ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 1214-21-U
Unlawful Strike

Toronto Transit Commission, Applicant v Amalgamated Transit Union, Local 113 and Carlos Santos, Responding Parties

OLRB Case No: 1286-21-U
Unfair Labour Practice

Amalgamated Transit Union, Local 113, Applicant v Toronto Transit Commission, Responding Party

OLRB Case No: 1287-21-U
Unfair Labour Practice

Amalgamated Transit Union, Local 113, Applicant v Toronto Transit Commission, Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - October 28, 2021

DATED: October 28, 2021

Catherine Gilbert
Registrar

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OLRB Case No: **1214-21-U**

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Amalgamated Transit Union, Local 113, Applicant v **Toronto Transit Commission**, Responding Party

OLRB Case No: **1287-21-U**

Amalgamated Transit Union, Local 113, Applicant v **Toronto Transit Commission**, Responding Party

BEFORE: M. David Ross, Vice-Chair

APPEARANCES: Dolores Barbini, Steve Lavender, Jim Ross, Meghan Rogers, Patricia Matusiak, Kemi Faneye, Jordynne Hislop, Lucy Siraco and Donna Walrond appearing on behalf of the Toronto Transit Commission ("TTC"); Dean Ardron Simon Blackstone, Carlos Santos, Frank Malta, Kevin Morten, and Emily Home appearing on behalf of the Amalgamated Transit Union, Local 113 ("ATU")

DECISION OF THE BOARD: October 28, 2021

1. Board File No. 1214-21-U is an application under section 100 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, (the "Act") that was filed with the Board on September 28, 2021 (the "unlawful strike application"). In this application, the TTC asserts that the ATU's president's request of ATU members to not comply with the TTC's direction to employees to disclose their vaccination status constitutes an unlawful strike.

2. Board File Nos. 1286-21-U and 1287-21-U are applications filed under section 96 of the Act. Both application assert that the TTC has violated section 86 of the Act, more commonly called the "statutory freeze".

3. In Board File No. 1286-21-U, the ATU asserts that changing the date in which its members are to select their shifts for the period starting on November 21, 2021 violated the Act.

4. In Board File No. 1287-21-U, the ATU asserts that introducing a mandatory vaccination policy during the statutory freeze period violated the Act. Specifically, the ATU asserts that the fact that the policy states that an employee could lose their employment if they do not comply with the policy is a change to the terms of condition of their employment, without consent from the union, and therefore constitutes a breach of the statutory freeze.

5. These matters came on for hearing before the Board on October 22, 2021 pursuant to its October 19, 2021 decision. The purpose of this hearing was to address the parties' preliminary matters that had been raised in the materials they had previously filed with the Board.

6. The three preliminary matters that were addressed were whether:

> 1. The unlawful strike application in Board File No. 1214-21-U should be dismissed for being moot and/or because there is no labour relations purpose to continue litigating the application;
>
> 2. The unfair labour practice application relating to the change of shift selection in Board File No. 1286-21-U should be dismissed for being *de minimus* or for having no labour relations purpose; and
>
> 3. The unfair labour practice application relating to the introduction of the vaccination policy in Board File No. 1287-21-U should be deferred pending collective agreement arbitration.

7. At the hearing, the Board heard the parties' submissions with respect to each of these three issues. Submissions were capably made

by their respective counsel on each issue. At the conclusion of argument, the Board recessed to consider the parties' submissions and the materials filed. As the next hearing date was the following business day on October 25, 2021, the Board provided a bottom-line decision with written reasons to follow. This decision contains those reasons.

The Unlawful Strike Application is Moot and there is No Labour Relations Purpose to Continue with this Application

8. The TTC filed its unlawful strike application on September 28, 2021. This application was filed in response to a statement made by the ATU's president, Carlos Santos in response to the TTC introducing its vaccination policy. Mr. Santos asked his members not to comply with the TTC's direction to provide it with medical information, specifically their vaccination status. The TTC seeks, among other things, a declaration from the Board that the ATU through Mr. Santos's comments has called or authorized an illegal strike as defined by the Act.

