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

LRB File No. 223-12; January 27, 2015
Vice-Chairperson, Steven Schiefner; Members: Duane Siemens and Don Ewart

For the Applicant: Mr. Michael A. Church and Ms. Heather Jensen
For the Respondents: Mr. Paul J. Harasen

Successorship – Vote – Trade union certified to represent running trades of CN – CN is Federally-regulated railway employer - Union applies to Board alleging successorship rights arising out of transfer of various branch lines from CN to provincially-regulated employers – Original panel of Board conducting hearing and concluding that transfer of a portion of a business had occurred to one of two employers – Original panel concluding that a transfer occurred from CN to Big Sky Rail involving three branch lines - No employees transferred from CN to Big Sky Rail for any of the branch lines – Original panel concluding that trade union was seeking to represent employees in addition to those it previously represented with CN – Board ordering vote of employees to determine if they wished to be represented by union – Union seeks judicial review of decision to conduct representational vote – Reviewing court directing new panel to hear submissions from parties on conduct of representational vote – During hearing before new panel, trade union clarifies that it is seeking only to represent those employees engaged in work done by running trades, namely engineers, conductors, brakepersons and yardpersons – Big Sky Rail argues that representational vote still required because all employees engaged in its operations were new hires - New panel of Board satisfied that trade union is seeking only to represent those positions that it previously represented with CN – New panel not satisfied that because new employees were hired to fill Union's positions that a representational vote was required – New panel granting new certification Order naming Big Sky Rail as new employer.

Successorship – Otherwise Order – Employer asks that it not be bound by predecessor's collective bargaining obligations or the Union's collective agreement – Board reviews its jurisprudence on the transfer of obligations and collective agreements in successorship applications - Board concludes that there is no basis to find that Big Sky Rail should not be bound by predecessor's obligations to the union and existing collective agreement save that the agreement shall be deemed

to have expired and the parties should begin bargaining toward a new collective agreement.

***Trade Union Act*, s. 37.**

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** The Teamsters Canada Rail Conference (the "Union") applied to the Saskatchewan Labour Relations Board (the "Board") for*, inter alia,* an Order confirming the sale and transfer of a business (or portion thereof) and concomitant successorship rights arising out of the transfer of a number of branch rail lines (railway subdivisions) from a federally-regulated employer, namely CN Rail ("CN"), to Big Sky Rail Corp ("Big Sky Rail"), to 101115529 Saskatchewan Ltd. (operating as "Last Mountain Railway"), and/or to Mobil Grain Ltd. The respondent employers were all provincially-regulated employers. All parties agreed that, if any of the respondent employers were successors, they would fall under provincial (not Federal) jurisdiction for purposes of labour relations.

[2] In addition (or potentially in the alternative), the Union also asserted that the respondent employers operated under common direction and control and ought to be designated as related employers for purposes of collective bargaining. Thus, the Union sought a certification Order naming all three (3) of the respondents as employers.

[3] All of the respondent employers resisted the Union's application and a hearing was conducted by the Board. On March 28, 2014, a panel of the Board (the "original panel") concluded that a transfer of a business had occurred between CN and Big Sky Rail involving three (3) local branch lines, namely the Elrose, the Conquest and the Mantario subdivisions. On the other hand, the original panel was not satisfied that there had been a transfer of a business (or portion thereof) between CN and Last Mountain Railway, which transaction involved the Craik subdivision. In addition, the original panel declined to declare that any of the respondent employers were related. However, the original panel found that Big Sky Rail did not directly employ any employees; rather all of the employees for its operations were supplied by Mobil Grain Ltd., who also supplied employees for Last Mountain Railway's operations. Having considered the evidence, the

original panel determined that Big Sky Rail was the true employer of the employees of Mobil Grain Ltd. while those employees were working for Big Sky Rail.

[4] Finally (and of significance to these proceedings), the original panel concluded that the Union was seeking to represent classifications of employees or positions that it had not previously represented and was not just seeking to represent those employees doing the work it previously represented with CN. As a consequence, the original panel directed that a representational vote be conducted of the affected employees and it reserved jurisdiction with respect to the description of the appropriate bargaining unit and whether or not CN's previous collective bargaining obligations and/or the Union's collective agreement ought to apply to Big Sky Rail.

