Saskatchewan
Labour Relations Board

TEAMSTERS CANADA RAIL CONFERENCE, Applicant v. BIG SKY RAIL CORP., MOBIL GRAIN LTD. and 101115529 SASKATCHEWAN LTD. o/a LAST MOUNTAIN RAILWAY, Respondents and CN RAIL, Interested Party

LRB File No. 223-12; March 28, 2014
Chairperson, Kenneth G. Love, Q.C.; Members: Jim Holmes and Brenda Cuthbert

For the Applicant:	Michael A. Church and Heather Jensen
For the Respondents:	Paul J. Harasen
For the Interested Party:	Jacynthe Girard

Determination of Employer – Sections 2(g) and 37.3 *The Trade Union Act* – Mobil was parent company of the two Respondents, Last Mountain Railway and Big Sky Rail – LMR and Big Sky technically have no employees as all employees are under the direct control of Mobil – Union argument that all entities are common employer under s. 37.3 was rejected – In order for s. 37.3 to apply, at least one of the entities for whom common designation is sought must be a unionized employer – Only unionized employer was CN who was not a respondent in this application – However, definition of employer under s.2(g)(iii) includes contractors who supply service of employees for or on behalf of a principal – Thus, Board finds that employers of the employees in this case are Big Sky and LMR

Successorship – Section 37 *The Trade Union Act* – LMR and CN Transaction – Mobil was in business of transportable grain terminals – Mobil essentially took control of LMR – LMR purchased abandoned rail lines from CN – Rail lines were not in operating condition – LMR granted CN running rights over some of these rail lines – Union asserts that this transaction triggers a successorship under s. 37 – Board finds that there was no successorship – Past Board jurisprudence indicates that Board looks to a variety of factors to determine successorship including relationship between companies; transfer of goodwill or customers; whether or not a living business has been transferred – In this case, LMR did not acquire any "living assets" from CN as tracks were not operational and had not been used for several years – LMR did not purchase tracks to operate a railway but to continue its own grain terminal business – Also significant that CN obtained running rights over tracks – Since no business of any kind had transferred there was no successorship

Successorship – Section 37 *The Trade Union Act* – Big sky and CN Transaction – Principals of Mobil utilized previously incorporated "shelf company" as purchaser of assets from CN – Rail Line assets acquired by Big Sky were in operation up to the time of transfer from CN –CN granted running rights to Big Sky over some of its lines to permit Big Sky to integrate with LMR lines, including running rights through its yard in Saskatoon – Union asserts that this transaction triggers a successorship under s. 37 – Board finds that there was a successorship –In this case, Big Sky did acquire a business from CN as tracks were operational and had been used for the conduct of CN business immediately prior to transfer to Big Sky – Also significant that CN did not obtain running rights over rail lines sold to Big Sky

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** Teamsters Canada Rail Conference, (the "Union") is certified by the Canada Industrial Relations Board as the bargaining agent for a unit of employees of CN Rail ("CN") by an Order of that Board dated September 2, 2008 with respect to a unit of employees that includes "conductors, baggagepersons, brakepersons, car retarder operators, yardpersons, yard operations employees, switchtenders, yardmasters and assistant yardmasters working for the Canadian National Railway Company lines in Canada" (the "CTY employees"). The Applicant is also certified by the Canada Industrial Relations Board by an Order of that Board dated April 4, 2004 with respect to a unit of employees that includes "all locomotive engineers and locomotive firemen/helpers working in the Canadian National Railway Company lines in Canada" (the "Engineers").

[2] The Applicants have applied to this Board to have the Respondents declared to be the successor to CN pursuant to Sections 37 and 37.2 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The Applicant has also applied to have some or all of the Respondents declared to be related businesses pursuant to Section 37.3 of the *Act* or as the true Employer pursuant to Section 2(g) of the *Act*.

[3] For reasons that follow, the Board has determined that there was no successorship in respect of the transaction between CN and 101115529 Saskatchewan Ltd. o/a Last Mountain Railway ("LMR"). The Board does find that there was a successorship in respect of the transaction between CN and Big Sky Rail Corp. ("Big Sky").

Furthermore, the Board has determined the true employer to be Big Sky Rail Corp. However, as the employees of Big Sky are new to the Applicant, the Board has also determined that their wishes must be canvassed in accordance with Section 37(2)(d) of the *Act.*

Facts:

[4] The Respondent, Mobil Grain Ltd. ("Mobil") was incorporated in October, 2004. It was incorporated to exploit a new technology invented by Mr. Sheldon Affleck and his brother, Lavern, which allowed grain products to be processed, cleaned and stored by means of a transportable grain terminal rather than through the historical geographically fixed terminal. This transportable grain terminal was first utilized by Mobil in 2005 and was located in the switching yard of the Canadian Pacific Railway in Moose Jaw, Saskatchewan. It was situated in that location until 2006, when Mobil was approached by farmers south of Moose Jaw, Saskatchewan, who encouraged Mobil to relocate its transportable grain terminal on to rail lines operated by Great Western Railway, a short line railway that operated in the south-western part of Saskatchewan.

[5] The plant operated at Meyronne, Saskatchewan until 2009. While operating in Meyronne, Mobil acquired rail equipment to facilitate "en route" processing of grain products. "En route" processing of grain products involved processing complete grain cars filled with product at the Mobil grain terminal as rail cars passed by the facility. This also required the company to obtain certain rail equipment necessary to move rail cars around and through the Mobil grain terminal. Rail equipment acquired included a shuttle wagon and a Brand Road/Rail power unit. Additionally, in order to properly operate the rail equipment and to operate on the rail lines, some of the employees, including Mr. Affleck, obtained the necessary licences and permissions to operate this rail equipment on the short line tracks.

[6] Sometime prior to 2008, CN determined to discontinue service on its Craik subdivision. The portion of the railway to be discontinued ran from near Davidson, Saskatchewan to near Regina, Saskatchewan. In accordance with the requirements set out in the *Canada Transportation Act,*[1] the intention to discontinue service on that portion of

[1] S.C. 1996 c. 10

its railway was publicly advertised. A group of urban and rural municipalities through which the discontinued line ran determined to form a group to purchase the abandoned rail assets from CN.

