PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF THE *INDUSTRIAL RELATIONS ACT*, RSNB 1973, c I-4

AND

IN THE MATTER OF A GRIEVANCE

Between:

United Brotherhood of Carpenters and Joiners of America, Local 1386 (Union)

And

Century Exteriors Inc. (Employer)

Date of Written Submissions: June 26, 2024
Date of Decision: June 27, 2024

Arbitrator: Michael Marin, K.C.

For the Union: Peter Dawson
For the Employer: Unrepresented

Award on Preliminary Issue:
Request for an Order to Disclose Particulars and Produce Documents
Edited to correct clerical errors pursuant to s. 76(1)(f), Industrial Relations Act

I. Overview

1. At issue in this matter is the extent of a labour arbitrator's authority to make an order that parties disclose particulars and documents in advance of a hearing. In the face of the Employer's ongoing non-responsiveness and failure to fulfill its commitment to provide notice of its position, the Union requested that I make an order to ensure that it is not prejudiced at the hearing by the Employer's lack of cooperation.

2. Specifically, the Union asks that I order the Employer to disclose its position on the grievance as well as all documents on which it intends to rely no later than two days before the start of the hearing. The Union further requests I make an order to the effect

that the Employer's failure to disclose documents by this deadline would result in those documents being inadmissible at the hearing.

3. For the reasons that follow, I find that I have the jurisdiction to make the orders requested pursuant to s. 76(1)(a) of the *Industrial Relations Act*, RSNB 1973, c I-4 ("*IRA*"). The language of this provision is broad enough to encompass the power to order pre-hearing disclosure and production. Moreover, this power is necessary for a labour arbitrator to uphold one of the purposes of the *IRA*, which is to ensure the fairness and efficiency of its dispute resolution mechanisms. In order for this power to have any meaning, it must come with the authority to take remedial measures in the event of non-compliance, such as the exclusion of evidence or arguments at the hearing.

4. However, despite having such remedial power, I find that a labour arbitrator should generally not exercise it in advance of a hearing. For the purpose of this case, it is sufficient to warn the Employer that failure to abide by my orders below *may* result in its inability to rely on undisclosed arguments or evidence at the hearing.

II. Facts

5. On May 27, 2024, I was advised of my appointment as arbitrator in this matter pursuant to s. 55.01 of the *Industrial Relations Act*, RSNB 1973, c I-4. Therefore, this is an expedited process with short timelines for the commencement of the hearing and issuance of a decision with reasons.

6. The same day I was advised of my appointment, I wrote to both parties in order to schedule a pre-hearing conference call. Only the Union responded. I sent two more emails asking the Employer to respond, but it never did. As a result, I set the date of the pre-hearing conference for June 5, 2024. Both the Union and the Employer attended. At that meeting, the Union advised that the Employer had not disclosed its position regarding the grievance. The Union said that it needed to know the Employer's position in order to prepare for the hearing. The Employer agreed to disclose its position to the Union on June 7. That day the Employer's representative wrote to me advising that he was unable to meet this deadline, but promised to "have something out before Monday."

7. When the parties reconvened for the pre-hearing conference on June 11, the Employer did not show up. I sent several emails to the Employer with links to the virtual meeting. I waited approximately 10 minutes for the Employer to join before starting the discussion with the Union's counsel. During this time, the Union's counsel advised me that the Employer still had not disclosed its position, despite repeated assurances that it would.

8. After the second pre-hearing conference, I emailed both parties requesting that the Employer explain its failure to disclose its position. I also asked both parties to tell me how this matter ought to unfold in light of a related common employer application currently before the Labour and Employment Board. The parties were to respond by June 21. Again, only the Union did. In the Union's submission, counsel advised me that the Employer still had not disclosed its position on the grievance. The Union's counsel also asked that I make two orders. First, that if the Employer fails to disclose its position a week before the hearing, then it would be precluded from raising at the hearing any defence of which the Union did not have prior notice. Second, the Union asked that I order both parties to exchange in electronic format all evidence on which they intend to rely at the hearing at least two days before it is scheduled to commence.

9. On June 24, 2024, I wrote to both parties tentatively setting July 4 and 5 as hearing dates. I gave the Employer until end of day on June 26 to advise me of any objection to these dates. I also asked both parties for submissions on my authority to make the orders that the Union had requested. The deadline for these submissions was also June 26. Once again, the Employer did not respond to either query.

10. In its submission, the Union modified the relief it was requesting. Specifically, the Union now asks that I order the Employer to disclose its position and all documents on which it intends to rely at the hearing no later than two days before the first hearing day. Furthermore, the Union asks that my order preclude the Employer from relying on any documents that were not previously disclosed. Given that this will be a virtual hearing, the Union submits that documents should be produced electronically for the convenience of the proceeding.