[5] This matter returned to the Board following a decision[1] of the Saskatchewan Court of Queen's Bench dated September 25, 2014. In that decision, the reviewing judge set aside the original panel's decision to conduct a representational vote and directed that a new panel of the Board invite submissions from the parties on the issue of whether or not a representation vote should take place.

[6] A new panel of the Board was constituted and heard submissions from the parties on January 8, 2015. For the reasons that follow, we find that a representational vote is not required and that a certification Order ought to issue naming Big Sky Rail as the employer of the unit of employees previously represented by the Union. In addition, we find that the Union's previous collective agreement ought to bind the parties from this date forward until such time as they are able to negotiate a new collective agreement appropriate for the workplace. In this regard, we direct that the old collective agreement shall be deemed to have expired and that the parties have given the requisite notice(s) to engage in negotiations towards the conclusion of a new collective agreement.

Facts:

[7] The facts relevant to these proceedings were not in dispute, having been found by the original panel, save for the clarifications and additional information heard by the Board when this matter returned on January 8, 2015.

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[1] See: *Teamsters Canada Rail Conference (Locomotive Engineers and Conductors, Trainpersons and Yardpersons) v. Big Sky Rail Corp, et. al.,* Q.B.G. No. 515 of 2014.

[8] For the purpose of clarity, the facts as found by the original panel were as follows:

> *[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.*
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> *[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.*
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> *[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,[2] the intention to discontinue service on that portion of 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.*
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> *[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.*
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> *[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.*
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> *[9] LMR negotiated with CN for the purchase of the Craik subdivision. Little progress was being made in the negotiations and many of the*

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[2] S.C. 1996 c. 10

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[3] and obtained by LMR.

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

[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.

[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.*
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> *[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[4] and obtained by Big Sky.*
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> *[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.*

[9] During the hearing on January 8, 2015, the Union clarified that it was only seeking to represent those classifications or positions that it previously represented when the branch lines were in the possession of CN Rail. Although various terms were used in these proceedings, the relevant positions are commonly referred to as the "locomotive engineers", the "conductors", the "brakepersons" and the "yardpersons". These classifications have specific meaning in the railway sector and are collectively describe the "running trades". The Union apologized for any confusion which may have occurred during the hearing before the original panel but confirmed that it was not seeking to represent any positions that it had not previously represented with the subject branch lines were operated by CN.

[10] Finally, the Union indicated that its current collective agreement with CN is very complicated and national in scope. The Union also indicated that the common practice when branch lines are transferred from a Federally-regulated employer to a new employer is to negotiate new collective agreements concomitant with prevailing local conditions and the circumstances of the successor's operations.

Relevant statutory provision:

[11] The statutory provisions relevant to these proceedings are contained in *The Trade Union Act*, R.S.S. 1978, c.T-17, and are as follows:

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

> *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:*
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> *(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:*
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> *(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;*
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> *(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).*

Union's arguments:

[12] Counsel for the Union provided a written argument which we have reviewed and found helpful. In both its written and oral submissions, the Union clarified that it was only seeking to represent those classifications or positions working for Big Sky Rail that fall within the so-called "running trades", namely locomotive engineers, conductors,

yardpersons and brakepersons. The Union confirmed that approximately six (6) employees of Big Sky Rail would fall within these classifications, with the remaining employees involved in Big Sky Rail's operations falling outside the scope of its bargaining unit.

[13] In light of this clarification, the Union argues that it would be contrary to the long standing jurisprudence of this Board to conduct a representational vote if no new positions were being swept into the Union's bargaining unit. The Union argues that the fact that these positions were vacant at the time of the transfer (i.e.: no employees were transferred from CN to Big Sky Rail) is not relevant or sufficient to trigger a representational vote. The Union argues that bargaining rights are not attached to specific individuals but rather to the nature of the work being done or classification of positions. In other words, in determining whether or not employees are being swept into a bargaining unit (following the transfer of a business), it is not relevant that no employees were transferred to the successor, the determining factor is the classifications or types of positions for which the trade union was certified; not the actual persons who performed that work. In the present applications, the Union argues that it has clarified that it is not seeking to represent any classifications or positions that it did not previously represent when the business was conducted by CN. As a consequence, the Union argues that no new positions are being swept in and thus no representational vote is required or appropriate.