[7] Mobil became aware of the interest of these municipal governments in purchasing the abandoned rail assets. Mr. Affleck attended a meeting of the interested group and agreed to subscribe for shares in a corporation, 101115529 Saskatchewan Ltd., ("Last Mountain Railway") which was incorporated as the purchaser for the assets to be acquired from CN. Mobil subscribed for 2 Class A shares in Last Mountain Railway.

[8] At the time of incorporation, Mr. David Green was elected as President of LMR. Neither Mr. Sheldon Affleck nor his brother, Lavern were, on incorporation, an officer of the corporation.

[9] LMR negotiated with CN for the purchase of the Craik subdivision. Little progress was being made in the negotiations and many of the municipalities, who were initially interested in being involved, began to lose interest. Mr. Affleck requested permission from the other shareholders to continue the negotiations on his own, which permission was granted. He subsequently was successful in negotiating a purchase of CN's assets pursuant to an Asset Purchase Agreement signed April 27, 2009 and which purchase and sale was scheduled to close on or about June 9, 2009.

[10] LMR purchased, *inter alia*, the land comprised in the right of way and the rail trackage, including rails, ballast, ties, switches, etc. At the time of inspection of these assets by Mr. Affleck prior to the purchase, he noted that the rail bed and lines, as well as some bridges, were not in operating condition. The rail bed was overgrown with vegetation, including trees that had grown on the right of way. Additionally, some bridges and abutments were also in an unsafe condition. The evidence was that no trains had operated over these rail lines for many years prior to their sale to LMR. An adjustment was made to the purchase price of the assets to compensate the purchaser for the costs to remediate the condition of the rails, bridges and abutments.

[11] Mr. Hackl, who testified for the Applicant, noted that when he was employed as a train engineer, he had delivered grain cars to a point south of Davidson, which formed

a part of the Craik subdivision in 2007 or 2008. This evidence was offered to support the Union's contention that the Craik subdivision remained in use.

[12] In addition to the assets purchased from CN, CN granted interchange rights to LMR over portions of the rail lines retained by CN to permit the exchange of rail cars between CN and LMR at both Davidson, Saskatchewan and Regina, Saskatchewan. This interchange agreement, and the joint running rights referenced below, required that employees of LMR be accredited to operate over CN trackage and hold the necessary permissions to so operate.

[13] In addition to the interchange rights, LMR and CN granted each other certain running rights over their rail lines. CN granted LMR the right to operate over its rail lines from Davidson, Saskatchewan to Saskatoon, Saskatchewan (Newcross MP 154.10) and between the City of Regina and the start of the rail lines which it owned. LMR granted CN the right to operate over the trackage owned by it between Davidson and Regina.

[14] Also included in the transaction was the assignment of a lease between CN and the Rural Municipality of Craik No. 222 for use of a portion of the right of way sold to LMR as a grain elevator site. That lease agreement ran from November 1, 2007 through October 31, 2012. Additionally, there were a number of other encumbrances on the titles sold to LMR, being orders of regulatory agencies.

[15] Apart from the interchange and joint running rights, no operating authorities were transferred to LMR from CN. The Craik subdivision, being situated solely within the boundaries of the Province of Saskatchewan, is regulated provincially. Operating authorities were sought by LMR pursuant to *The Railway Act*[2] and obtained by LMR.

[16] Following completion of the purchase and sale of the assets from CN, Mr. Sheldon Affleck and his brother Laverne, through Mobil, took control of LMR. In August of 2009, the Articles of Incorporation of 101115529 Saskatchewan Ltd. were amended to create additional share classes. Mobil subscribed for an additional 3,576 Class D shares and 950 Class F shares. At or about that same time, additional shareholders subscribed for Class A shares in the aggregate amount of 1350 Class A shares.

[17] Notwithstanding the changes in shareholdings that occurred in August of 2009, Mr. Sheldon Affleck did not become President of LMR until July 13, 2011. On that date, his brother Lavern became Chairman of the Board and Managing Director of LMR and Daren Young became Secretary-Treasurer.

[18] In September of 2009, LMR entered into an agreement with Mobil for Administrative Services, Rail Operation Services, and Rail Maintenance Services. Each of these services was provided by Mobil to LMR for a monthly fee as specified in the agreement. That agreement ran for a term of five (5) years and was renewable for a further five (5) year term.

[19] In August of 2011, Mobil took control of a shelf company which had been incorporated in 2008 by its legal counsel. Mobil became the sole and controlling shareholder of that corporation, Mr. Sheldon Affleck became its President and the name of the company was changed to Big Sky Rail Corp. ("Big Sky"). These events occurred because Mr. Sheldon Affleck had been contacted by CN regarding other branch lines which CN wished to abandon. Those branch lines were the Conquest Subdivision, the Elrose Subdivision, the Mantario Spur and a portion of the White Bear Spur as well as all connecting branch lines and spurs to the forgoing excepting the Matador and White Bear Spurs. The land comprised in the right of way and the rail trackage, including rails, ballast, ties, switches etc. of the Elrose lines were sold by way of an asset purchase agreement. The balance of the lines were leased to Big Sky by CN with an option to purchase them. CN also agreed to lease to Big Sky the railway right of way and adjacent lands comprising the Matador and White Bear spurs with an option to purchase those lands. Those transactions were effective as of September 2, 2011.

[20] CN also agreed to provide Big Sky with running rights along portions of its Rosetown and Watrous subdivisions and through its yard in Saskatoon, Saskatchewan which would allow Big Sky to interconnect with LMR. No joint running rights were granted by Big Sky to CN over the lands which were sold or leased to Big Sky by CN.

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[2] S.S. 1989-90 c. R-1.2

[21] There was no involvement by either Mobil or LMR in these transactions. However, the result of the transaction was that Big Sky was granted access across CN lines to interconnect with LMR and *vice versa*.

[22] The lines that were the subject of the Big Sky transaction with CN were put up for abandonment by CN some ten (10) years prior to this transaction. There was opposition to the trackage being abandoned by municipal governments in the area. Following discussions concerning the abandonment, CN agreed to keep the lines in service, provided a group known as West Central Road and Rail made certain capital investments and provided sufficient volumes of car loading to ensure the viability of the line. That agreement was coming to an end when the transaction occurred. The agreements between Big Sky and CN did not impose any obligations on Big Sky with respect to West Central Road and Rail, nor did it provide any benefits to Big Sky in regards to that entity.

