING:	February 22, 2011
DATE OF DECISION:	March 23, 2011

DECISION OF THE BOARD

I. **NATURE OF THE APPLICATION**

1 The Union complains the Employer has breached Sections 6(1) and 11 of the
Labour Relations Code (the "Code") by refusing to provide the Union with contact
information for employees in the bargaining unit, as well as other information the Union
says it requires for the purpose of engaging in collective bargaining. It seeks an order
requiring the Employer to provide the requested information.

2 The Employer says it is not obliged to provide the Union with the information
requested and therefore no order to provide the information should be made.

II. **BACKGROUND**

3 The Union is certified to represent employees of the Employer. The Union and
the Employer are parties to a collective agreement with a term from January 1, 2009
through June 30, 2010. On June 24, 2010, the Union gave the Employer notice to
bargain a new collective agreement.

4 In a letter dated July 20, 2010 (the "July 20 letter"), the Union requested the
Employer provide it with certain information (listed as items 1 through 8) to assist it with
its preparation for collective bargaining. In a reply letter dated August 13, 2010, the
Employer agreed to provide some of the information requested (items 2, 4 and 6), but
refused to provide the Union with the following information (items 1, 3 and 5):

1. A current contact list containing all bargaining unit members' names, addresses, telephone numbers, and email addresses.

* * *

3. Specific information on each bargaining unit member including name, date of birth, benefit coverage (single, family, enrolled, not eligible, etc.), wage rate(s), premium(s), job classification(s) and any other form of remuneration including but not limited to vacation entitlement, and any profit-sharing, incentive or bonus plans in effect.

* * *

5. Actual data on usage and cost on all areas of any benefit plan for the past three (3) years.

5 The Employer, citing the privacy interests of the bargaining unit members, stated that it would not provide this information without their written consent. It added that, if the Union was able to obtain their written consent, the Union should at the same time

obtain the information it sought from the bargaining unit members themselves. In the result, the Employer refused to disclose the information requested by the Union.

6 The Employer also refused to provide item 7 (a copy of any paperwork and related procedures used to allow drivers to record their daily trips and to invoice for revenue earned) on the basis that this material is proprietary.

7 III. POSITIONS OF THE PARTIES

7 The Union submits that it requires the information requested in order to engage in rational discussion at collective bargaining and to properly cost out its proposals in relation to wage rates, premiums and benefits. It submits it also requires the information to communicate with and otherwise properly discharge its obligations to the members of the bargaining unit.

8 The Union notes the Employer did not claim that it was not in possession of the information. Nor, the Union submits, did it provide any sound business concerns as a rationale for not providing the information. The Union says the collective agreement does not require the information be provided to it, but submits that the requirement to provide this information arises under the Code. It submits that the Employer's refusal to provide the requested information interferes with the Union's representation of employees contrary to Section 6(1) and represents a failure to bargain in good faith contrary to Section 11.

9 The Union further submits the Employer cannot rely on the employees' right to privacy as a basis for refusing to provide the information, as it is the certified bargaining agent and is therefore entitled to this information.

10 In support of these arguments, the Union relies on the Board's decision in *P. Sun's Enterprises (Vancouver) Ltd.*, BCLRB No. B301/2003, 99 C.L.R.B.R. (2d) 110 ("*P. Sun's*") (Leave for Reconsideration denied, BCLRB No. B388/2003, 99 C.L.R.B.R. (2d) 120 ("*P. Sun's Recon*")) and *The Governor and Company of Adventurers of England Trading into Hudson's Bay*, BCLRB No. B226/2004, 108 C.L.R.B.R. (2d) 259 ("*Hudson's Bay*").

11 In response, the Employer submits the Code does not contain a general legal right to disclosure of information at the commencement of bargaining or at any other time. The Employer says clear statutory language would be required to achieve such a result, citing examples of provisions in labour codes past and present that impose, or have imposed, specific disclosure requirements on employers.

12 The Employer says the Board decisions that the Union relies on cannot create a statutory disclosure obligation where none exists. Furthermore, it submits the case law does not support the Union's position that the Employer is required to disclose the information requested in the circumstances of this case.

13 The Employer notes that the Union has "summarily" requested the information without establishing or even asserting that it is having difficulty contacting its members. The Employer submits that the cases on which the Union relies establish that an employer is only required to disclose information of the kind sought by the Union in circumstances where it is difficult or impossible for the union to otherwise obtain the information.

