

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 the costs of documents produced by the Employer.

Before: Daniel Harris, Sole Arbitrator

Heard at: Toronto, June 27 and September 24, 2024

Decision Date: June 11, 2025

Appearances:

For the employer: Dolores Barbini, Jordynne Hislop and Brittany Bates, Counsel; Patricia Matuziak, TTC In-House Counsel, and Claudio Cashera, Toronto Transit Commission.

For the Union: Kassia Bonisteel, Ian Fellows, Counsel; Jason da Silva, ATU Local 113 Executive Board Member.

DECISION

The Background

1. The issue leading to this decision has arisen in the course of the arbitration hearing between the Amalgamated Transit Union Local 113 (the ATU) and the Toronto Transit commission (the TTC). Both parties have called experts to opine on the safety of operating subway trains in Toronto, Ontario, with only one operator. Historically, subway trains were operated by a driver in the front carriage and a guard in a rear carriage. The onus is on the ATU to establish that it is not safe for its employees to operate a subway train without a guard. To that end, the ATU's expert witness Dr. Ann Williamson included in her evidence two reports of the *Rail Safety and Standards Board*, (RSSB), which describes itself on its web-site as "the independent safety, standards and research body for Great Britain's railways". The two reports, entered as exhibits 37 and 38 on April 17, 2019, are respectively titled *Safety of Driver Controlled Operation (DCO)* and *Risk Associated with Train Dispatch*. It was her evidence in chief that exhibit 37 is incorporated in exhibit 38. In her view the studies and reports from the RSSB in the United Kingdom are the best source of data. Suffice it to say however that Dr. Williamson had concerns about the methodology used and conclusions reached in exhibits 37 and 38.
2. After I decided disputes between the parties as to who was competent to delve into the reliability of exhibits 37 and 38 on behalf of the RSSB, the Employer decided to call one of the authors, Jay Heavisides. The Union made a request on March 22, 2023, for

production of, in essence, any and all documents underpinning the creation of exhibits 37 and 38.

3. On May 11, 2023 the Employer replied, in part, with the following:

As you know, RSSB is not our client; they are a third party. As well, we have not retained them as an expert in this hearing. We are therefore not in a position to defend their position in response to your request for production. It is my understanding that, as a third party, they will need to be summonsed and if they want to oppose the summons they will have to attend the hearing to argue it.

The TTC takes no position on this production request. However, we are being advised by RSSB that the TTC will be invoiced for their cost in preparing the productions and, we also anticipate, the costs of attending the hearing to oppose the summons. Given that the RSSB reports were put into evidence by the ATU and the ATU is requesting production for the purpose of cross examination, we will be seeking that the ATU pay for all costs related to this RSSB production that are invoiced to the TTC.

4. The Union's reply of May 11, 2023 includes the following:

. . . 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.

As you are aware, Exhibits 37 and 38 were entered as exhibits through a properly qualified expert witness. This witness provided her opinion, as well as the Union produced all arguably relevant documents related to same. As in the normal course, the Union bore all costs related to its witness, as is established in law. The Commission is free to call evidence in defence of its case, including evidence in response to the Union's expert witness. The fact that the evidence the Commission seeks to call is in response to the Union's case does not have any bearing on the Commission's responsibility to bear the costs.

5. Each party sought to push the cost of reproduction of the documents onto the other party.

I am told that these costs were invoiced to the TTC in the amount of £5200 GPD, being approximately \$9000.00 CAD. It is my decision that liability for these costs fall to the TTC, for the reasons that follow.

The Submissions of the Parties

6. The TTC submitted that each party should fund its own case. The TTC initially relied on three cases arising in the civil litigation context, being: *Endale v. Parker*, 2022 ONSC 2008 (Valente J.); *Traverse v. Turnbull*, 1996 NSCA 124 and *Beeching Estate v. Beeching*, 1994 CanL11 4553 (SKCA).

7. This general rule that each party is responsible for the cost of its own case was dealt with in *Endale* in the context of the costs associated with the plaintiff's obligation to produce their medical records, and bear the costs of doing so. This was summarized in paragraph 17 of the report as follows:

[17] I accept the principle that each party must fund its own case. The obligation to produce documents as required by Rule 30.01(1) cannot be the responsibility of an adverse party who may have better financial means to source the documents.