[23] Apart from the interchange and joint running rights, no operating authorities were transferred to Big Sky from CN. The rail lines sold, being situate solely within the boundaries of the Province of Saskatchewan, are regulated provincially. Operating authorities were sought by Big Sky pursuant to *The Railway Act*[3] and obtained by Big Sky.

[24] On September 2, 2011, Big Sky entered into an agreement with Mobil for Administrative Services, Rail Operation Services, and Rail Maintenance Services. Each of these services was provided by Mobil to Big Sky for fees as specified in the agreement. That agreement, which was unsigned by the parties as at the date of this hearing, ran for a term of five (5) years and was renewable for a further five (5) year term. Although the agreement was not either complete or executed, it was apparently being utilized by the parties to govern their relationship.

Relevant statutory provision:

[25] Relevant statutory provisions are as follows:

> *2 In this Act:*
>
> *(g) "employer" means:*

[3] S.S. 1989-90 c. R-1.2

(i) an employer who employs three or more employees;

(ii) an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;

(iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;

and includes Her Majesty in the right of the Province of Saskatchewan

. . .

37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

37(2) On the application of any trade union, employer or employee directly affected by a disposition described in this section, the board may make orders doing any of the following:

> *(a) determining whether the disposition or proposed disposition relates to a business or part of it;*
>
> *(b) determining whether, on the completion of the disposition of a business, or of part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be:*
>
> > *(i) an employee unit;*
> > *(ii) a craft unit;*
> > *(iii) a plant unit;*
> > *(iv) a subdivision of an employee unit, craft unit or plant unit; or*
> > *(v) some other unit;*
>
> *(c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);*
>
> *(d) directing a vote to be taken among all employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);*

> *(e) amending, to the extent that the board considers necessary or advisable, an order made pursuant to clause 5(a), (b) or (c) or the description of a unit contained in a collective bargaining agreement;*
>
> *(f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).*
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> *. . .*
>
> *37.2 Unless the board orders otherwise, if collective bargaining relating to a business is governed by the laws of Canada, and the business or part of it becomes subject to the laws of Saskatchewan, section 37 applies, with any necessary modification, and the person owning or acquiring the business or part of it is bound by any collective bargaining agreement in force when the business becomes subject to the laws of Saskatchewan.*
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> *37.3(1) On the application of an employer affected or a trade union affected, the board may declare more than one corporation , partnership, individual or association to be one employer for the purposes of this Act if, in the opinion of the board, associated or related businesses, undertakings or other activities are carried on under common control or direction by or through those corporations, partnerships, individuals or associations.*
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> *37.3(2) Subsection (1) applies only to corporations, partnerships, individuals, or associations that have common control or direction on or after October 28, 1994.*

Union's arguments:

[26] Counsel for the Union provided a written argument which we have reviewed and found helpful. In that argument, the Union framed the issues as follows:

1. Was there a sale, transfer or other disposition of a part of a business as defined in ss. 37 and 37.2 of *The Trade Union Act* from CN Rail to Big Sky Corp., Mobil Grain Ltd. and Last Mountain Railway, or any of them?

2. Which employees of the Respondents are affected by the operation of s. 37?

3. Is the part of the business that was transferred now subject to provincial regulation?

4. Are the Respondents, or any two of related corporations carrying on business activities under common control or direction, related business or common employers pursuant to s. 2(g(iii)?

5. Are the successor Employers, pursuant to the operation of s. 37 of the *Act* subject to certification Orders and collective agreements with the Union?

[27] In respect of its arguments regarding issue 1 above, the Union relied upon the Board's decisions in *SGEU v. Headway Ski Corporation*[4] and *CUPE, 1975 v. Versa Services Ltd.*[5] to support its arguments that the Board should consider, in its determination of whether a transfer of a business or a portion thereof had occurred, whether there was a transfer of any of the following: goodwill, logos, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing, any other obligations to assist the successor in being able to effectively carry on the business, whether there was a hiatus in production, whether any employees continue to work for the alleged successor, and whether employees perform the same skills or tasks. They further argued that *Headway, supra,* established that a transfer of assets combined with a contracting out of work is sufficient to constitute a successorship.

[28] The Union argued that there is no uniform definition of successorship, nor is there any factor or single set of criteria which, of themselves, establish a successorship. It argued that the form of the transaction was not necessarily significant, rather the important factor was the relationship between the successor, the employees and the undertaking.

[29] It argued that the Board should not be persuaded by the fact that Mobil carried on a different business than CN prior to the transfer of the LMR assets to Mobil. Nor, they argued should the Board consider Mobil's concerns that the collective agreement or bargaining rights presented a problem for Mobil.

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[4] August 1987 Sask. Labour Rep. at pp. 53-55
[5] July 1983 (1st Quarter) Sask. Labour Rep. at pp. 176-177

[30] The Union argued, based upon the Board's decision in *SGEU v. Golf Kenosee Inc.*[6] that the Board should not be persuaded by the fact that no employees transferred between CN and either LMR, Mobil, or Big Sky. Nor, they argued that there was no hiatus in the business since Mr. Hackl gave evidence that as late as 2008, cars had been delivered by CN south of Davidson, Sask.

[31] Relying on more recent decisions of the Board in *RWDSU and Charnjit Singh*[7] and *United Steel Workers Union, Local 1-184 and Edgewood Forest Products Inc.*[8] a successorship could be found when the transaction was of a functional vessel for the hotel business (*Charnjit Singh*) or a continuation or a similar business (*Edgewood*).

[32] The Union also argued that other cases involving the sale of short lines in Saskatchewan should be considered. It argued that when the Carlton Trail Railway was transferred, the Union and the purchaser both agreed a successorship had occurred and that it was both self-evident and automatic. The Union also relied upon the decisions in *Via Rail Canada Inc.,*[9] *Southern Rail of British Columbia,*[10] *United Transportation Union v. Canadian National Railway Company and Central Western Railway.*[11]

[33] On the second issue framed by the Union, they argued that the Union was not seeking to represent only those employees engaged in the work formerly done by the Union's members, that is, locomotive engineers, conductors, brakepersons, and yardpersons.