[14] The Union argues that ordering a vote following a finding of successorship where no employees are transferred from the predecessor to the successor would be contrary to the jurisprudence of this Board and would have the unintended consequence of encouraging the purchasers of business (with unionized employees) to seek the termination of those employees before acquiring that business in the hopes that its new employees would displace the union. The Union argues that such a precedent would tend to discourage new owners from acquiring existing employees and would generally cause unnecessary disruption in the workplace following that sale or transfer of a business.

[15] The Union argues that, in light of its clarification, no representational vote is now required and asks that a certification Order be issued naming Big Sky Rail as the employer. The Union also takes the position that the description of the bargaining unit is no longer an issue following its clarification; the unit description should be the same as it held with CN.

Argument on behalf of Big Sky Rail:

[16] Counsel for Big Sky Rail also provided a written brief following his oral argument which we have reviewed and found helpful.

[17] Big Sky Rail takes the position that, because no employees were transferred from CN, the effect of the Board's finding of successorship will be that all of the subject employees are swept into the Union's bargaining unit without canvassing their wishes. The Respondent notes that, prior to the transfer of the three (3) local branch lines from CN to Big Sky Rail, none of the employees of Mobile Grain Ltd. were unionized. However, now those employees of Mobile Grain Ltd. that work for Big Sky Rail that fall within the scope of the Union's bargaining unit will automatically be unionized irrespective of their wishes. Big Sky Rail argues that sweeping in these employees is inconsistent with the long standing jurisprudence of this Board. See also: *Canadian Union of Public Employees, Local 5506 v. Prairie South School Division No. 210*, (2008) 189 C.L.R.B.R. (2d) 150, 2008 CanLII 47033 (SK LRB), LRB File No. 149-07. See also: 2011 SKCA 54 (CanLII). Big Sky Rail notes that the Legislature had authorized this Board to conduct representational votes in a succesorship application[5] and argues that situations such as this is precisely why such authority was included in the *Act*.

[18] Simply put, Big Sky Rail argues that the unique circumstances arising in these proceedings render it appropriate for a representational vote of the affected employees to take place so that they can decide for themselves whether or not they wish to be represented by the Union.

Analysis and Decision:

[19] These proceedings give rise to the following questions that require determination by this panel of the Board:

1. Is a Representational Vote Appropriate or Necessary?
2. Should this Panel deal with the Matters Reserved by the Original Panel?

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[5] See: s. 38(2)(d) of *The Trade Union Act*

3. Should Big Sky Rail be bound by CN's previous obligations to bargain collectively with the Union or should the Board "otherwise order"?
4. Should Big Sky Rail be bound by the Teamster's Collective Agreement or should the Board "otherwise order"?

[20] We will deal with each of these questions in turn.

Is a Representational Vote Appropriate or Necessary?

[21] With the Union's clarification that it is not seeking to represent any new classifications or positions through its successorship application, the landscape of these proceedings has changed. There can be little doubt that the original panel understood that the Union was seeking to represent classifications or positions in addition to those that it previously represented. With all due respect, inconsistencies in nomenclature between the Union's application, the evidence heard, and the submissions of counsel was the likely source of the original panel's conclusion that the Union was not seeking to represent only those employees engaged in the work formerly done by the Union's members. In our opinion, with this clarification, a representational vote is no longer required.

[22] In coming to this conclusion, we noted that s. 37(2)(d) of *The Trade Union Act* (as does s. 6-18(4)(d) of *The Saskatchewan Employment Act*) authorizes this Board to direct that a representational vote be taken of affected employees in determining the disposition of a successorship application. However, the long standing jurisprudence of this Board is not to do so except in specific circumstances. An examination of the Board's decisions reveals that representational votes are only conducted in successorship applications in three (3) types of circumstances:

1. **Multiple Bargaining Agents**: These circumstances arise where, following the transfer of obligations, there will be two (2) bargaining agents representing the same classifications or positions and it is not possible or appropriate to maintain two (2) separate bargaining units because of extensive intermingling of employees and/or where there is no discrete skill or geographic or other boundary that can be used to separate the two (2) bargaining units. In these circumstances, the normal

practice[6] of the Board would be to conduct a representational vote of affected employees. The representational question that employees will be asked to determine is which of the two (2) bargaining agents they wish to be represented by in the future. These circumstances arose in *Service Employees International Union, Local 333 v. Fairhaven Long-term Care Centre, et. al & the Canadian Union of Public Employees, Local 77*, [1991] 2nd Quarter Sask. Labour Rep. 33, LRB File No. 212-86. See also: *Estevan Coal Corporation v. United Mine Workers of America, Local 7606 and United Steelworkers of America, Local 9279*, [1998] Sask. L.R.B.R. 709, LRB File No. 186-98.