8. In *Endale* it was decided that the party who was obligated to produce the documents bears the costs of doing so. That conclusion rested on the decision in *Demiroghu v. Kwarteng*, [1998] O.J. No. 4472 (Gen. Div), of Associate Judge Peppiatt. which approach had been endorsed by Cullity J. of the Ontario Superior Court, as set out in paragraphs 13 and 14 of *Endale*, as follows:

[13] Cullity J. in his 2002 decision of *Ho v. O'Young-Lui*, 2002 CanLII 6346 (Ont. S.C.), endorsed the approach adopted in *Demiroglu*, but also held at para. 5:

...the balance of the authorities at present appears to favour the view that, as a general rule, the expenses of a party's productions are to be paid by that party in the first instance.

[14] While plaintiff's counsel, in the matter before me, acknowledges the finding of Cullity J., he questions whether his client is the party "in first instance" relative to the Documents? I reject the plaintiff's proposition in its entirety. In his decision, Cullity J. was referring to the costs of litigation which may be recoverable if the plaintiff is successful.

9. Care must be taken in adapting decisions of the civil courts to the labour arbitration context. The civil court context is clearly of great import in that, as set out in paragraph 14 of the excerpt, the initial responsibility of paying such costs falls to the party obliged to produce the documents, and those costs may well ultimately be recovered, depending on the outcome of the cause. Of course in the labour arbitration context, there is no such costs recovery depending on success in the outcome of the grievance litigation; each party bears its own litigation costs. So long as that is understood, the pay-as-you-go costs of document production, in a labour arbitration, fall, based upon the guidance of *Endale* and the cases cited therein, on the party obliged to produce the documents.
10. In *Endale* there was a long discussion regarding whether the plaintiff had the power to produce the records of the doctor. In this matter the Employer also took the position that the documents were in the hands of a third party. RSSB would only provide the documents on condition that the payment be made. Here, the documents were in the hands of the Employer's witness. On the strength of *Endale*, if it wanted to call that witness, the Employer was obliged to produce, and pay for, compellable documents.
11. Further, *Endale* relies on *Demiroglu* with respect to the two-fold purpose of the documents in question. Notwithstanding that the plaintiff was not relying on the documents, it still bore the costs of producing them for the use of the defendant as set out in paragraphs 11 and 12 as follows:

[11] In the 1998 decision of *Demiroglu v. Kwarteng*, [1998] O.J. No. 4472 (Gen. Div.), Associate Judge Peppiatt (then referred to as Master) found that when records are in the plaintiff's "power", he is required to produce them under Rule 30.02(1), and furthermore, "[w]hen a party is obliged to do something he must pay whatever cost is incurred in discharging that obligation unless there is a specific provision to the contrary in the Rules": at para. 3.

[12] On appeal of Associate Judge Peppiatt's decision, this Court found that it was immaterial that the plaintiff was not relying on the subject documents in order to prove his case. Production of the documents has a twofold purpose: to prove the plaintiff's case but also for the defendant to determine the nature and extent of the plaintiff's injuries. This Court also found that any costs associated with obtaining the documents is irrelevant: **"To hold otherwise would permit parties to avoid production of relevant documents on the basis of cost":** *Demiroglu v. Kwarteng*, [1999] O.J. No. 3117 (S.C.), at para. 17.

(emphasis added)

12. In this situation before me, the Union submitted that it is not looking for documents that are primarily to support its case but rather to be able to effectively cross-examine the Employer witness as an author of the two exhibits that the Union's expert witness had taken issue with. It should be noted that this Employer witness is not being called as an expert *per se*, but as one of the authors of the exhibits. The opinions in those exhibits were reached unrelated to the facts in issue in this litigation. In a separate decision I dealt with the scope of the testimony of any such witness. *Toronto Transit Commission and Amalgamated Transit Union, Local 113*, 2022 CanLII 12795 (ONLA), paragraph 39 deals with the scope, as follows:

39) The authors of the documents may give evidence about any relevant opinions relating to the subject matter of the litigation formed for a purpose other than the litigation. If their evidence extends to include any other opinion, for example any commentary on Dr. Williamson's evidence, they must comply with Rule 53.03.