[34] In respect of the third issue framed by the Union, the Union argued that this Board had exclusive jurisdiction to determine if there had been a transfer of a business as contemplated in Sections 37 and 37.2 of the *Act*.

[35] The Union made no arguments with respect to the fourth identified issue.

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[6] September 1978 Sask. Labour Rep. 34
[7] [2013] CanLII 3584 (Sask LRB)
[8] [2012] CanLII 51715 (Sask LRB)
[9] July 1992, CLRB Decision No. 946
[10] [1989] B.C.L.R.B.D. No. 271
[11] CLRB Decision No. 611 (February 27, 1987). Overturned by the Supreme Court of Canada on the grounds that the Canada Board lacked jurisdiction over the provincially regulated railway, Central Western Railway.

[36] In respect to the fifth identified issue, the Union focused upon the interrelationship between the various corporate entities and the commonality of ownership between all three. It argued that the entities functioned as one entity under common control and direction and were therefore common employers pursuant to Section 37.3 of the *Act*.

Employer's arguments:

[37] Counsel for the Respondents provided a written brief following his oral argument which we have reviewed and found helpful. The Respondents identified only two issues which were:

> 1. Has there been a sale of a business, or a part of a business from CN to LMR or Big Sky within the meaning of section 37 of the *Act*?
>
> 2. Should Big Sky, LMR and Mobil be considered common or related businesses and [sic] ought to be treated as one and the same employer for the purposes of the *Act*?

[38] The Respondents argued that there must be more than a transfer of assets to establish a successorship. Relying upon *CUPE v. Metropolitan Parking Inc.*[12] the Respondent argued that there must be a transfer of a "going concern" or a "functioning economic vehicle". They also argued that it was not sufficient that Big Sky and LMR were performing a like function to that performed by CN.

[39] The Respondents also relied upon a Canadian Industrial Relations Board decision in *Quebec North Shore and Labrador Railway Company Inc.,*[13] which it argued was analogous to the current fact situation. That case, it argued stood for the proposition that a mere sale of assets was not the sale of a business as a "going concern".

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[12] [1980] 1 C.L.R.B.R. 197 (Ont)
[13] [2007] C.I.R.B. No. 10

[40] The Respondents also relied upon other decisions from an arbitrator and the Canada Board, being *Goderick Elevators v. Fisher,*[14] *Parrish & Heimbecker, Limited*[15] and *S.I.U v. Secunta Offshore Inc.*[16]

[41] The Respondents further argued that many of the components necessary for the operation of a railroad were not acquired from CN by any of the Respondents. These included:

(a) Locomotives;
(b) Rail Cars;
(c) Employees;
(d) Tools and Equipment;
(e) Customer Accounts;
(f) Communications systems and software specific to the rail industry;
(g) Accounting/billing systems specific to the rail industry;
(h) Training programs; and
(i) Safety and maintenance programs

[42] In their submission, the Respondents had not acquired key elements of the business operated by CN. While acknowledging that the Respondents did haul rail cars, they argued that this fact alone was not sufficient to constitute a transfer of CN's business to the Respondents.

[43] In respect of the second issue, the Respondents acknowledged that there was no dispute that the Respondents were all under common control and direction. However, they argued that more was required to be shown. In support, they relied upon *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184 v. Cabtec Manufacturing Inc.*[17] wherein the Board utilized its discretion under Section 37.3 not to declare a successorship.

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[14] [1998] C.L.A.D. 654
[15] [2004] CIRB No. 264
[16] [1986] CLRB No. 589
[17] [2008] CanLII 47035 (Sask LRB)

[44] The Respondents argued that Mobil had been in existence for many years prior to the transactions with CN. It owned its own locomotives, rail cars, and had employed accredited rail personnel prior to the CN transactions. Furthermore, they argued that LMR was originally incorporated by others, some of whom were still shareholders.

CN's Arguments

[45] CN did not make substantive arguments concerning the issues before the Board. They were, in essence, keeping a watching brief with respect to other ongoing matters as between the Union and CN which was a separate dispute. They noted the Board had heard evidence concerning this dispute and the grievances filed in respect thereto and wanted to ensure the Board did not stray into these areas.

Analysis and Decision:

Who is the Employer?

[46] The Board is often tasked with determining which, of several entities, is the employer of employees for the purposes of the *Act*. There are two provisions of the *Act* that are routinely referenced by the Board and supplicants to assist in that determination. One of these is Section 37.3 and the other is Section 2(g). Section 37.3 was added to the *Act* by amendment on June 2, 1994. The effect of that amendment was described by Vice-Chairperson Hobbs in his decision in *U.B.C.J.A., Local 1985 and P.S.P. Erectors Inc.,*[18] as follows:

> *Prior to the coming into force of section 37.3 of The Trade Union Act and section 18 of The Construction Industry Labour Relations Act, 1992, there were several occasions where the Board treated separate corporations as one employer for certification purposes (see Water Group Canada Ltd./Aquafine Water Ltd., LRB File No. 009-92; Prairie Pipeline Ltd., LRB File No. 189-91; Immigrant Women of Saskatchewan, LRB File No. 049-94). Furthermore, there are several other decisions of this Board where in it ruled that it did not have jurisdiction to treat separate corporations as one employer (Parkland Drywall Ltd.; LRB File No. 029, 030-85, Graham Construction, LRB File No. 330-84)*
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> *Regardless of what jurisdiction the Board had to treat separate legal entities as one employer prior to the coming into force of section 37.3 of The Trade Union Act and 18 of The Construction Industry Labour Relations Act, 1992, the Board's jurisdiction is now set forth in these sections.*

[18] [1995] 3rd Quarter Sask. Labour Rep. 64, LRB File No.083-95 at 67-68

[47] In *International Brotherhood of Electrical Workers, Local 529 v. Western Electrical Management Ltd.,*[19] the Board made it clear that for Section 37.3 to operate, one of the employers with respect to whom a common employer designation is sought, must be a unionized employer. That determination was based upon the Board's earlier decision in *PCL Construction Holdings Ltd. v. U.B.C.J.A., Local 1985.*[20] In this case, the only unionized entity is CN. The Applicant Union amended its application to exclude CN from the application. There is, therefore, no unionized employer within the group of employers who the Union seeks to have declared as common employers.