2. **Sweeping-in New Employees**: These circumstances arise where an applicant trade union is seeking to add positions to its bargaining unit that were not previously included within that union's bargaining unit prior to the transfer of obligations. These circumstances have arisen in a number of cases, including *Canadian Union of Public Employees, Local 5506 v. Board of Education of Horizon School Division No. 205*, (2008) 144 C.L.R.B.R. (2d) 271, 2007 CanLII 68761 (SK LRB), LRB File No. 053-06 and *Canadian Union of Public Employees, Local 5506 v. Prairie South School Division No. 210, supra,* and *Saskatchewan Government and General Employees Union v. Canora Ambulance Care (1996) Ltd.*, 2014 CanLII 28134 (SK LRB), LRB File Nos. 026-14 & 039-14. In these circumstances, the Board will conduct a representational vote if the applicant trade union demonstrates the requisite threshold of support from the group of previously unrepresented employees[7]. If the results of

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[6] An exception to this practice was noted by the Board in *Estevan Coal Corporation v. United Mine Workers of America, Local 7606 and United Steelworkers of America, Local 9279*, [1998] Sask. L.R.B.R. 709, LRB File No. 186-98. In this decision, Chairperson Gray opined that, if a trade union represented less than 25% of the combined workforce, a representational vote would be unnecessary. A similar conclusion was reached by the Board in *United Steelworkers of America v. A-1 Steel & Iron Foundry Ltd., et.al. & International Molders & Allied Workers Union, Local 83,* [1985] Oct. Sask. Labour Rep. 42, LRB File No. 001-85. In this decision, Chairperson Ball stated that the relatively few employees that were members of the Ironworkers could be effectively integrated into the much larger unit of employees represented by the International Molders Union. No representational vote was conducted in the *A-1 Steel and Iron* case.

[7] As this Board noted in the *Horizon School Division* case and in the *Prairie South School Division* case, trade unions also have the options of demonstrating support for an expanded bargaining unit from both previously represented and unrepresented employees but doing so would result of the representational question being asked of all employees in that group (not just the previously unrepresented employees). This has not been an attractive option for trade unions because of the potential for an unfavourable vote and concomitant loss of the bargaining unit. This was referred to as "Option #4" in the *Horizon School Division* case and in *Prairie South School Division*, supra.

the representational vote indicate that the majority of the additional employees wish to also be represented by the applicant trade union, the union's certification order will be amended, if necessary, to include the additional position. If, on the other hand, the majority of employees do not wish to be represented, the applicant trade union's certification Order will exclude the previously unrepresented employees. Finally, if the applicant trade union does not file evidence of support, no vote will be conducted and the applicant trade union's certification Order will exclude[8] the previously unrepresented employees. See: *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v. North American Construction Group Inc., et. al.*, (2014) 234 C.L.R.B.R. (2d) 168, 2013 CanLII 60719 (SK LRB), LRB File No. 051-13. In all of these scenarios, the Board must be satisfied that the resultant bargaining unit is or continues to be appropriate for collective bargaining following the transfer of obligations.

3. **Bargaining Unit No Longer Appropriate After Transfer**: These circumstances can arise where the normal operation of the trade union's certification Order following the transfer of obligations would be to sweep in a number of positions that had previously been unrepresented and it is not possible to exclude the previously unrepresented positions because doing so would result in a unit that is inappropriate for collective bargaining. Such circumstances could arise where there is extensive intermingling of employees; where there is no discrete skill or geographic or other boundary that can be used to circumscribe the bargaining unit; and/or where the resultant bargaining unit would represent only a small fraction of the employees. These were the circumstances found by the Board in *Saskatchewan Union of Nurses v. Prince Albert District Health Board*, [1996] Sask. L.R.B.R. 368, LRB File No. 304-95. In this case, the resultant bargaining unit would have included only two (2) of many nurses in a new, combined health care facility. The Board directed that a vote be conducted of all nurses in the new facility (including both previously represented and unrepresented) to determine if they

[8] The exception to this rule is where the number of employees being swept-in is very small in relation to an "overwhelming" number of employees in the existing bargaining unit. This was referred to as "Option #2" in