14 For example, the Employer submits, in *Hudson's Bay*, the union requested a list of information in the face of a proposal from the employer related to an entirely new wage system. In *Millcroft Inn Ltd.*, [2000] O.L.R.D. No. 2581 ("*Millcroft*"), a leading decision of the Ontario Labour Relations Board cited and relied on in both *P. Sun's* and *Hudson's Bay*, the applicant union had no ongoing relationship with the members of the bargaining unit and accordingly no way of contacting the employees.

15 The Employer further submits these cases stated that a two-step process is required to determine whether an employer must disclose employee information to a union certified to represent them. First, the union is required to establish that the employer's refusal to provide the union with the information interferes with the union's capacity to represent the bargaining unit. If so, the Board will then consider whether the employer has a sound business purpose for refusing to provide the information.

16 Here, the Employer submits, the Union has failed to establish that there has been any interference with the Union's ability to represent the bargaining unit. The Union has an ongoing relationship with all of the members of this bargaining unit and has not provided evidence of any difficulty contacting its members. Instead, the Employer says the Union's position is simply that it should not have to devote its time and resources to assembling the information it may already have, but should be able to "offload that obligation" onto the Employer. The Employer submits there is no statutory basis for that position, absent evidence that the Union is otherwise unable to obtain the information.

17 Alternatively, the Employer says that even if there is some obligation to disclose information, the obligation is not as expansive as characterized by the Union. The Employer submits that once the Union has a list of its members, it can obtain all of the other information it requires from them: "[t]he Union simply has to make the effort". The Employer submits that, for example, much of the information the Union seeks will be on each employee's paycheques.

18 In its final reply, the Union submits that the case law does not require it to first establish that it is difficult, if not impossible, for it to obtain information necessary for collective bargaining before it can require the Employer to disclose the information to it (subject to a sound business reason for refusing to disclose it). The Union relies on a passage from *Millcroft*, which is cited with approval in *P. Sun's*, to the effect that the fact there may be alternative methods by which the Union could, with effort, obtain the information, does not mean the Employer should not be required to provide it.

19 The Union further submits that most of the information it has requested could not be obtained by alternative methods in any event.

IV. ANALYSIS AND DECISION

20 The parties do not dispute, and in any event I find, that the Board's leading authorities on this issue are *Hudson's Bay* and *P. Sun's*, both of which cite and rely on the Ontario Board's decision in *Millcroft*.

21 In *P. Sun's*, the union complained under Section 6(1) that the employer had refused to provide it with a list of the names, home addresses and home telephone numbers of employees in the bargaining unit that the union represented. The employer took the position that it was not obliged to provide the union with such a list because "the Union has other means of obtaining that information" (para. 1). It also argued that it could not provide the employees' personal contact information to the union in any event because of privacy concerns (para. 7).

22 The original panel described the issue in *P. Sun's* as:

...whether an employer interferes with the administration of a trade union if, when asked by a union that represents certain employees, it refuses to provide a list of the names, addresses and home phone numbers of those employees in circumstances where (i) it could provide such a list with little or no effort or expense; (ii) it would take the union more effort and expense to obtain the information by other means; and (iii) protecting the employees' privacy is the only reason the employer gives for refusing the union's request. (para. 12)

23 The original panel in *P. Sun's* noted that the issue had been considered in *Millcroft*. It noted that the Ontario Board used a two-step process to decide whether the employer was in breach of the code in refusing to provide the requested information:

First, it determined whether the employer's refusal to provide the requested information interfered with the union's capacity to represent the employees in the bargaining unit. Having determined that it did, the Board considered whether there was a sound business purpose which counterbalanced the adverse impact on the union's capacity to represent the employees (*Millcroft*, para. 17). (para. 15)

24 The original panel in *P. Sun's* further noted that in *Millcroft*, the Ontario Board found that certified unions' statutory duty of fair representation gave rise to a right to require the employer to provide it with information necessary for the proper representation of the members of the bargaining unit (paras. 16-18). The original panel in *P. Sun's* then noted that the Ontario Board had "also addressed the employer's argument that the union had other means of obtaining the information it sought", quoting the following passage from *Millcroft*:

The employer has made much of the availability of alternative methods for the union's acquiring the information it wants. Of course, with effort, the

union could put a notice on its bulletin board asking each employee to let it have his or her address, and perhaps all, but more likely, less than all of the employees would bother to do so. Also, with effort, the union's stewards could, in their own time (at meal breaks and before and after work), seek out each employee and obtain his or her address and telephone number. That too would probably result in some success. The question, though, is why the union should be put to such toil when the employer can easily, without hardship, supply the information? To my mind, there is no justification for putting the union to the exertion. The employer has the information, the union needs it, the union is entitled to it and it should have it. The employer is best placed to provide it, and it should do so.

