

IN THE MATTER OF an Arbitration pursuant to the Ontario *Labour Relations Act, 1995*

BETWEEN:

THE TORONTO TRANSIT COMMISSION

(the Employer)

- and -

AMALGAMATED TRANSIT UNION, LOCAL 113

(the Union)

AND IN THE MATTER OF a union grievance of One Person Train Operation regarding production of documents by the Employer.

Before: Daniel Harris, Sole Arbitrator

Heard at: Toronto, June 27, 2024

Decision Date: September 6, 2024

Appearances:

For the employer: Dolores Barbini and Brittany Bates, Counsel, Geoffrey Vendeville, Student-at-Law, Hicks Morley; Claudio Cashera and Patricia Matuziak, Toronto transit Commission.

For the Union: Kassia Bonisteel, Issac Handley, Counsel; Jason da Silva, Executive Board Member.

ORDER

1. This matter deals with a request by the Union for an order that the Employer produce arguably relevant documents. The Union had made a number of informal requests on earlier hearing days for the same materials as are dealt with here. To ensure clarity with respect to what was being requested, at the hearing on December 5, 2023 I invited the Union to provide to the Employer a draft order, which it did on December 8, 2023. The materials that were requested in the draft order were as follows:

- Key performance indicators;
- Materials respecting the incident at or near Spadina/Dupont stations which occurred on or about June 23, 2023,;
- Materials respecting the incident at or near St. Patrick station which occurred on or about October 17, 2023,.

2. The Employer did not accede to the Union's request to produce these materials.

Accordingly, this motion requesting the production order was heard on June 27, 2024.

Prior to the hearing of this motion, the Union enlarged its request by adding three more incidents. The descriptions of all five incidents as provided by the Union, in its communications to the Employer, are as follows:

1. On or about June 23, 2023 an incident occurred between Spadina and Dupont Stations, wherein a passenger forcibly opened a train door and the train moved off on instruction from Transit Control and proceeded to the next station. This incident involved a train being run using One Person Train Operation.

2. On or about October 17, 2023 an incident occurred near St. Patrick Station, wherein a passenger forcibly entered a guard cab of a subway train, made an announcement to passengers related to a bomb, and stole a radio (or radios) and thereafter made inappropriate and improper transmissions on said radio(s). This incident involved a train being run using One Person Train Operation.

3. On or about December 17, 2023 at St. Patrick Station, a deceased person was discovered at track level. The Union understands that the person had been hit by a subway train, and thereafter contacted by multiple trains prior to discovery. As you are aware, One Person Train Operation was operating at this time, at this location.

4. On or about March 2, 2024 an incident occurred at or near St. George Station, wherein a passenger forcibly entered a guard cab of a subway train, deployed the emergency ramp and evacuated to track level. This incident involved a train being run using One Person Train Operation.

5. On or about June 12, 2024 at approximately 5:30 PM an incident occurred at or near Dundas Station, wherein an operator (*****) was removed from duties after she reported that, due to overcrowding on the platform, she was unable to safely move the train out of the station as a single operator on said train. A supervisor took over the train and moved the train. This incident involved a train being run using One Person Train Operation.

3. Accordingly, by the time this hearing convened, the matter of the key performance indicators, was outstanding as were five requests for production of materials relating to the five incidents set out above. The specific materials requested for each of the five incidents is the same and includes the following:

1. All occurrence reports prepared by any TTC employee;
2. All notes regarding the incident made by any TTC employee;
3. All audio recordings of any announcements made on the train in question;
4. All audio recordings of any calls to/from Transit Control;
5. All audio recordings of any calls to/from emergency services;
6. All audio recordings of any transmissions/communications made to or from the stolen radio(s);
7. All ICS slips prepared by Transit Control;
8. All records related to any investigation(s) conducted related to this incident;
9. All internal TTC emails or other communications related to this incident;
10. All camera/CCTV footage related to this incident, including but not limited to:
 - a. The camera/CCTV footage from any platform cameras in the station(s) involved;

- b. The camera/CCTV footage from the TOMS of the train involved in this incident; and
- c. The camera/CCTV footage from the internal train cameras of the train involved in this incident.