[48] Section 2(g) defines who is an "employer" for the purposes of the *Act*. Subsection (iii) includes within the description of "employer", a contractor who "supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal…"

[49] The evidence before us is that neither LMR nor Big Sky has any employees. All of the persons engaged in the operations of LMR or Big Sky are provided by Mobil pursuant to the Management Agreements between Mobil and 101115529 Saskatchewan Ltd. (LMR) and between Mobil and Big Sky. Clause 1.01(d) of each agreement provides that Mobil has complete authority over the hiring and employment of all employees of LMR or Big Sky (respectively), and has the sole discretion to terminate the employment of any such employee. However, rather than hire employees for each of the operating corporations as provided for in the agreements, it appears that Mobil has hired employees which it has utilized to conduct the operations of the LMR and Big Sky.

[50] We were provided a list of employees. That list is headed Mobil Grain Employee Org Chart. There is no listing of employees for either LMR or Big Sky. Position descriptions for those employees include:

LMR Track Supervisor
BGS Track Supervisor

[19] [2013] CanLII 55453
[20] [2002] Sask. L.R.B.R. 120, S.L.R.B.D. No. 12, 85 C.L.B.R. (2d) 57

BGS Foreman
Equipment Operator
Chamberlain Unload (2)*
LMR Daily Operations/Conductor
Locomotive Engineer/Conductor (4)*
Locomotive Engineer (4)*
BGS Daily Operations/Conductor
Conductor (3)*

* numbers in brackets indicate the number of that type of position listed.

[51] This is the only evidence before us to show who are the employees engaged in the railroad operations. All of these employees are employed by Mobil, presumably pursuant to the Management Agreements. Section 2(g)(iii) authorizes the Board to determine that those employees are employees of LMR and Big Sky and not of Mobil. Accordingly, the employers of the above noted employees, in this case are determined to be LMR and Big Sky.

Has There Been a Successorship?

[52] The Board has recently reviewed its jurisprudence regarding successorship in *RWDSU and Charnjit Singh*[21] and *United Steel Workers Union, Local 1-184 and Edgewood Forest Products Inc.*[22] At paragraph [40] of its decision in *Charnjit Singh*, the Board described successorship in the following terms:

> *[40] Successorship in labour relations is a legislative creation that provides for the transfer of collective bargaining obligations from the owner of a certified business to another party upon the disposition of that business or a part therein. Without legislative intervention, changes in the ownership of a business would generally have the effect of undermining and/or dislocating the collective bargaining rights of the employees of that business. However, thanks to specific provisions in labour legislation, collective bargaining rights now tend to survive and flow through changes in the ownership of a business (provided there is some sense of continuity of that "business"). Through legislative intervention, it is the "business", not a particular employer to which the collective bargaining rights are seen to have attached and, if that business ends up in the hands of a new owner, previous collective bargaining obligations tend to flow with the transaction through to that new owner.*

[21] [2013] CanLII 3584 (Sask LRB)

[53] In *Canadian Union of Public Employees v. Metropolitan Parking Ltd.,*[23] the Ontario Labour Relations Board described the concept of successorship in the following terms:

> *A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a going concern, something which is carried on. A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a business from an idle collection of assets...*

[54] The Board routinely examines a number of factors to determine if, in its opinion, a successorship has occurred. These include the presence of any legal or familial relationship between the predecessor and the new owner; the acquisition by the new owner of managerial knowledge and expertise through the transaction; the transfer of equipment, inventory, accounts receivable, customer lists and existing contracts; the transfer of goodwill, logos and trademarks; and the imposition of covenants not to compete or to maintain the good name of the business until closing. In *Versa Services Ltd. v. Canadian Union of Public Employees,*[24] the Board said:

> *No list of significance, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e.: whether there has been a continuation of the business.*

[55] As described by former Chairperson, Sherstobitoff, in *R.W.D.S.U. v. Pauline Hnatiw,*[25] the Board must look to determine if the new business "drew its life" from that of the predecessor. That concept has also often been referred to as the Board making a determination of whether or not the "beating heart" of the business had been transferred.[26]

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[22] [2012] CanLII 51715 (Sask LRB)
[23] [1979] CanLII 815 (Ont. LRB), [1980] Can. L.R.B.R. 197
[24] [1993] 1st Quarter Sask. Lab. Rep. 174, LRB File No. 170-92
[25] LRB File No. 190-80
[26] See *United Steel Workers Union, Local 1-184 v. Edgewood Forest Products,* [2012] CanLII 51715 (Sask LRB); *Applicant v. Charnjit Singh,* [2012] CanLII 51715 (Sask LRB); United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 v. Monad Industrial Contractors Inc., [2013] CanLII 83710 (SK LRB); *C.U.P.E. v. Athabasca Health Authority Inc.,* [2007] CanLII 68933 (SK LRB).

The CN – LMR Transaction

[56] In our opinion, the transaction between CN and LMR does not trigger a successorship under Section 37 of the *Act.* The essence of the transaction was the acquisition of the railway right of way assets by LMR from CN. LMR acquired these assets to support the business being operated by Mobil Grain not as an operating railway.

[57] The evidence was that Mobil saw the purchase of the Craik subdivision as an opportunity to establish its mobile grain cleaning facility at another location on rail lines which it owned and operated. LMR acquired the rail assets not for the purposes of operation of a railway, but rather for the enhanced operation of its own business, that being the mobile storage and cleaning of grains prior to shipment. It relocated its mobile facility from Meyronne and began operations on the Craik subdivision.

[58] The assets acquired by LMR were not "living assets". The Craik subdivision had not seen rail traffic for many years prior to the acquisition of it by LMR. Mr. Affleck testified concerning its condition and provided photos which showed the rail line to be unserviceable, insofar as it would not be safe, nor prudent to operate trains across the right of way in that condition. Repairs were required to be performed to make the rail lines operative prior to the closing of the transaction. This, in our opinion, showed that contrary to the position espoused by the Union that the Craik subdivision was in regular use, the Craik subdivision was not in a fit state for the movement of rail cars.