9. At the time that the application was filed, only 38.6% of the ATU's members had disclosed their vaccination status as requested by the TTC. The TTC identified the strong correlation between Mr. Santos' message to the ATU members and the lack of compliance with the TTC's request for disclosure.

10. However, this application was adjourned *sine die* on October 1, 2021, and the ATU publicly retracted this comment. In the retraction, the ATU requested its members to comply with the vaccination status disclosure. The specific comment asking members to comply was:

> …Accordingly, myself and the Executive Board of ATU Local 113 are now asking that on or before September 30th, 2021, members comply with the vaccination status disclosure set out in the TTC's policy.

11. The ATU members' disclosure rate went from approximately 38% to 83% as of October 22, 2021. For comparison sake, the non-ATU rate is approximately 93%.

12. The TTC requested this application to be relisted on October 12, 2021, which coincidentally is the date the ATU filed Board File Nos. 1286-21-U and 1287-21-U. In its submissions, the TTC has asserted that the ATU retraction was not good enough and it still faces a work slowdown if more members do not comply. The TTC took the Board through the ATU's retraction, and pointed out that it is contained in a

communication that is fraught with criticism of the TTC and its leadership, that it has attempted to bury this direction in other articles that are critical of the TTC's vaccination policy and response to covid-19, and that it is not apparent that it has done anything since September 29, 2021 to encourage its members to disclose their vaccination status to reduce the chance of reduced transit services. In essence, the TTC's argument is that it can be inferred that the ATU's continued conduct continues to encourage its members not to disclose their status, and a disproportionate number of ATU member have still not disclosed their status, notwithstanding the ATU leadership asking them to comply with the TTC's direction.

13. The TTC states that the declarations requested would encourage more of the individuals who have not disclosed their status to do so.

14. The TTC likened this case with the situation that school boards found themselves in after the *Putting Students First Act, 2012*, was enacted and teachers engaged in a prolonged work to rule campaign. In *Trillium Lakelands District School Board*, 2013 CanLII 20262 (ON LRB), the Chair of the Board commented that there can remain a labour relations purpose to continue with an unlawful strike application even after the trade union has retracted its comments that authorized or called for an unlawful strike.

15. The ATU submitted that the purpose of section 100 of the Act is not to punish, rather to correct and provide guidance as to the parties' legal rights and to end unlawful conduct. The ATU submitted that this has occurred in this case, as the TTC has obtained the relief it sought, a public direction from Mr. Santos to the ATU members, and therefore the issue has become moot and there is no labour relations purpose served by continuing with this application.

16. The ATU submitted that there can be no doubt that its members have understood that the ATU has changed its position as this issue received significant media attention, and the Board, based on the materials before it, cannot presuppose a causal connection between the statement made and why more ATU members have not complied with the TTC's and the ATU's request to disclose their vaccination status, and nor can the Board presuppose that a declaration would do anything to increase disclose rates.

17. In response to the TTC's arguments that it had not done enough to make its position know, the ATU pointed to the fact that if someone

googles "TTC ATU and vaccination" the top hits are: "TTC Union reverses course, urges members to disclose vaccination status to transit agency"; "TTC Union backs down on opposition to vaccination policy after labour board filing"; and "TTC Union walks back on telling staff not to disclose Covid-19 vaccination status to employer".

18. The ATU submitted that it understands and appreciates the doctrine of "obey now and grieve later", and that in this case its members have been urged to comply with the TTC's direction while the ATU challenges the content of the vaccination policy pursuant to its collective agreement grievance procedure. As such, this issue has become moot and there is no labour relations purpose to continue with this application.

19. The Board has considered the arguments, written submissions and materials filed. The Board finds that this unlawful strike application has become moot, and that no labour relations purpose would be served by continuing with ongoing litigation of this matter. Again, in this case, the Board is not deciding whether an unlawful strike has occurred at all, only the request to dismiss this application for being moot and for having no labour relations purpose.