4. At the outset of this hearing, the Union raised a concern that the jurisprudence set out in the Employer's casebook, provided to the Union in advance of this hearing, was replete with cases dealing with the admissibility of post-grievance evidence. The Union submitted that it had been taken by surprise because the Employer had only ever objected to the production of these documents on the basis that these incidents were irrelevant to the facts-in-issue on the merits of the OPTO grievance and not to the timing of the occurrence of the incidents. The Employer had set out its reasons for refusing to produce the documents requested in the draft order in its correspondence to me and to the Union dated January 11, 2024. It took the position that the incidents were not relevant to these proceedings and specifically disavowed any other reason for its refusal. The letter reads in part as follows:

The TTC's position is simple and unchanged: it is objecting to the ATU's production request in relation to two incidents (June 23, 2023 at Spadina station and October 17, 2023 at St. Patrick). The TTC has clearly put on record in multiple letters and at the hearings of November 9 and December 5, 2023 that it is objecting on the basis that these two incidents are not relevant to OPTO. At no time has the ATU even attempted to explain why these incidents are relevant to OPTO. A process by which to properly argue these issues has not yet been determined. The TTC offered to argue it, with sufficient notice, at a hearing date (to be agreed upon) or in writing. We still await a determination as to how these issues will be adjudicated.

...

In hindsight, it is not even clear to us how the process of the Union preparing a draft Order was appropriate or in any way dispositive of TTC's objections. On both hearing dates, the TTC confirmed its objections on the basis of relevance. At no time did the ATU even attempt to explain the relevance of each incident to OPTO. In addition, reference to "concerns not already raised" by the TTC is also inappropriate and confusing since the TTC had clearly and consistently already put its objections to the requested production on record on the basis of relevance. *There are no other concerns and we fail to see why there even need to be other concerns.*

(emphasis added)

5. The Employer submitted at this hearing that this case has been proceeding, in essence, in real time, with the Union requesting and receiving materials that deal with incidents as they occur. The Employer submitted further that there must be, at some point, an evidentiary boundary in time after which evidence will not be entertained. I first employed this concept with these parties in previous proceedings that related to the Union's grievance against the Employer's COVID Vaccination Policy. The Employer conceded that the first time it raised this issue here was on this hearing day. It proposed that an appropriate evidentiary boundary would be November 2022, being the time at which One Person Train Operation was implemented on the Yonge/University/Spadina subway line. The grievance before me is dated November 10, 2015, having been filed after the opening of the Shepherd subway line, on which One Person Train Operation was implemented from its inception. The parties have agreed that my jurisdiction be extended to include implementation on the Yonge/University/Spadina subway line.
6. All of this was news to the Union, which pointed out that there was already considerable evidence on the record relating to facts that had occurred after November 2022.

Notwithstanding that this was the first time the Employer had adverted to this approach, the Employer submitted that I ought to employ the concept of an evidentiary boundary in deciding on the issues in this motion. It was the Union's submission that the Employer should raise this issue, if so advised, by way of a Notice of Motion returnable on a fixed date. Specifically, the Union submitted that certainly the first three incidents should be insulated from the imposition of any consideration of an evidentiary boundary by virtue of the Employer's prior conduct and the late raising of the concept. It said that as of its letter dated January 11, 2024 the Employer's objection to production was clearly and unequivocally limited to simple relevance. The Union submitted that these three incidents should certainly be dealt with on that basis and in the same way as earlier, similar, production issues had been resolved.

7. Ultimately, the Employer conceded that it would limit its objections to the first two incidents to relevance, but reserved its right to object to admissibility of the subsequent incidents. It said that it would deal with the two incidents set out in the draft order. It was the Union's submission that the first three incidents be dealt with on the basis of relevance alone, and the fourth and fifth incidents be heard in the broader context of the Employer's evidentiary boundary submission, if the Employer brings such a motion with proper notice. Counsel for the Employer was instructed by her client to not include the third incident with the first two as being heard only with respect to simple relevance. I decided that all three should be heard on that basis, given the timing of the notice of the three incidents to the Employer as well as the Employer's January 11, 2024 letter excerpted above.

8. The parties made submissions on the first incident. The Union submitted that Transit Control instructed the operator to move to the next station without investigating what had taken place. It said that if there had been a guard, the incident would have been investigated by the guard and an unsafe situation of a forced door been found so that the train would not have been moved. It said that the circumstances were arguably relevant to the issues raised in the grievance. The Employer submitted that it was now the duty of the operator to make such investigations. It said that the Union should not be allowed to rely on an incident wherein the operator did not do their job and failed to tell Transit Control that the door-light was not green. In reply, the Union submitted that even on the employer's submissions the incident was arguably relevant to OPTO and production of the documents was required to permit the Union to assess the incident in detail, including any evidence of the status of the door-light. In my view the incident is relevant to OPTO. The rearranged responsibilities as between the former guards and the OPTO operators as at least arguably relevant and has been the subject of a considerable amount of evidence already before me. Accordingly, the order is to go as asked.
9. With respect to the second incident, the Union submitted that the forcible entry by passengers into the guard cab, now vacant due to the lack of a guard under OPTO, which resulted in radios being stolen and bomb threats being broadcast, was clearly arguably relevant. This situation created a significant safety concern in-that the train and the station had to be evacuated. The Union likened the situation to the evidence called by the TTC regarding the "Black Panther Exercise" in which an evacuation was role-played. The