The establishment of a collective bargaining relationship between a union and an employer entails a change in the employment relationship between the employer and its workers. The change is from an individual to a collective basis of the relationship – the union becomes the agent for the employees and, as such, it is entitled to speak on their behalf as if they were together negotiating as a group. The individual employees may not make their own individual bargains or deals with the employer. To that end, the union is entitled to take full instructions from them and to represent them. For the union to do so, it must be able to communicate effortlessly with the employees. The alternative methods offered by the employer do not meet that need. They enable the union to obtain the information, but the methods are such as to amount to an obstacle in the path of the union obtaining what it wants. Obstacles have their social value, but not in this case. Here they serve merely to frustrate the union's capacity to do its job properly. The union needs the information and it should have it without the need to pass through the obstacles suggested by the employer. ([*Millcroft*], paras. 32-3) (para. 19)

25 After quoting this passage from *Millcroft*, and noting it had been followed in subsequent Ontario Board decisions (para. 22), the original panel in *P. Sun's* stated:

I agree with the reasoning of the Ontario Board in *Millcroft* and conclude that (i) to fulfill its statutory obligations a union has to be able to communicate with the employees it represents and (ii) if an employer does not have a sound business purpose for refusing to provide a union with the information needed to communicate with

those employees, the employer interferes with the union's representation of those employees. (para. 23)

26 The original panel in *P. Sun's* then considered whether such interference is a breach of Section 6(1) of the Code, and concluded that it is (paras. 24-28).

27 The original panel in *P. Sun's* then turned to the remaining question of whether the employer in that case had a sound business reason for refusing the union's request that it provide the union with the information it sought. The original panel noted in that regard:

Aside from denying that it had any obligation at law to provide a current List, the only reason offered by the Employer for refusing to provide one was its assertion that home addresses and phone numbers are "personal information" under unspecified "privacy legislation" and that it is not permitted to disclose such information, at least in the absence of consent. (para. 29)

28 The original panel in *P. Sun's* concluded that it would not breach British Columbia privacy legislation for the employer to provide the union with the requested information (paras. 30-31). Accordingly, it ordered the employer to provide the information.

29 In upholding the original decision in *P. Sun's*, the reconsideration panel stated:

The original panel simply concluded that, if the Employer refuses, without a sound business reason, to provide the Union with information which the Employer can easily supply, and which the Union needs to fulfill its statutory obligation to represent its members in the bargaining unit, the Employer will breach Section 6(1) of the Code. We find no error in that conclusion. (*P. Sun's Recon*, para. 14)

30 The decisions in *P. Sun's* and *Millcroft* were considered by another panel of the Board in *Hudson's Bay*. In that case, the union complained the employer had breached Sections 11 and 47 of the Code by refusing to provide it with information it said was necessary for it to bargain a renewal of the collective agreement. The panel in *Hudson's Bay* further notes:

The Union has asked for information consisting of a list of the names of employees, their wages and benefits. The Union says that the Employer has proposed an entirely new system of wage rates. The Employer has refused to provide the Union with the requested information. (para. 2)

31 In *Hudson's Bay* (as in *P. Sun's* and the present case), the employer cited the privacy of its employees as a reason why it was not prepared to give the union the information it sought (para. 3). The panel focused on the question of whether this constituted a sound business reason for refusing to provide the information and

concluded it was not, on the understanding that a decision on that issue would likely resolve the complaint for the parties (para. 5).

32 The panel in *Hudson's Bay* considered British Columbia privacy legislation and the decisions in *P. Sun's* and *Millcroft*, as well as decisions from other labour boards which had reached the same conclusions as reached in those cases (paras. 22-30). It concluded:

...the personal information requested by the Union is required or authorized by law and as such is allowable under the provisions of Section 18 of *PIPA*. Thus, the Employer has no valid reason under *PIPA* for not disclosing the requested information to the Union. Accordingly, we order production of the requested information. (para. 32, italics added)

33 In the present case, the Employer does not strongly rely on employee privacy concerns as a basis for refusing to provide the information requested by the Union, and I find in any event the Board decisions cited above make it clear that this is not a basis or "sound business reason" for refusing to provide information to a union that is necessary for it to fulfil its statutory obligation to represent its members in the bargaining unit.

34 Rather, the Employer argues that the two-step process mandated in *Millcroft* and adopted by the Board in *P. Sun's* requires the union to first establish that the employer's refusal to provide the information requested does interfere with the union's ability to represent the bargaining unit. The Employer submits the Union has not met this requirement in the present case because it has not shown that it cannot obtain the information through alternative methods and has made no efforts in that regard.