13. As part of the Employer's Reply submissions, the Employer objected to the submissions of the Union on the basis that the Employer had not been given notice of the two arguments the Union was going to make, being, first that a labour arbitrator has no jurisdiction to award costs and, second, that documents that are the foundation of a witness's evidence are compellable at the cost of the caller of the witness.
14. As it said that it was taken by surprise by these Union arguments, the Employer continued its reply submissions on the next hearing day. On that occasion the Employer

submitted that each party should bear its own costs. It said that this cost was the cost of a third party and that the costs should be borne by the Union because they related to exhibits 37 and 38 that were made part of the record as part of the Union's case, and the costs were as a result of producing documents in aid of the Union's cross-examination of the Employer's witness. The Employer submitted that these were unique and unprecedented issues: that, first, the RSSB reports of exhibits 37 and 38 were put into the record by the Union; second, they were put in by the Union's expert; third, the RSSB is an expert organization, but it was not retained in that capacity by the TTC for purposes of this litigation; and fourth, exhibits 37 and 38 were not prepared for purposes of this litigation, rather they were independently produced by the RSSB for its own purposes. Accordingly, it submitted that the documents sought are not foundational documents related to an expert report commissioned by the TTC for this litigation.

Analysis and Decision

15. The Employer decided to call one of the authors, Ms. Jay Heavisides, whereupon the Union requested the production of documents in its correspondence on March 22, 2023, which reads in part as follows:

We write further to your email of March 8, 2023 wherein you confirmed that you intend on calling Jay Heavisides from the RSSB as a witness in this matter. We write to request production of all arguably relevant material respecting Ms. Heavisides' evidence.

Without limiting the breadth of the request for production of all arguably relevant materials related to Ms. Heavisides' evidence, please providing the following . . .

16. The letter goes on to particularize what was being sought. The Employer's response of May 11, 2023, included the following with respect to the expense issue:

The TTC takes no position on this production request. However, we are being advised by RSSB that the TTC will be invoiced for their cost in preparing the productions and,

we also anticipate, the costs of attending the hearing to oppose the summons. Given that the RSSB reports were put into evidence by the ATU and the ATU is requesting production for the purpose of cross examination, we will be seeking that the ATU pay for all costs related to this RSSB production that are invoiced to the TTC.

17. Accordingly, it was the Employer's choice, as part of its case, to buttress the methodological integrity of the RSSB reports of exhibits 37 and 38 by calling the author and in doing so it created a category of arguably relevant documents that it is obliged to produce, and it is thereby obliged to pay the costs of that production. *Endale*, adapted to the labour arbitration context, supports payment of the expense in this case by the Employer.

18. Another case submitted by the Employer, *Traverse v. Turnbull*, 1996 NSCA 124, is another instance of the production of the plaintiff's medical records. The court sets out exceptions to the rule that the party in control of the documents pays the costs of their production. The seventh to last paragraph reads as follows:

From a review of the cases in other jurisdictions, I have concluded that the rule requires that the party who has possession, custody or control of documents related to every question in issue is to produce those documents at that party's expense; **it is the cost of being involved in a law suit.** Depending on the outcome of the trial, those disbursements may be recovered as part of an award for costs. However, the case law evidences exceptions to the rule. For example: (i) if a party demands compliance with the rule in a manner that is unjust or burdensome to the party in possession or control of the documents the court may relieve the party of the cost burden of reproduction of the documents (*Imperial Oil v. N.S. Light & Power* (supra)); (ii) if the cost of obtaining information sought from third parties, that would be of little relevance, the burden may be shifted to the party seeking the information (see statement previously quoted of Kroft J. in *Royal Bank of Canada v. Waller*); and (iii) if the documents sought are primarily to support the other party's claim or defence a court may decide that the party seeking the documents should pay for the cost of reproduction (*Saunders v. Nelson* (supra); *Beeching Estate v. Beeching* (1994), 29 C.P.C. (3d) 242 (Sask. C.A.)).

(emphasis added)

19. The Union's request for these foundational documents is neither unjust, of little relevance, nor sought to primarily support its case. With respect to the latter, the request

is to be able to effectively cross-examine the author of exhibits 37 and 38, a witness called by the Employer to defend the exhibits in question, the reliability of which was challenged by the Union as part of its case. As set out in paragraph 12 of *Endale* above, citing paragraph 17 of *Demiroghu*, “to hold otherwise would permit parties to avoid production of relevant documents on the basis of cost”.

20. Also relied upon by the Employer was *Beeching Estate v. Beeching*, 1994 Can LII 4553 (SKCA), where the court did justice by applying the third exception set out in *Traverse*, supra, in the fifth to last paragraph of the report in *Beeching*, which reads in part as follows:

We are of the view it was necessary in the circumstances which existed here for the chamber judge to determine who should bear these costs and he did so in such a way as to require the appellant to pay the costs of obtaining these documents in the hands of a third party to enable her, if she thought it worth the investment, to determine the extent to which they would support her case.