III. Issues

11. In my view, there are three issues before me: 1) whether a labour arbitrator in New Brunswick has the authority to order the pre-hearing disclosure of particulars and documents; 2) whether a labour arbitrator may preclude a party from relying on documents at the hearing that were not previously disclosed to the other party in accordance with a request or order to that effect; and 3) assuming that these powers exist, whether I should exercise them in this case.

IV. Analysis

12. The starting point for determining any question related to the jurisdiction of a labour arbitrator is the applicable enabling statute, in this case the *IRA*. Unfortunately, unlike the legislation in other provinces, the New Brunswick statute does not specifically

address the powers of a labour arbitrator over pre-hearing procedural matters. The relevant provision is s. 76(1), which reads as follows:

> **Powers of arbitrator or arbitration board**
>
> 76(1) The arbitrator or the arbitration board, as the case may be, in any proceeding under the provisions of section 55, has power
>
> (a) to summon and enforce the attendance of witnesses and to compel them to give evidence in the same manner as a court of record in civil cases, orally or in writing, and to produce such documents and do all other things that, during the proceedings, the arbitrator or arbitration board may require,
>
> (b) to administer oaths and affirmations of witnesses,
>
> (c) to enter any premises where work is being done or has been done or commenced by the employees, in which the employer carried on business, or where anything is taking place or has taken place concerning any of the differences submitted to him or it, and to inspect and view any work, material, machinery, appliance or article therein, and interrogate any person in the presence of the parties or their representatives respecting any such thing or any of such differences,
>
> (d) to authorize any person to do any things that the arbitrator or arbitration board may do under paragraph (c) and report to the arbitrator or arbitration board thereon,
>
> (e) to receive and accept any relevant evidence whether admissible in evidence in a court of law or not, and
>
> (f) to correct in any award any clerical mistake, error or omission.
>
> [Emphasis added]

Despite the fact that s. 76(1) does not deal expressly with pre-hearing matters, the powers that it grants are quite extensive, going so far as to allow a labour arbitrator to enter the workplace and question anyone present. This suggests that the legislature intended labour arbitrators to have the power necessary to resolve the matters before them. In addition, I note that the first sentence and paragraph (a) use the phrases “in any proceeding” and “during the proceedings”.

13. I acknowledge that paragraph (a) could be read as applying to the hearing only since its first clause deals with compelling witnesses to attend and give evidence, which is obviously done at the hearing and not before it. Indeed, in *Unifor Local 907 and J.B. v. Irving Paper Ltd.*, 2020 CanLII 38613 (NB LA), the learned arbitrator held that s. 76(1)(a) “only empowers arbitrator to require that certain persons attend the hearing

and give evidence, whether it be oral or written, and, if so requested, that they produce documents" (at para. 43).

14. With respect, I interpret this provision more broadly. In particular, it does not restrict the arbitrator's jurisdiction to the "hearing" itself, but rather to the entire "proceeding". In my view, the proceeding includes not just the hearing, but the various stages leading up to it that ensure a fair and efficient process consistent with legislative intent. This reading is supported by s. 17 of the *Interpretation Act*, RSNB 1973, c I-13, which says the following:

> Every act and regulation and every provision thereof shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as best ensures the attainment of the object of the Act, regulation or provision.

15. As a result, s. 76(1)(a)'s use of the word "proceeding" as opposed to "hearing" should be interpreted generously and in a manner that fulfills the purposes of the *IRA*, which include the fair and efficient resolution of disputes that arise under a collective agreement. This broader approach was adopted by Arbitrator McEvoy in *Canadian Union of Public Employees (N.B.) (R.C.) v A Seniors Complex*, 2017 CanLII 29671 (NB LA):

> It would seem an absurdity to interpret section 76(1)(a) of the *I.R. Act* as reflecting the legislative intention to restrict any such disclosure or production to the actual first day of a formal hearing or indeed to the formal hearing itself. It would mean that the Legislature, instead of intending to facilitate the efficient settlement of disputes by arbitration, actually intends to frustrate it. The literal or strict approach would limit disclosure or production to the actual formal hearing and thus necessitate an adjournment (possibly for several days or weeks) to permit an adequate opportunity for the receiving party to review the information disclosed or produced (at para. 21).

16. I share this concern about an overly narrow reading of s. 76(1)(a), especially in the context of an expedited arbitration under s. 55.01, which requires that the hearing begin within 28 days of the matter being referred to the Minister. Without pre-hearing disclosure of documents and particulars, a party may be taken by surprise at the hearing and prejudiced unless an adjournment is granted. But an adjournment would frustrate the intention of the Legislature to create an expeditious process.

17. It seems to me that a sensible compromise that furthers procedural fairness and the statutory purpose is to give s. 76(1)(a) a more generous reading. In particular, it is broad enough to allow a labour arbitrator to order that the parties disclose to one another, before the start of the hearing, sufficient particulars of their positions and all evidence on which they intend to rely at the hearing. I note that in *Irving Paper Ltd*., the

learned arbitrator recognized, at para. 38, that there may be instances where a labour arbitrator may order pre-hearing production of documents to ensure the fairness of the eventual hearing. As I will explain below, I consider this to be one of those cases.

18. I will briefly note that this case is distinguishable from both *Irving Paper Ltd.* and *A Seniors Complex*. In both of those cases, one party asked the arbitrator to compel another party to produce a particular document that it had reason not to want to disclose before the hearing. In this case, the Union is simply asking to receive advance notice of the Employer's position and the documents on which it intends to rely so that the Union knows the case to meet. This is a matter of enforcing basic procedural fairness as opposed to compelling the disclosure of a particularly sensitive document.

19. For these reasons, I find that s. 76(1)(a) of the *IRA* gives labour arbitrators in New Brunswick the power to order the parties to disclose the particulars of their positions and the evidence on which they intend to rely in advance of the hearing.

20. The second issue deals with a labour arbitrator's scope to address non-compliance with an order for pre-hearing disclosure. If a labour arbitrator has the power to order pre-hearing disclosure in circumstances where fairness so requires, then it follows that they also have some power to remedy non-compliance, otherwise they would be helpless in the face of injustice and the non-complying party would be able to make a mockery of the process. This issue is canvassed by Brown and Beatty in *Canadian Labour Arbitration*, 5th ed., looseleaf (Toronto: Thomson Reuters, 2020) at p. 3-22:

> … [W]here a timely request [for production] is made, and there is no response to it or to an order for production, it is open to the arbitrator to refuse to admit the document into evidence or to grant an adjournment. And if the party's refusal continues thereafter, the arbitrator may make an award of costs payable by the recalcitrant party, where he has the authority to do so, or may convene the hearing and either allow or dismiss the grievance. [citations omitted]

While this statement is based on authority from outside of New Brunswick, it nevertheless recognizes a general principle that is equally relevant in this province, which is that a labour arbitrator must be able to protect the fairness and integrity of the process over which they are presiding. At the same time, although there is precedent in other jurisdictions for arbitrators excluding evidence that should have been produced before the hearing, that discretion should be exercised carefully in a manner that is sensitive to the context of each case: see e.g. *Re Dough Delight Ltd*. (1998), 74 LAC (4th) 144 at pp. 150-152.

21. In my view, simply because a document was not produced before the hearing does not mean that the other party is necessarily prejudiced or that the document

should be excluded. There may be a justification for why the document was not produced earlier, or perhaps any prejudice can be remedied by a brief adjournment that does not disrupt the entire proceeding. Accordingly, while I find that a labour arbitrator may exclude evidence that was not disclosed before the hearing in breach of an order for production, this is not a power that should be exercised in advance of the hearing because it would fetter their discretion to consider the circumstances. The same reasoning applies to a party's failure to disclose particulars in breach of an arbitrator's order to do so.

22. This brings me to the third issue, which is whether I should exercise my discretion to order the pre-hearing disclosure of particulars and documents in this case. Given the Employer's continued non-responsiveness, and its failure to disclose its position to the Union despite committing to do so, I find that such an order is necessary to preserve the fairness of the arbitration. Without notice of the Employer's position on the grievance, the Union will be hampered in preparing its case and may be surprised at the hearing, with the result that what is supposed to be an expedited process is further delayed.

23. Moreover, pursuant to Article 20.04 of the Collective Agreement, the Employer is required to provide the Union with a written response to the grievance, which never happened. As a result, the Employer's failure to do so is not just a matter of procedural fairness in the conduct of the arbitration, but a violation of the Collective Agreement as well.

24. For the purposes of this matter, it is sufficient for me to warn the Employer that failure to produce a document before the hearing in violation of my disclosure order *may* result in exclusion of that evidence at the hearing. Similarly, failure to give notice to the Union of its position in accordance with my order *may* result in the Employer not being able to advance that position.

25. In particular, if there is no good reason for the Employer's non-compliance and prejudice to the Union cannot easily be remedied, then in this case an adjournment would only serve to reward the Employer's intransigence and be contrary to the purpose of s. 55.01 of the *IRA*.

V. Conclusion

26. For the above reasons, I order as follows:

1. The hearing in this matter will take place virtually on July 4 and 5 beginning at 9:30am.

2. No later than 9:30am on July 2, the Employer will disclose to the Union its position regarding the grievance.

3. No later than 9:30am on July 2, both parties will send to one another by email in electronic format all documents on which they intend to rely at the hearing.

Dated at Fredericton, New Brunswick, June 27, 2024.

[Original signed]

Michael Marin, K.C.

Arbitrator