35 In addition, the Employer submits, the case law relied upon is factually distinguishable because, in those cases, there were reasons why the union would have had difficulty contacting and communicating with the members it represents, whereas in the present case there is no reason why the Union would have such difficulty; it would simply be required to "make the effort".

36 I agree the case law indicates that a two-step analysis is required, the first step being whether the Employer's refusal to provide the information interferes with the Union's ability to fulfil its statutory duty to represent the bargaining unit. However, I do not agree that this analysis requires the Union to establish that it could not obtain the information it requests by alternative methods. This argument was rejected in *P. Sun's*, essentially for the reasons persuasively expressed by the Ontario Board in *Millcroft*.

37 Accordingly, I find the argument that the Union could, with effort, obtain the information it seeks from the Employer by alternative methods does not establish that the Employer's refusal to provide the information (in circumstances where, as here, the Employer does not indicate that it would be difficult for it to do so) does not interfere with the administration of the Union contrary to Section 6(1).

38 I also am not persuaded that *Hudson's Bay*, *P. Sun's* and/or *Millcroft* are distinguishable on the basis that in those cases there were factual circumstances which made it more difficult for the union to communicate with bargaining unit members and obtain the information it sought than in the present case. While the facts are mentioned as background to the dispute in those cases, the reasoning does not suggest that the order to provide information turned on this factual point.

39 Rather, these cases suggest a general principle that, as stated by the reconsideration panel in *P. Sun's Recon* (at para. 14), "if the Employer refuses, without a sound business reason, to provide the Union with information which the Employer can easily supply, and which the Union needs to fulfill its statutory obligation to represent its members in the bargaining unit, the Employer will breach Section 6(1) of the Code." I do not find this constitutes the Board imposing a statutory requirement that does not exist in the Code. On the contrary, I find it constitutes the Board interpreting and applying provisions of the Code as it is required to do, that is, consistent with Section 2 and other appropriate interpretive principles.

40 In the present case, the Union seeks the information for purposes of collective bargaining. The Board has emphasized the importance of parties engaging in co-operative participation and fostering good bargaining relationships through good communication.

41 I find that the first step of the analysis is met here, where the Union seeks information for purposes of collective bargaining which the Employer is able to supply. The Employer does not dispute that the Union legitimately requires the information it requests for purposes of collective bargaining and it does not suggest that it is unable to supply that information or would have difficulty doing so.

42 With respect to the second step of the analysis, I find the Employer has not provided a sound business reason for refusing to provide the information requested by the Union. As indicated in the Board decisions noted above, providing such information to a union certified to represent bargaining unit members does not raise privacy concerns. I reject the argument of the Employer that the second step of the analysis requires the Union to demonstrate it is not able to obtain the requested information through other means or to show the efforts it has made to obtain that information.

43 I emphasize the Employer has not disputed that the Union requires the information requested for the purposes of collective bargaining. Had it done so, additional analysis might be required. I make no judgment as to the outcome of such analysis.

44 For the reasons set out above, I find the Employer, by refusing to provide the information requested in items 1, 3 and 5 of the July 20 letter, has interfered with the administration of the trade union, contrary to the provisions of Section 6(1) of the Code.

45 Regarding items 7 and 8, neither party made submissions relative to this information. The Employer, in its response to the July 20 letter, resisted disclosure of the materials specified in item 7 and went on to say that it would provide all written material available. The latter refers, presumably, to the materials requested in item 8 of the July 20 letter. I make no finding or order in relation to the information requested in either item 7 or 8 of the July 20 letter.

46 One final note, regarding the request that the Employer provide to the Union the e-mail addresses of those employees who have provided them to the Employer. I questioned at the hearing whether the Union is seeking to impose a positive obligation on the Employer to obtain employee e-mail addresses. The Union is not seeking to impose any obligation on the Employer other than to disclose those e-mail addresses which have been provided to it. Accordingly, I find the information in the hands of the Employer should be shared with the Union as the Employer argued no sound business reason for refusing to provide the information.

V. CONCLUSION

47 I find that the Employer has breached Section 6(1) of the Code by refusing to provide the information requested to the Union without a sound business reason for doing so. I order the Employer to forthwith provide the Union with the information requested in items 1, 3 and 5 of the July 20 letter.

LABOUR RELATIONS BOARD

"PHILIP TOPALIAN"

PHILIP TOPALIAN
VICE-CHAIR