[59] It is also significant that LMR enjoyed the right to move rail cars over its lines between a point just outside Regina to a point just south of Davidson. In addition, interchange and joint running rights were provided over CN lines between Davidson and Newcross, Saskatchewan and between Regina and the commencement of it rail lines to facilitate movement of rail traffic which originated on LMR's rail lines. No evidence was provided that any rail movements other than those which originated from Mobil Grain moved across those lines. This also showed that contrary to the position espoused by the Union, that there was no business being conducted by CN on the Craik subdivision.

[60] Also significant is the fact that CN was granted running rights across the Craik subdivision. We have no evidence that these rights were ever utilized, however, the issue did arise when the possibility of rail service to the K & S Potash Mine, which is currently under construction, arose. Nevertheless, if, in the future, CN acquired a customer which required it to move its goods on the Craik subdivision, that would have been possible.

[61] In the case of the LMR rail line, there was no business of any kind transferred to LMR by CN. LMR acquired the rail lines for use by Mobil Grain in its previous business. No goodwill, no customers or contracts with customers, no accounts receivable, no locomotives, and no employees were transferred.

[62] To use the organic analogies above, LMR did not acquire a living business from CN. This portion of CN's former rail system had ceased to be a functional operation many years prior. While Mr. Hackl testified that he delivered railcars south of Davidson in 2006, this was the only evidence of any rail movements in recent years. That was undoubtedly the result of the construction of large inland terminals at Davidson, Saskatchewan to which farmers routinely trucked their production and from which CN transported loaded and unloaded cars. With the construction of these large inland terminals, the grain elevators which were in the smaller communities were abandoned, with many of them being torn down. As a result, there was no longer any need for CN to service those communities.

[63] Mr. Affleck had a unique solution to the problem. He had a portable grain storage and cleaning facility which operated in conjunction with rail facilities. He purchased the assets from CN, not to continue the business previously operated by CN (since, that would not be possible with the removal of the older grain elevators), but rather to facilitate the operation of his new technology to store and clean grain while in transit.

The CN – Big Sky Transaction

[64] The transaction between CN and Big Sky was somewhat different from the LMR transaction. Those differences have lead us to conclude that there was a transfer of a portion of the business from CN to Big Sky. As a result, we find that Big Sky is the

successor to CN with respect to the acquisition of those assets which comprised the transaction between them.

[65] The principal difference between the LMR transaction and the Big Sky transaction is that no reciprocal running rights were granted to CN by Big Sky. CN granted Big Sky running rights through its yard in Saskatoon and down the Davidson line to interconnect Big Sky and LMR. CN, however, had no ability to service any of its customers (present or future) on the rail lines sold or leased to Big Sky. This meant that any customers requiring rail services would have to get those services from Big Sky. We were not provided evidence with respect to what the traffic had been on the lines transferred by CN to Big Sky. Regardless of the volume of the traffic moved, that business was transferred to Big Sky by virtue of their monopoly on the movement of rail goods over the transferred lines.

[66] Additionally, Big Sky covenanted to service existing service commitments. Article 12.07 of the Operating, Marketing and Interchange Agreement between the parties provides as follows:

> *12.07 BSKY shall use its best efforts to satisfy, without interruption, the service commitments contained in contracts with shippers existing as of the Commencement Date for the term of such agreements. CN shall provide BSKY with reasonable access to its files and records relating to such contracts for the purpose of determining the services required of BSKY, subject to obtaining waivers from parties to the contracts in respect of confidential matters set forth in such contracts.*

[67] No such similar provision was contained within the Operating, Marketing and Interchange Agreement between CN and LMR.

[68] Evidence was also heard concerning the arrangements made for turn over of the assets and transitional activities after the effective date of the agreements. These arrangements required Big Sky to complete any rail transactions in progress at the effective date of the transition.

[69] Again, there was no goodwill, no customers or contracts with customers, no accounts receivable, no locomotives, and no employees transferred from CN to Big Sky. These elements, as noted above, are not necessarily the determining factor insofar as a

successorship declaration is concerned. Notwithstanding the lack of these elements, there was, nevertheless, some life and a feeble, but beating heart of a business transferred to Big Sky from CN.

Nature of the Remedy

[70] Section 37 provides the Board with numerous options regarding a successorship. First, it has the discretion to "otherwise order" that the certification should not apply as was done in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-184 v. Cabtec Manufacturing Inc.*[27] Secondly, the Board may determine the appropriate unit of employees to be represented by the Union. Thirdly, the Board may give directions which it considers necessary or advisable, regarding the application of the existing collective agreement. Finally, the Board may direct a vote to be conducted among employees eligible to vote.

[71] Successorship under Section 37 is intended to ensure that collective bargaining rights are not eroded by changes in ownership of a business. The Board has ruled that where a successorship results in employees being swept in to a bargaining unit that those employees should be permitted to determine if they wish to be represented for the purpose of collective bargaining.[28] In those instances, the Board has ordered that a vote be held among those employees eligible to vote. We would also do so in this case.

[72] The Board heard no evidence concerning the application of the existing collective agreement. In his evidence, Mr. Hackl advised that substantial modifications were necessary with respect to collective agreements regarding the Carlton Trail Railway. Absent that evidence, we are unable to provide any direction under Section 37(2)(f).

[73] Nor were we provided any evidence concerning the appropriate unit of employees to which collective bargaining would apply other than the unit applied for in the application which was "conductors, baggagepersons, brakepersons, car retarder operators,

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[27] [2008] CanLII 47035 (SK LRB)
[28] See: *Canadian Union of Public Employees, Local 5506 v. Prairie South School Division No. 210,* [2010] CanLII 47033; *United Food and Commercial Workers, Local 1400 v. Affinity Credit Union,* [2010] CanLII 13388; *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v. North American Construction Group Inc.,* [2013] CanLII 60719.

yardpersons, yard operations employees, switchtenders, yardmasters and assistant yardmasters. We have no evidence to show which of the positions identified above would fall within those descriptors.

Orders

[74] The Board hereby orders:

1. That a vote shall be conducted by an agent of the Board, as soon as practicable, to determine if the employees of Big Sky Railway, who are determined to be within the appropriate unit of employees, wish to be represented by the Applicant for the purposes of collective bargaining.