> supported continued representation by the S.U.N. See also: *Saskatchewan Union of Nurses v. Twin Rivers District Health Board,* [1994] 3rd Quarter Sask. Labour Rep. 132, LRB File No. 109-94. In cases such as this, if the results of the representational vote indicate that the majority of employees wish to be represented, the applicant trade union's certification Order will apply to the expanded bargaining unit, as occurred in the *Twin River District Health Board* case. If, on the other hand, the majority of employees do not wish to be represented, the applicant union's certification Order will be rescinded. Finally, it should be noted that if the applicant trade union's bargaining unit would represent a very small percentage of an overwhelmingly larger combined workforce following a transfer of obligations, the Board would have the option of simply rescinding the union's certification order without a representational vote.

[23] As noted above, there are various circumstances where a representational vote could be ordered by the Board following a finding that a sale or transfer of a business had occurred. On the other hand, doing so is not required in most cases. As this Board has noted in many decisions, successorship is a legislative vehicle to ensure that collective bargaining rights survive changes in the ownership and control of a business. The goal of the successorship provisions in *The Saskatchewan Employment Act* (as it was with *The Trade Union Act)* is the seamless transfer of collective bargaining obligations into the hands of a new owner of a previously organized business if there has been a sale or transfer of that business. There can be little doubt that this Board sees successorship as a vehicle for the preservation, not expansion, of collective bargaining rights. Thus, successorship applications are examined to determine whether or not any previously unrepresented employees are being intentionally or unintentionally "swept into" the bargaining unit and/or whether or not sweeping-in is pragmatically unavoidable. If a successorship application will have the effect of sweeping-in new employees, the Board's practice is to conduct a representational vote unless the number of employees being swept-in is very small in relation to an "overwhelming" number of employees in the existing bargaining unit[9]. In all

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the *Horizon School Division* case and in *Prairie South School Division*, supra.

[9] This was referred to as "Option #2" in the *Horizon School* Division case and in *Prairie South School Division*, supra.

other scenarios, either a representational vote will be conducted or the bargaining unit will be restricted to avoid the sweeping-in effect.

[24] In the present application, there is only one (1) bargaining agent involved. The substance of Big Sky Rail's argument that a vote should be conducted is that employees are being swept into the Union's bargaining unit and/or that the unit of employees of Big Sky Rail that the Union is seeking to represent is inappropriate because of excessive intermingling and/or a lack of discrete boundaries. We will consider each of these arguments in turn.

[25] In a successorship application, "sweeping-in" is measured by examining the nature of the work that was done by the members of a bargaining unit in the business (or portion thereof) that was transferred from the predecessor employer into the hands of the successor. In doing so, the Board examines the positions or classifications of positions previously represented by the union in deciding whether or not new "employees" are being swept into the bargaining unit. In this context the term "employee" is a bit of a misnomer. The primary consideration for the Board is the work being done not necessarily the specific individuals who are performing that work.

[26] While in many cases employees are transferred to or hired by the new owner as part of the sale of a business, such is not always the case. For example, in the construction sector, businesses are routinely sold, reorganized and transferred at times when there are no employees working within the scope of a bargaining unit. In protecting bargaining rights following the transfer of a business, there may well be cases where specific individuals find themselves included within a bargaining unit without being asked for their views on the representational question; such as in the case of individuals hired while a successorship application is pending before the Board. In such circumstances, the position of these individuals may be likened to that of employees hired after a union has filed a certification application but before a certification Order is granted by the Board. While these employees did not participate in the representational question; they may not even have known that an application was pending when they came to work for that particular employer; nonetheless that is the structure that has been established to govern their workplace. As this Board has noted in many cases, labour relations often involves necessary compromises between legitimate yet conflicting objectives. Successorship is such an example. It is a legislative creation that necessitates compromise between the

right of employees to decide the representational question and the need to protect bargaining rights following the transfer or change in ownership of a business.

[27] In the present case, the Union represents a very specific trade or craft unit of employees, namely those employees engaged in the so called “running rights”. In acquiring the three (3) branch lines from CN, the normal operation of our successorship provisions would see Big Sky Rail became subject to the Union’s collective bargaining rights. The fact that Big Sky Rail did not acquire any employees from CN, and the positions falling within the scope of the Union’s bargaining unit were vacant when Big Sky Rail acquired that portion of CN’s business, is not sufficient to justify or require a representational vote. In coming to this conclusion, we assume it unlikely that any of the employees engaged in running rights for Big Sky Rail were asked whether not they wished to be represented by the Union or even knew that such potential existed. However, successorship is a vehicle to protect and preserve bargaining rights following a change in ownership or control of a business. Bargaining rights attach to the bargaining unit, irrespective of whether or not those positions happen to be vacant at the time of the transfer. Because the Union is seeking to represent the same positions that it previously represented, from the Board’s perspective, no “employees” are being swept in and thus no representational vote is required.