21. In that case, the executrix of her father’s estate wanted to examine the cheques “written by her father’s widow over the course of her marriage.” The widow had not kept her copies of the cancelled cheques. Copies of the cheques were available under the following circumstances:

Fortunately for the appellant, the Saskatoon Credit Union has a practice of making film records of the cheques that pass through its systems. Cheques are photographed in batches as they are cleared, without being separated by account number or member. The Credit Union is willing to release these records on the respondent's approval, provided the copies of the respondent's cheques are separated from the batches. This can only be done with the expenditure of considerable labour and expense.

22. The report is silent on whether the executrix thought it worth the investment for the estate to absorb those costs. Be that as it may, that case is manifestly unlike the question before me. Although this could also be considered a disputatious family law case, it is actually a

case dealing with the disposition of an estate. Probate cases especially are of little assistance in the determination of the question here, given that costs of motions are generally paid out of the estate. Although perhaps the *Jarndyce* effect may be a feature of these proceedings, I make no specific finding nor hold such a definitive opinion on that bleak prospect.

23. The Union submitted that the documents being requested were all foundational documents that inform the opinions expressed by the authors of exhibits 37 and 38, and there is no question but that the party that calls such evidence bears the cost of producing them. Further, the Union submitted that there is no jurisdiction to make a costs award such as that requested here. Having read and considered the cases relied upon by the Union, I agree with those propositions. However, here I am not being asked to make a costs award against the Union. Rather, I am being asked to decide which party is responsible, in these circumstances, for these costs. In my view, these are the costs of litigation. The documents at issue were in the hands of the Employer's witness and they were legitimately and justly required by the Union to prepare for the cross-examination of that witness. In labour relations, each party bears its own costs. Ms. Heavisides is the Employer's witness; these costs are part of the Employer's litigation costs. That is the ruling in *Endale*.

24. Finally, and as set out above, the Employer said that it had been taken by surprise by the Union submissions, and, therefore, the Employer continued its reply submissions on the next hearing day. The Employer took the position that the Union should be constrained

from making the two submissions set out above, because of the lack of notice as to what those submissions would be. However, absent a party advising the party opposite that its submissions would be circumscribed in some fashion, and not following through, I do not see that a party being taken by surprise is a bar to the party opposite making specific submissions. The approach taken in these proceedings was to cure the surprise by the Employer continuing its submissions on the next hearing day. I believe that to be appropriate.

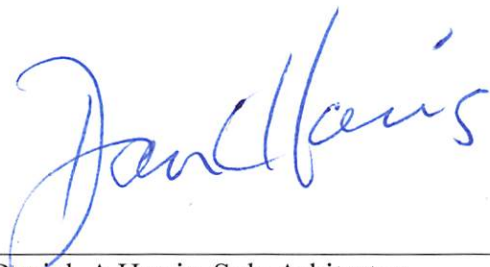
25. The Employer said that this was a unique and unprecedented situation in that the Union had entered the two exhibits into evidence through its expert, and the documents sought are not foundational documents related to an expert report commissioned by the TTC for this litigation.
26. In my view, for the reasons set out above, the Employer is using the wrong test in submitting that it is only responsible for production of foundational documents of its own expert's report. Ms. Heavisides was its witness, and it is responsible for the costs associated with her testimony.
27. The Employer called Ms. Heavisides, an expert, as its witness. She was not an expert retained by the Employer; she was called to give expert opinion evidence as one of the authors of the documents. She was permitted to give evidence about any relevant opinions relating to the subject matter of the litigation provided they were formed for a purpose other than the litigation. Her opinion evidence, like any opinion evidence, rests

upon the materials and investigations she relied upon in forming her opinion. It is conventional and appropriate to challenge opinions by exploring the bases upon which they rest. That is what the Union did in its cross-examination of Ms. Heavisides. Any documents that were required for the cross-examination of this witness are to be made available at the Employer's expense, because she was the Employer's witness giving expert evidence testimony as the author. The Union properly asked for the production of arguably relevant documents in advance, for the purpose of preparing its cross-examination. Such an approach saves hearing time by the avoidance of adjournments or lost-time while the matter is stood-down if the documents are produced one-by-one in the course of the hearing.

The Decision

28. The costs of reproduction of the documents at issue are the responsibility of the Employer.

DATED at Toronto this 11th day of June 2025.



Daniel A. Harris, Sole Arbitrator.