employer submitted that the absence of a guard was in fact a safer situation because otherwise there would have been a confrontation with people breaking into the cab and confronting the guard. Counsel for the TTC also submitted that most of the general public do not know that there is no guard. In my view the test for an order that a party produce documents is whether the incident and the documents being requested are arguably relevant to the facts in issue raised on the merits of the case. In this situation, it seems plain to me that the absence of the guard in the cab reserved for the guard is certainly arguably relevant to the question before me, which is whether there should be a guard in the cab.

10. With respect to the third incident. It is strikingly similar to evidence that is already before me in which a person fell to track level and was struck by subsequent trains. The Union submitted that it is advised that in this third incident the person was struck by thirteen trains before the body was discovered. It was the Union's submission in the previous incident, the one that is already part of the record before me, and it remains its submission with respect to the arguable relevance of this instance, that if a guard was still positioned in the last carriage of the train, they would be in a position to see that someone had been struck and prevent subsequent trains from doing so. Counsel for the TTC submitted that priority one incidents also occur on the Bloor/Danforth line. It said that therefore a priority one incident, such as this, happening on Yonge/University/Spadina is not even arguably relevant. In my view, now is not the time to weigh any such evidence. The test is whether the evidence is arguably relevant. Further, it is my view that, as was the case in the incident that is already before me, the absence of a guard who might stop

such a situation from occurring is relevant to the facts in issue in this matter, which include the consequences of eliminating the guard position at the rear of the train.

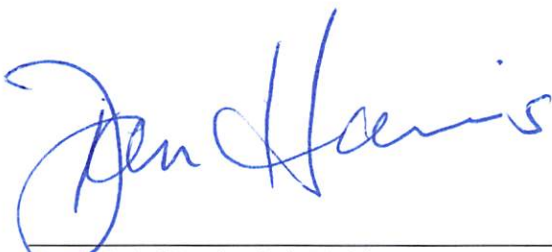
11. There was a second issue dealt with on June 27 2024. That issue dealt with the production of documents that underpin the expert opinion of a witness called on behalf of the TTC. Firstly, the production of those documents by the witness had not been complied with. Counsel for the TTC undertook to advise the witness that she had 30 days to comply with my previous order.
12. The second branch of this deals with which party will bear the cost of the production of these documents. It was the TTC submission that the Union should pay those costs. At the hearing, the Union submitted that the parties to an arbitration are required to bear their own costs and that I had no jurisdiction to order the Union to pay the costs incurred by the TTC witness in providing documents that underpinned her report. Counsel for the TTC took the position that it had been taken by surprise by this jurisdictional argument in exactly the same way that the Union claimed to have been taken by surprise regarding the notion of imposing an evidentiary boundary. Further, counsel submitted that it disagreed that it had to prove jurisdiction and reiterated that the Union should have put the TTC on notice that they intended to raise a jurisdiction argument. The Union submitted that Council for the TTC had been sufficiently put on such notice by the last sentence of paragraph two of its letter to TTC counsel of May 11, 2023, which reads, "The Commission has decided to call Ms. Heavensides [*sic*] as a witness and any costs associated with same are the typical costs associated with the preparation and

presentation of one's case." Implicit in that statement is that parties to a labour arbitration bear their own costs.

13. In my view, there is a distinction between a party seeking to impose a temporal limitation on the evidence that has never before been raised and a jurisdictional argument sought to be relied upon here by the Union. Be that as it may, in the present circumstances there is no prejudice. Arguments on these issues we're not completed on the last day. It is anticipated that they will be completed on the next hearing day. Accordingly, any surprise that may have been experienced by counsel for the TTC has been cured by the passage of time. The parties are directed to complete their arguments on the next hearing day on the issue of who pays for the foundational documents of a party's expert witness.

14. The parties are also directed to address the status of the production of the key performance indicators in the first three paragraphs of the draft order produced by the Union and referred to above.

DATED at Toronto this 6th day of September 2024.



Daniel. A Harris, Sole Arbitrator.