[28] In this regard, we agree with the position advanced by the Union that ordering a representational vote in the present application merely because no employees were transferred from CN would be contrary to the jurisprudence of this Board and would have the unintended consequence of encouraging future purchasers of businesses (with unionized employees) to seek the termination of those employees before acquiring that business in the hopes that its new employees would displace the union. In our opinion, such a precedent would tend to discourage new owners from acquiring existing employees and would generally cause unnecessary disruption in most workplaces following the sale or transfer of a business.

[29] As for the employees of Big Sky Rail that now find themselves included within the scope of the Union’s bargaining unit, they are not without recourse. *The Saskatchewan Employment Act* provides options for employees to revisit the

representational question and the affected employees may avail themselves of their rights if they choose to do so.

[30] The only remaining argument for a representational vote rests on the basis that the Union's previously bargaining unit is not appropriate for collective bargaining with Big Sky Rail. With all due respect, we are not persuaded by this argument. The running rights represent a unit of employees that is particular and well known in the rail sector. Furthermore, the members of this unit have particular skills and responsibilities that differentiate them from other employees in the workplace. Finally, we acknowledge that there will be a certain level of intermingling of the employees of Mobile Grains. However, we are not satisfied that such intermingling is sufficient to render the bargaining unit inappropriate and/or that any conflict that might arise in the future because of this intermingling cannot be resolved through negotiation. Simply put, we are satisfied that the Union's bargaining unit is appropriate for collective bargaining following the transfer of obligations from CN to Big Sky Rail.

Should this Panel deal with the Matters Reserved by the Original Panel?

[31] In its decision dated March 28, 2014, the original panel reserved jurisdiction with respect to three (3) issues, namely; the description of the bargaining unit; whether or not the Board should exercise its discretion to "otherwise order"; and what direction, if any, the Board should give regarding the application of the Union's previous collective agreement with CN.

[32] As we have indicated, with the Union's clarification that it is not seeking to represent or sweep in any new positions, the answer to the first question becomes self-evident. Assuming a transfer of obligations, the Union will be representing the same unit of employees that it previously represented subject only to the change in the identity of the employer. As we have already indicated, we find this unit appropriate for collective bargaining.

[33] Big Sky Rail asks that the remaining two (2) questions be remitted back to the original panel. With due respect, doing so would be an inefficient use of the Board's scarce resources. The original panel reserved jurisdiction on these issues because it understood the description of the Union's bargaining unit to include positions that it had not

previously represented. With the clarification that such is not the case, the answers to the two (2) remaining questions are relatively straight forward.

Should Big Sky Rail be bound by CN's previous obligations to bargain collectively with the Union or should the Board "otherwise order"?

[34] In most cases involving a sale of an organized business, the predecessor's collective bargaining obligations are transferred with the business (or part thereof) and bind the new owner, who is then also bound by the predecessor's collective agreement until such time as a new agreement can be negotiated. In doing so, the Board acknowledges that collective agreements negotiated with a predecessor are seldom a "perfect fit" when applied to the successor. Nonetheless, the normal practice of the Board is to leave it to the union and the successor to interpret and apply the previous agreement in a fashion that makes common sense taking into account changes in the identity of the employer. Collective bargaining will ultimately result in a new collective agreement between the parties. See: *Saskatchewan Government Employees' Union v. Saskatchewan Institute of Applied Science and Technology*, [1989] Summer Sask. Labour Rep. 51, LRB File No. 131-88.