2. That all of the employees in the positions set out in paragraph [52] hereof shall be eligible to vote. All votes shall be "double enveloped" and the ballot box sealed pending further order of the Board.

3. That this panel of the Board shall remain seized of this matter for the purposes of determining:

   (a) what is the appropriate unit of employees of Big Sky who are eligible to vote on the representational question, which is; if they wish to be represented by the Applicant for the purpose of collective bargaining?
   (b) should the Board exercise its discretion to "otherwise order" that the successorship not be deemed to apply?
   (c) what directions, if any, should the Board give regarding the application of the collective bargaining agreement under Section 37(2)(f)?

[75] The Board Registrar is hereby directed to contact the parties with respect to making arrangements for the conduct of the vote and to schedule a hearing in respect of the matters reserved to this panel pursuant to paragraph [74] above.

DATED at Regina, Saskatchewan, this 28 day of March, 2014.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

Dissent of Member Holmes

Member Jim Holmes dissents from decision of the majority for the following reasons:

[1] I have read the majority decision. I agree that there is a successorship between Canadian National Railway and Big Sky Rail. The evidence was unambiguous that the transfer took place at midnight and the next day Big Sky was running trains over the same track as CN had the day before.

[2] The situation with Last Mountain Rail is more complex, but with respect I disagree with the majority's conclusion, and would find that Last Mountain Rail is also successor to CN.

LAST MOUNTAIN RAIL

[3] It is clear that CN transferred a railway to Last Mountain Rail (LMR). The asset in question was the rail line from just outside Regina to Davidson, approximately 136 kilometers of right of way and rail.

[4] After LMR bought the asset it did not tear up the rail and sell it for scrap, it did not sell the land to surrounding landowners, nor did it donate the land as a walking trail and apply for a tax credit. LMR ran rail cars on the line and interconnected with CN in Regina or Davidson, or eventually Saskatoon.

[5] The operation of this stretch of the railway was a railway and part of the CN network. The sale agreement was explicit.

LMR's Representations and Warranties

[6] LMR is acquiring the Craik Line for **continued railway operations** (emphasis added) (*Asset Purchase Agreement Canadian National Railway Company and Last Mountain Railway,* Exhibit E-2. Tab 8., p 31)

[7] The *Asset Purchase Agreement* also specifies LMR "will, prior to closing, become and … and continuously thereafter… remain a member of the association of American Railroads…"(9.3 (e) p. 51.

[8] LMR will maintain and operate the Craik Line as an operating line providing service to existing and future rail users (9.3 (f) p. 31.

[9] The parties also signed a number of agreements covering leasing of the southern part of the rail line at Lumsden and Regina and for interchange rights into the City of Regina and north from Davidson. Eventually, the Respondent was granted running rights from the Big Sky Rail short line over CN tracks through Saskatoon and then through Davidson to Last Mountain Railway.

[10] Mr. Affleck testified at the hearing the line was in poor condition. He testified with respect to his inspection of the line including an account of the damage to the highline inspection truck, bridges without ballast and photos of willows growing between the rails.

[11] However the Craik Line is described somewhat differently on The Mobil Grain website.

> *In 2008, when Mobil Grain founder, Sheldon Affleck found himself at a meeting where CN was discussing their intention to abandon this beautiful section of rail, he saw a golden opportunity. Through negotiation and shareholder investments this 136 kilometer track, which runs from Regina north to Davidson, soon became the heartbeat of Mobil Grain operations. (mobilgrain.com/last mountain railway (Exhibit U-8, unpaged screen capture, p. [6?]*

[12] Mr. Affleck also testified, during his examination-in-chief, that the line was operational within weeks of the purchase. Although the purchase agreement does not reference it, he testified the cost of the necessary repairs adjusted the purchase price.

[13] It was also Mr. Hackl ‘s testimony that CN had been storing railcars of the line south of Davidson prior to the sale, a business that LMR continued.

[14] The CN Craik line that became Last Mountain Railway was a “bruised and battered” asset as described in *Charnjit Singh* 2013 SLRB 196-10 and *Victoria Inn* 1195 SLRB 125-94, 130-94, 131-94. (para 47)

[15] In *Charnjit Singh* it took two (2) weeks to re-open the hotel and even three (3) months later only 30 of the 144 rooms were operational (para 22). In the case before us, operations resumed on the now Last Mountain rail line weeks after the transfer date.

[16] It is clear from the testimony that the mobile grain handling facility generated the traffic necessary for the renewed viability of the rail line. Mr. Affleck’s innovation is an impressive example of entrepreneurial creativity and courage.

[17] But owning the rail line was not essential to Mr. Affleck’s mobile grain handling facility. It was Mr. Affleck’s testimony that the facility had been successful on the CP mainline at Moose Jaw and on the Great Western short line at Meyronne. It was part of his testimony that the ability to move rail cars short distances to the facility increased productivity substantially. This is another example of Mr. Affleck’s business skill. It was an example of integrating grain handling, grain cleaning and grain transportation. However, Mobil Grain did and could operate without owning a rail line just as CN can operate without owning grain-handling facilities. Last Mountain Railway was not necessary to the operation of Mobil Grain.

[18] Another of Mr. Affleck’s contributions was the rail experience he gained in the Great Western short line and generally his business acumen, vision and drive. But theoretically, had another member of the original Last Mountain Rail group from the

surrounding communities possessed these qualities, the location of the mobile grain facility on the short line would have generated the same traffic.

[19] What is also clear is that the Last Mountain Railway and the Big Sky Rail line are useless assets without interchange with a transcontinental rail line. Unlike the case of *Quebec North Shore and Labrador* 2007 CIRB 392 where the line provider passenger service to the terminus, the acquired asset had no market for the product in the railcars along its length.

[20] While there was conflicting testimony about how similar the products moved by CN and LMR/BGS were, the exact nature of the traffic is likewise irrelevant. Before CN moved any significant product out of the prairies, it first needed to transport large numbers of settlers into the region. CN no longer carries passengers anywhere in Canada. What the railway carries must change according to market demand.

[21] The fact that CN was not actively moving products on the line prior to the sale is irrelevant. Transfers of business and successor applications often arise when a large entity (*University of Regina*, *Government of Saskatchewan*) transfer a money losing operation to a private operator (*Versa Foods*; *Headway Ski*). The private operator does not take over the operation with the intention of losing money.