20. In *Board of Education for the City of Toronto,* 1995 CanLII 9912 (ON LRB), the Board reviewed how it approaches issues of mootness in circumstances where the circumstances giving rise to an unlawful strike have ended:

> 33. The "mootness" problem posed by this case is not entirely novel. Where an allegedly unlawful strike has ended, the Board has often declined to review the situation, and in *Ontario Hydro,* [1994] OLRB Rep. June 765 the Board refused to consider an alleged violation of section 41.1 of the Act because no practical relief would be ordered. The Board observed: "although this is the first case concerning section 41.1 which the Board has considered, that in itself is not a sufficient reason to decide the matter". Finally, we might note that in *Dayne's Health Care Limited,* [1983] OLRB Rep. May 632, *both parties* urged the Board to declare whether certain facts would trigger a sale of a business and collateral relief under section 64 of the Act a matter of considerable interest to them so that they could plan their future relationships. However, the Board refused to give an advisory opinion:

> 13. We are not unsympathetic to the parties' concerns, but we have concluded that we should not express any opinion or make any determination about the application of section 63 [now 64] until the transactions said to constitute a transfer of a business have been completed. Any desire to provide guidance to the labour relations community in a difficult area of the law must be tempered by a recognition that preliminary opinions based on hypothetical facts could create as much mischief as they resolve, if not more. Not only would such opinions encourage a recision or restructuring of transactions to which section 63 might otherwise apply but, in addition, there could be litigation about the effect of the opinion itself and whether the transaction was actually consummated in the form upon which the Board's opinion was based. Since close cases will often turn on subtle shadings of fact, in our view, it would be unwise to render opinions on what will inevitably be less than complete information. In today's volatile business climate there is a real likelihood that various components of "the deal" will change (for example, to accommodate financing or licencing requirements) between its initial conception and its completion, and we are by no means convinced that the injection of a preliminary Board opinion at one stage or another in this process would really facilitate the promotion of orderly collective bargaining or the interests which section 63 was designed to protect. Finally, we are constrained to note that section 63 is not the only provision of the Act which occasionally gives rise to interpretive difficulties. The same could be said of the duty to bargain in good faith, the so-called statutory freeze (see section 79), and certain of the unfair labour practice provisions. It is an unfortunate tact that, like other areas of the law, the law regulating employer-employee relations has become increasingly complex and in many cases there is room for argument about how the law should be interpreted or applied. However, we do not think that the answer to this complexity or to the business planning problems faced by the labour relations community lies in this Board giving preliminary opinions on hypothetical fact situations.

21. When considering whether there remains a labour relations purpose to be served by litigating an issue, the Board summarized its analysis in *Stock Transportation,* [2006] O.L.R.D. No. 2350 at paragraph 13:

> The question of whether there is a labour relations purpose to be served by the litigation exercise has typically been determined by comparison of the labour relations reality that prompted the complaint in the first place, as compared to its reality at the time that the question of exercising the discretion arises. The Board asks itself two questions: Does the situation that prompted the applications still exist; and/or does the relief requested still make sense?

22. In this case, the circumstance that gave rise to the application does not exist. The circumstance was a public statement asking members not to comply. That comment has been removed, and a public request for ATU members to comply with the TTC's request has been made. The ATU members' response rate has more than doubled since this application was filed and the ATU retracted its comment. The response rate is now within 10% of the TTC's general non-union staff rate. As such, the situation that existed when the application was filed is not the same.

23. At this stage of the process, it would be unreasonable to assume that the TTC's employees who have not complied with the request, despite the TTC and ATU both having requested them to do so, do not understand and appreciate the consequences of not doing so. In these circumstances, the Board is not convinced that the remedy requested would make sense in accomplishing the TTC's objective in filing this application given the context and the disclosure rate as of the date of the hearing.

24. Furthermore, as was the situation in the *Board of Education for the City of Toronto, supra*, the Board is sympathetic to the objective of the TTC, which is to get the maximum response rate so it has as much information as possible to plan for when its vaccination policy comes into force and to minimize the potential for reduced services. However, as indicated in *the Board of Education for the City of Toronto, supra*, the Board must exercise caution before weighing into issues that are more political and personal rather than adjudicative in nature.

25. The *Trillium Lakelands District School Board*, *supra*, decision received more attention during argument than the other cases relied on by the parties. In that case, the Chair set out some circumstances in which the Board will continue to hear arguments and make a declaration of an unlawful strike after the union's unlawful direction has been withdrawn. However, this case is distinguishable from the instant case

for a few reasons. The most important distinctions are that the Board found that an unlawful strike had actually been occurring for several months as a result of a coordinated work slowdown; and that the Board had heard nine days of evidence before the union withdrew its direction of a work slowdown on the "eve" of the Board's decision being issued.

26. Neither of those factors are present in the instant case, as there has been no actual slowdown or stoppage of work, and the statement complained about was addressed within a day of the application being filed, prior to a single hearing date being held.

27. Of course, if new facts present themselves that the TTC believes constitutes a fresh violation of section 100 of the Act, it can file another unlawful strike application at that time. However, the facts which support this application are no longer present, and it has become moot.

Board File No. 1287-21-U Will Be Deferred Pending the Collective Agreement Arbitration Process

28. The ATU has submitted that unilaterally imposing a vaccination policy that states that its members will lose pay and ultimately their jobs during the statutory freeze is contrary to section 86 of the Act. Section 86 of the Act states:

> Where notice has been given under section 16 or section 59 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,
>
> (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
>
> (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
>
> (ii) 14 days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board, as the case may be; or

> (b) until the right of the trade union to represent the employees has been terminated, whichever occurs first.

29. The ATU submitted that introducing a policy that explicitly affects someone's job security and their ability to earn wages, without the union's consent, is a clear violation of section 86 of the Act. It also submitted that the question of whether the policy is reasonable, which is the subject of a grievance that is proceeding to arbitration before Arbitrator Harris, is severable from the question of whether the unilateral implementation of a specific penalty that alters the terms and conditions of employment for failing to comply with the policy breaches section 86 of the Act.

30. The TTC submitted that this is not a "freeze" violation. Instead, it states that the creation and implementation of a covid-19 policy is a proper exercise of management rights, and that the appropriate forum to adjudicate the policy dispute is before Arbitrator Harris, who has been seized with the underlying grievance.

31. The leading case on this issue is *Valdi Inc.,* [1980] O.L.R.B. Rep. Aug. 1254. Recently, in the *Professional Lacrosse Player's Association*, 2019 CanLII 69316 (ON LRB), relying on the *Valdi Inc., supra,* decision, the Board summarized the analysis that it applies when considering whether to defer a matter such as this one to the grievance procedure set out in the collective agreement. At paragraph 14, the Board held:

> The decision to defer to arbitration is discretionary and the Board has favoured deferral when: (1) the nature of the dispute is primarily contractual or factual; (2) the statutory issue is congruent with the resolution of the contractual dispute; (3) the relief at arbitration would satisfy the relief sought for the alleged conduct of the employer; (4) the resolution of the unfair labour practice complaint will not eliminate the need for arbitration; and (5) there is a risk of inconsistent findings between the Board and the arbitrator (see *The Corporation of The County of Lambton*, 2013 CanLII 48880 (ON LRB)).

32. In this case, all five elements of the analysis favour deferring the matter to the arbitration process that Arbitrator Harris is seized with.

33. It is well-established in the Board's jurisprudence that the term "freeze" used in these cases is a misnomer. Terms and conditions of employment do not have to be "frozen" in place pending the resolution

of collective bargaining, and in this case, by interest arbitration. Section 86 of the Act requires employers to conduct "business as usual". These are unprecedented times, and "business as usual" in this context requires employers to determine how to manage in this global pandemic and what policies they will implement. The range of options that employers can consider and implement in these times can vary greatly and will be contextual for each employer. The TTC is the proverbial circulatory system of Toronto, and there are factors unique to the TTC's operations that are different than those faced by other employers. Of course, this management right is subject to a trade union's right to challenge elements of these policies, and to take the issue to grievance arbitration. This is exactly what has occurred in this case.