[35] The circumstances where the Board could "otherwise order" that a predecessor's collective bargaining obligations not be transferred to a successor were discussed by Chairperson Ball in *Saskatchewan Government Employees' Union v. Headway Ski Corporation,* [1987] August Sask. Labour Rep. 48, LRB File No. 396-86:

> *Section 37 is intended to preserve existing bargaining rights, but it is not meant to expand them (see Sun Electric Ltd. et al, LRB File No. 052-85, Reasons dated May 14, 1986). Occasionally, employees of an existing business become merged or intermingled with employees of an acquired business in such a way that it becomes unworkable for one group to be represented by a union and the other to be either represented by a second union or to remain unrepresented. When that happens, the Board is given a discretion to deal appropriately with the realities of each case by making an "otherwise order" under Section 37. It may establish the boundaries of a new appropriate bargaining unit and order a representation vote to determine the wishes of the majority (see, for example, S.E.I.U. Local 333 v. Fairhaven Long-Term Care Centre and C.U.P.E. Local 77, LRB File No. 212-86, Reasons dated January 9, 1987). It may terminate the union's bargaining rights if the union represents only a very small percentage of intermingled employees or it may find that the "new" business is so significantly different in character or operates in a labour and product market so entirely unrelated to its*

> *predecessors that the certification order and/or collective bargaining agreement could not reasonably have been intended to apply to it.*
>
> *The criteria to be applied in determining the appropriate bargaining unit resulting from a disposition of part of a business are similar but not identical to those used in certification proceedings. For example, the Board will consider similarity in job functions, shared community of interest and the degree and nature of integration. Existing bargaining rights will be maintained if they can reasonable be accommodated within the new employment structure (see City of Peterborough (1979) OLRB Rep. Feb. 133). Thus, a bargaining unit which would be inappropriate on a certification may nonetheless prevail if it has proved itself workable in the circumstances.*
>
> *In deciding whether a bargaining unit can be appropriately maintained after the transfer of part of a business, the Board on the one hand will wish to honour existing bargaining rights and on the other will wish to maintain its preference for larger and ideally single all-employee units. Whether there is a conflict between these two goals, the interest of maintaining industrial peace should prevail and undue fragmentation should be avoided. Unlike a transfer within the private sector, where there is a transfer of part of a business between the public and private sectors, there is no presumption that the already existing bargaining units are "appropriate" and thus should continue unaltered. On the contrary, existing units must be adapted to fit the bargaining structure of the sector into which they have been transferred (see Boston Bar Lumber (1976) 1 CLRBR 380; Municipality of Metropolitan Toronto (1975) OLRB Oct. 777; and Owen Sound General and Marine Hospital (1978) OLRB May 445 at p. 449).*

[36] Practically speaking, the circumstances where the Board might exercise its discretion to not transfer bargaining obligations to the new owner following the sale of a business are fairly limited. Firstly, if following the transfer of obligations, the members of the union's bargaining unit will be intermingled with an overwhelmingly larger group of unrepresented employees of which the union would represent only a very small fraction. Secondly, if a representational vote is conducted and the employees indicate their desire to no longer be represented by a trade union. Thirdly, if the character of the successors business is so significantly different and/or if the successor operates in a completely different labour and product market than that of the predecessor.

[37] While the Board has the authority to "otherwise order", it is not apparent that the Board has done so (i.e.: declined to transfer collective bargaining obligations to a successor) following a determination that there has been a sale or transfer of a business. As can be seen in *United Steelworkers of America & VicWest Steel Inc.*, [1988] January Sask. Labour Rep. 33, LRB File No. 128-87, the kind of circumstances that could justify not

transferring collective bargaining obligations to a new owner are the kind of circumstances that would indicate that there has not been a sale or transfer of a business in the first place.

[38] It is not apparent from the findings of the original panel or our review of the evidence that the circumstances of the transfer of obligations from CN to Big Sky Rail justify not transferring CN's collective bargaining obligations to Big Sky Rail. While there is no doubt that Big Sky Rail is a different employer than CN, with all due respect, these differences are matters of scale not substances in terms of labour relations. Both operate in the same sector, they provide similar services to their customers, and the nature of the work performed by the members of the bargaining unit for the successor will be very similar to that performed for the predecessor. Simply put, we saw no evidence from which Big Sky Rail has established a basis for finding that CN's previous obligation to bargain collectively with the Union should not transfer to and bind Big Sky Rail in the ordinary course.

[39] For the foregoing reason, Big Sky Rail shall bargain collectively with the Union in relation to those employees in its operations that fall within the scope of the Union's bargaining unit. A new certification Order naming Big Sky Rail shall issue in favour of the Union.

Should Big Sky Rail be bound by the Teamster's Collective Agreement or should the Board "otherwise order"?