[22] The legal framework, however, is that the new owner cannot evade the existing certification Order (nor normally the collective agreement).

THE FRAMEWORK OF THE TRADE UNION ACT

[23] The decision to have Union representation is the central purpose and indeed the full title of *The Trade Union Act.*

[24] Trade Unions were, and are, an important institution in the distribution of the wealth produced by labour and capital and an important tool in the reduction of income inequality, now identified as a primary economic issue globally.

[25] Trade Unions are democratic institutions and are chosen by the workers, but only a small minority of union members belong to a newly organized bargaining unit. Most union members benefit from an inheritance of union representation. In the current example, no current member of the applicant union was part of the original organizing committee of the railway craft unions.

[26] Successor rights have several purposes. The first is to protect the representation rights of the union. This right belongs to the union as a certified organization, not to the members as individuals. Whether the previous employer formerly employed any of the current workers is irrelevant (*Headway Ski*). The essential element is that the representation rights cannot be extinguished by Employer action. The *Act* does provide that individual workers can vote on whether they wish to continue with union representation. But this should not normally be part of a successor decision.

[27] In addition to protecting the Union's representation rights, the successor provisions of the *Act* also form a disincentive to illegal action by ensuring that business decisions are not made with the intention of extinguishing union representation. This disincentive protects the value of representational rights of the employees of the larger employer, in this case CN. In practical terms this means the members of the applicant union are not forced into competition with unrepresented employees doing work that had been previously covered by their collective agreement.

[28] The *Act* also protects Employers, like Carleton Rail, who follow the spirit of the successor provisions from competing with employers who seek to evade them.

[29] These two purposes are important when determining remedy.

REMEDY

Proposed Vote Among Employees

[30] The majority has ordered a vote to be conducted among employees and that the ballots be sealed. I do not agree with that a vote is necessary in these circumstances. The first part of the remedy should be to confirm the Union's bargaining rights

[31] The workers will then be able to decide if they wish this representation to continue during the open period of the collective agreement. Now is not the time for this.

[32] The normative provisions of Section 37 and 37.3 are that both the certification and the collective agreement will apply to the successor employer. The Board should not exercise its power to make an "otherwise" order unless there are compelling reasons why such an order furthers the purpose of the *Act*.

[33] The key principle is that representation votes are a response by employee request, not by an employer action.

[34] Ordering a vote is an appropriate remedy where there are competing representational rights (*Wolf Willow Lodge* 1992 LRB File No.091-92, 099-22 155-92).

[35] An Order to conduct a vote at this time will act as an incentive to future illegal actions by encouraging employers to engineer votes by a deliberate policy of inaction. Without bargaining rights and a collective agreement, the Union enters the vote in the weakest possible position. Following the normative provisions of continuing the certification Order and the collective agreement does not negate the workers right to choose. It does ensure the decision will be as informed as possible and as a result of worker initiative not employer action.

Collective Agreement

[36] Mr. Hackl for the union gave two (2) examples of collective agreements between his union and Short Line Railways, both of which are operating successfully. While I agree that the Board should be able to make a determination under Section 37(2)(f) of the *Act*, it would be my preference to have the parties bargain collectively the necessary amendments to the existing collective prior to their coming to the Board for assistance.

[37] Mr. Hackl freely acknowledged the necessity to amend the National Agreement substantially to meet the operating needs of short line railways. Without attempting to detail the collective agreement the Parties might enter into, Mr. Hackl

specifically mentioned changing pay from a mileage-based system to an hourly rate. While Mr. Affleck admitted he was unfamiliar with the collective agreement, this was one of the concerns he raised with a unionized railway. The difficulty always lies in the details but the union was very forthright in its willingness to find a compromise.

[38] Mr. Affleck's behaviour has been rather different. Although he clearly indicated he worked collaboratively with CN and he retained counsel, he never made any attempt to talk to the union nor did he reply to the unions' request to meet (Exhibit U-5).

[39] In *Headway Ski,* 1987, the Board determined the collective agreement was not appropriate for the new much smaller unit.

[40] But later in *Versa Foods*, 1993 the Board wrote:

> *...we are confident that the process of collective bargaining will produce any modifications necessary to reflect the fact that this unit will no longer be included in the larger group of employees…"*

[41] Most importantly, and differently from the legislation in those cases, the *Act* now contains Section 37(2)(f), that explicitly gives the Board the power to resolve any differences the Parties cannot resolve in the terms of the collective agreement.

[42] In the event of the Parties being unable to reach a collective agreement in 90 days the Board could then properly exercise its discretion to ensure a smooth transition.

Common Employer

[43] The Board heard extensive evidence of the corporate relations between Big Sky, Last Mountain and Mobil Grain. Although the structure of each varies, the common characteristic is that the Affleck brothers effectively control each.

[44] The majority's decision is that Big Sky Rail is a successor employer. This makes Big Sky a unionized employer from the date of transfer, September 22, 2011.

[45] Neither Last Mountain nor Big Sky have any employees, both contract this work from Mobil Grain. The evidence is clear that the network operates in an integrated

manner with rolling stock, cars and employees moving from the Big Sky Rail Line to the Last Mountain Railway Line.

[46] Certifying all the various branches of the enterprise will ensure there is no temptation to use a complex corporate structure to evade certification. Perhaps this is groundless fear, but it does not have any effect on LMR or BGS under the current form of organization and seems a reasonable step under the circumstances.

Appropriate Unit

[47] I agree that the Board requires additional evidence prior to its definition of the appropriate unit of employees who may be certified by the Board. The applicant union has asked for a craft unit similar to the unit described in its Canada Board certification orders. I believe that such a unit would be the preferred unit at this stage of the inquiry.

[48] Numerous cases have established that this Board need not certify the most appropriate unit but only an appropriate unit. The effect of the employee list proposed by the majority's draft may be to create an all rail employee unit. No one asked or argued for this.

[49] It is worth noting that craft bargaining units formed around a special set of skills have been very successful in establishing and maintaining bargaining units in small workplaces. LMR/BGS/Mobil Grain is a small workplace.

[50] In summary the purpose of the *Act* is to facilitate representation rights and collective agreements.

Jim Holmes, Board Member