34. In this case, the ATU has asked the Board to determine whether the TTC can implement a policy where the repercussion of non-compliance is an unpaid suspension and ultimately termination during a statutory freeze. In order for the Board to consider this question, it has to consider whether the introduction of such a policy is "business as usual" in these unprecedented times, and this inevitably would require evidence on the policy itself and the reasonableness of it. That question will be front and centre before Arbitrator Harris in the grievance arbitration. In my view, it is impossible to sever the issues in a meaningful way that would not require analytic gymnastics or artificial distinctions that deters from the real issues between the parties. It will also duplicate evidence and create the potential for inconsistent finding of facts and legal conclusions.

35. When considering the five factors set out above: the dispute between the parties arises out of the collective agreement; the statutory issue is congruent with the resolution of the contractual dispute; the relief sought at arbitration would remedy the relief being sought in this application; the resolution of the complaint will not remedy the need for arbitration, as that process will continue regardless of the Board's decision in this case; and there is a real risk of the duplication of evidence and inconsistent findings of facts and legal conclusions between the Board and the Arbitrator.

36. Accordingly, this matter is adjourned *sine die* pending the resolution of the grievance arbitration before Arbitrator Harris.

Board File No. 1286-21-U Will Proceed On Its Merits

37. This application pertains to the ATU's complaint that the TTC changed the amount of advance notice its members must select their shifts. In this case, the dates were moved from October 20 or 27 to November 3, 2021, for the schedule commencing November 21, 2021. There is no suggestion in the materials that future dates have, or will, be changed.

38. The TTC requested that the Board dismiss this application because it is *de minimus* and because its litigation would serve no labour relations purpose. The TTC highlighted that there is no collective agreement right for an ATU member to choose their shifts four weeks in advance of their schedule as opposed to three, and that the impact of having one less week of advance notice to make life plans is *de minimus*, as there is no practical difference with the amount of advance notice given, and the fact that schedules are selected by seniority so they can be assumed in any event. The TTC also highlighted that no labour relations purpose would be served by litigating this issue because by the time that this matter gets decided, it will be well past the deadline to choose shifts in any event.

39. The ATU submitted that the notice that its members are provided in advance of their schedule is an important term and condition of their employment, and that the TTC changed that timeline during the statutory freeze contrary to section 86 of the Act. The ATU submitted that it cannot be the case that a matter becomes moot solely because the effect of an alleged violation of the Act has occurred.

40. After considering the materials filed and the parties' submissions, the Board is not prepared to dismiss this application using the *de minimus* principle, or because there is no labour relations purpose served by litigating the issue at this stage of the process. While the Board understands the TTC's well argued position, the Board has to be cautious in declaring that an issue is *de minimus* without hearing evidence, because by doing so the Board is effectively telling a party is that the dispute is so insignificant that it is not worthy of the Board's time and resources. That is a strong message to send, and one that should not be made lightly. Whether an application should be dismissed because it is *de minimus* is a separate question from requesting the Board to dismiss an application for failing to establish a *prima facie* case of a violation of section 86 of the Act. The question of whether the ATU's

pleadings establish a *prima facie* violation of the Act was not before the Board at the October 22, 2021 hearing.

41. To reiterate, the Board has not commented on the relative strength of the ATU's case. Rather, the Board is not prepared to dismiss this application on the basis that it is *de minimus* or because no labour relations purpose would be served by litigating it.

Conclusions

42. Board File No. 1214-21-U is dismissed as it has become moot and it serves no labour relations purpose to continue litigating this application.

43. Board File No. 1286-21-U proceeded to a hearing on October 25, 2021, and a decision has been issued setting out the process in which this issue is being litigated.

44. Board File No. 1287-21-U is adjourned *sine die* pending the grievance arbitration hearing before Arbitrator Harris. The parties will have 30 days from the date Arbitrator Harris issues his final decision in the grievance arbitration process to request that this matter to be relisted, otherwise it will be deemed terminated without any further notice to the parties.

45. This panel is seized.

"M. David Ross"
for the Board

APPENDIX A

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