[40] As indicated, in most cases involving a transfer of an organized business, the new owner is bound by the predecessor's collective agreement until such time as a new agreement can be negotiated. The normal practice of the Board is to leave it to the union and the successor to interpret and apply the previous agreement in a fashion that makes common sense until a new agreement can be negotiated. For example, this Board has held that practical problems arising out of the old collective agreement should not override the need to preserve bargaining rights. See: *Canadian Union of Public Employees v. R. J. Sollars, et. al. (o/a Medical Arts Clinic)*, [1982] Dec. Sask. Labour Rep. 38, LRB File Nos. 128-82 & 163-82. Similarly, this Board has also held that economic hardship for the new owner is not sufficient to "otherwise order" that a collective agreement not apply to a successor. See: *United Brotherhood of Carpenters and Joiners of America, Local 1867 v. Graham Construction Ltd., et.al.*, [1986] June Sask. Labour Rep. 35, LRB File No. 330-84.

[41] However, there are a few examples where the Board has declined to transfer and apply an existing collective agreement to a successor following a determination that there has been a sale or transfer of a business. For example, in *Saskatchewan Government Employees' Union v. Headway Ski Corporation,* supra, in *Saskatchewan Government Employees' Union v. Golf Kenosee Inc.* [1987] Sept. Sask. Labour Rep. 34, LRB File No. 180-86, and in *Saskatchewan Government Employees' Union v. Mission Ridge Ski Development Inc.,* [1987] August Sask. Labour Rep. 46, LRB File No. 396-86, the Board concluded that the respondent private-sector successors should not be bound by the collective agreements negotiated with a public-sector employer. In these particular cases, the Board declined to transfer and apply the previous collective agreement to the successor because the Board concluded that the previous agreement would be "unworkable" in the private sector.

[42] With respect to the Union's collective agreement, the Union acknowledges that it will require revision. The Union indicated in its submissions that its normal practice is to negotiate new collective agreements with employers who purchase local branch lines but asks that its existing collective agreement with CN apply until a new agreement is negotiated with Big Sky Rail.

[43] A review of the proceedings before the original panel would indicate that neither the substance of the Union's collective agreement nor its applicability to Big Sky Rail's operations was well canvassed during the original hearing. Understandably, the primary focus of the parties before the original panel was whether or not there had been a sale or transfer of a business and the extent to which the respondent employers were related. On the other hand, the evidence does support the conclusion that both CN and Big Sky Rail operate in the railway sector, that they provide similar services to their customers, and that the nature of the work performed by the members of the bargaining unit for the successor will be very similar to that performed for the predecessor. While we have acknowledged that they are very different employers, we have also noted our view that the differences are largely a matter of scale and not substances. As this Board noted in the *Medical Arts Clinic* case, the fact that practical problems could arise in applying the Union's collective agreement to Big Sky Rail's operations should not override the legislative directive to preserve bargaining rights following the sale or transfer of a business. Similarly, the mere fact that the Union's agreement might be more expensive than anticipated by the

Big Sky Rail is not sufficient for the Board to "otherwise order". Simply put, we were not persuaded that the Union's collective agreement would be unworkable for Big Sky Rail or otherwise incompatible with its operations. For the foregoing reasons, the Union's existing collective agreement shall transfer to and bind Big Sky Rail.

[44] The Union indicated in its submissions that its normal practice is to negotiate new collective agreements with employers who purchase local branch lines. In fact, it is reasonable to assume that a collective agreement negotiated with an employer of national scope like CN would require some significant revision and simplification given the modest size of the current employer's operations. In our opinion, the parties should embark upon this exercise without delay.

Conclusion:

[45] For the reasons stated above, a new certification Order shall issue naming Big Sky Rail as the employer following the transfer of CN's obligations to bargain collectively with the Union. Although the precise language of the new certification Order has yet to be determined, the Union shall represent the same unit of employees that it previously represented subject only to the change in the identity of the employer. In addition, the Union's collective agreement shall apply from this date forward until such time as they are able to negotiate a new collective agreement appropriate for this new workplace. In this regard, we direct that the Union's current collective agreement shall be deemed to have expired and that the parties have given the requisite notice(s) to engage in negotiations towards the conclusion of a new collective agreement.

[46] Board Members Duane Siemens and Don Ewart both concur with these Reasons for Decision.

DATED at Regina, Saskatchewan, this 27th day of January, 2015.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson