INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Applicant v **ALUMA SYSTEMS INC., SAFWAY SERVICES CANADA, ULC and BRAND ENERGY SOLUTIONS (CANADA) LTD., Respondents**

- and -

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant v ALUMA SYSTEMS INC., SAFWAY SERVICES CANADA, ULC and BRAND ENERGY SOLUTIONS (CANADA) LTD., Respondents

LRB File Nos. 049-18 & 052-18; June 4, 2019

Chairperson, Susan Amrud, Q.C.; Board Members: Mike Wainwright and John McCormick

For International Association of Heat & Frost Insulators and Asbestos Workers, Local 119:	Greg Fingas
For United Brotherhood of Carpenters and Joiners of America, Local 1985:	Heather Jensen
For Aluma Systems Inc. and Safway Services Canada, ULC:	Larry Seiferling, Q.C., Steven Seiferling
For Brand Energy Solutions (Canada) Ltd.:	Christopher Lane, Q.C.

Applications for successorship dismissed – Related companies competing over same annual contract – Customer awarded it to one company first year, other company second year – Relationship between companies not sufficient to find successorship without any evidence of disposition of contract by first company to second company.

Application for successorship dismissed – No evidence that second company was successor of a company that was taken over by first company even though there was some similarity in their names.

REASONS FOR DECISION

Background:

[1] Susan Amrud, Q.C., Chairperson: On February 8, 2018, Construction Workers Union, CLAC Local 151 [“CLAC”] filed an Application for Bargaining Rights for all employees of Brand Energy Solutions (Canada) Ltd. [“BESC”] in Saskatchewan, except the general manager, office

manager, office and sales staff and management personnel.[1] Since then, numerous other applications have been filed for the purpose of determining which union(s) have bargaining rights respecting BESC's employees. In these Reasons, the Board is addressing two of those applications:

- Application for Employer Successorship filed by the International Association of Heat & Frost Insulators and Asbestos Workers, Local 119[2] ["Insulators"] that alleges that BESC is a successor employer to Aluma Systems Canada Inc. and Safway Services Canada, ULC ["Safway"];[3]
- Application for Employer Successorship filed by the United Brotherhood of Carpenters and Joiners of America, Local 1985[4] ["Carpenters"] that alleges that BESC is a successor employer to Brand Scaffold Systems of Canada Inc., Aluma Systems of Canada Inc. and ThyssenKrupp Safway Inc.

[2] After hearing from the parties on June 21, 2018, the Board ordered that the Applications for Employer Successorship would be heard before the Common Employer applications. All proposed amendments to the Employer Successorship applications and Replies to those applications were allowed.

[3] The Board heard these applications on November 13 and 14 and December 4, 2018. Each party called one witness. The basic facts are straightforward. Husky Oil Operations Ltd. ["Husky"] owns an upgrader in Lloydminster, Saskatchewan and a refinery in Lloydminster, Alberta. Every year Husky undertakes a shutdown at both facilities; every third year the shutdown is more substantial, and 2017 was one of those years. The shutdown work on the upgrader is much more substantial than the shutdown work on the refinery (by a factor of ten). In 2016 Aluma Systems Inc. ["Aluma"] asked the Carpenters and Insulators for "enabling" concessions for their bid on the Husky upgrader shutdown work, for a multi-year contract. In 2016 Husky signed three-year Master Service Agreements ["MSAs"] with respect to scaffolding and insulation services with both Aluma and BESC[5]. An MSA does not guarantee work; to obtain work, a company must be

[1] LRB File No. 030-18.
[2] LRB File No. 049-18. Amended Application filed September 10, 2018; consented to by BESC, Aluma and Safway September 17, 2018.
[3] Aluma and Safway were represented by the same counsel, who advised the Board that they were in the process of merging into one entity, AlumaSafway Inc. Accordingly, they will often be treated as one entity in these Reasons.
[4] LRB File No. 052-18.
[5] Exhibits RA-2 and RB-4.

awarded a Work Authorization[6]. For 2017 Aluma was awarded the upgrader shutdown work and BESC was awarded the refinery shutdown work[7].

[4] Because of issues with a non-unionized employee, Husky was not entirely satisfied with Aluma's work performance in 2017. In 2018 it awarded the upgrader shutdown work to BESC and no work to Aluma. This 2018 upgrader shutdown work is at the core of these successorship applications. The Carpenters and Insulators were of the view that it was awarded to Aluma, but that Aluma or its parent company transferred the work to BESC. This suspicion was not borne out by the evidence. The evidence established that Husky chose BESC over Aluma to do the 2018 upgrader shutdown work because it was dissatisfied with Aluma's 2017 performance, it was pleased with BESC's 2017 performance and, in preparation for the next major shutdown in 2020, it wanted to give BESC experience working on the upgrader shutdown. In order to perform the 2018 upgrader shutdown work BESC did not hire any Aluma employees; no vehicles or equipment were transferred; nothing was transferred from Aluma to BESC.

[5] The Carpenters also asked the Board to find that BESC is a successor to Brand Scaffold Services of Canada Inc. ["Brand Scaffold"] on another basis. They argue that Aluma acquired the Brand name from Brand Scaffold, and did nothing to protect that name from its use by a related corporation (BESC) when that corporation came into Saskatchewan. Aluma allowed its asset, the Brand name, to be transferred to its sister company, BESC. Aluma's reputation and name were thereby transferred to BESC.

[6] The evidence indicated that Aluma became the successor to Brand Scaffold in 2005. The predecessor to BESC, MT Erectors Inc., was established in 2006 and was acquired and renamed as BESC in 2010. MT Erectors Inc. had no presence in Saskatchewan.

[7] AlumaSafway and BESC are sister corporations, owned by the same holding company and operated in the interests of the same corporate parent and its shareholders. They both report directly to Aluma Systems Intermediate Holdings, Inc. and ultimately to BEIS Holdings, Inc.

[8] The Carpenters referred to three certification orders they hold, with respect to:

- Aluma Systems of Canada Inc., issued October 30, 1995;

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[6] MSAs s. 2.1.
[7] Section 1.2(a) of Schedule A of each MSA: "turnaround scaffolding and insulating services for Spring-Summer 2017".

- Brand Scaffold, issued March 31, 2004;
- ThyssenKrupp Safway Inc., issued November 27, 2008.

Aluma acknowledges that it is bound by the first Order, as the successor to Aluma Systems of Canada Inc. Aluma acknowledges that it is bound by the second Order, as the successor to Brand Scaffold. Safway acknowledges that it is bound by the third Order, as the successor to ThyssenKrupp Safway Inc.

[9] The Insulators also hold relevant certification orders, with respect to:

- Aluma Systems Canada Inc., issued October 2, 2003;
- Safway, issued June 29, 2017.

Aluma acknowledges that it is bound by the first Order, as the successor to Aluma Systems Canada Inc.

[10] All five of these certification Orders continue to bind AlumaSafway, Inc. following the merger of Aluma and Safway.

Relevant statutory provisions

> ***Transfer of obligations***
> *6-18(1) In this Division, **"disposal"** means a sale, lease, transfer or other disposition.*
>
> *(2) Unless the board orders otherwise, if a business or part of a business is disposed of:*
>
> > *(a) the person acquiring the business or part of the business is bound by all board orders and all proceedings had and taken before the board before the acquisition; and*
> > *(b) the board orders and proceedings mentioned in clause (a) continue as if the business or part of the business had not been disposed of.*
>
> *(3) Without limiting the generality of subsection (2) and unless the board orders otherwise:*
>
> > *(a) if before the disposal a union was determined by a board order to be the bargaining agent of any of the employees affected by the disposal, the board order is deemed to apply to the person acquiring the business or part of the business to the same extent as if the order had originally applied to that person; and*
> >
> > *(b) if any collective agreement affecting any employees affected by the disposal was in force at the time of the disposal, the terms of that collective agreement are deemed to apply to the person acquiring the business or part of the business to the same extent as if the collective agreement had been signed by that person.*
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> *(4) On the application of any union, employer or employee directly affected by a disposal, the board may make orders doing any of the following:*

> *(a) determining whether the disposal or proposed disposal relates to a business or part of a business;*
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> *(b) determining whether, on the completion of the disposal of a business or part of the business, the employees constitute one or more units appropriate for collective bargaining;*
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> *(c) determining what union, if any, represents the employees in the bargaining unit;*
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> *(d) directing that a vote be taken of all employees eligible to vote;*
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> *(e) issuing a certification order;*
>
> *(f) amending, to the extent that the board considers necessary or advisable:*
>
> > *(i) a certification order or a collective bargaining order; or*
> >
> > *(ii) the description of a bargaining unit contained in a collective agreement;*
>
> *(g) giving any directions that the board considers necessary or advisable as to the application of a collective agreement affecting the employees in the bargaining unit referred to in the certification order.*
>
> *(5) Section 6-13 applies, with any necessary modification, to a certification order issued pursuant to clause (4)(e).*
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> ***Proceedings not invalidated by irregularities***
> *6-112(2) At any stage of its proceedings, the board may allow a party to amend the party's application, reply, intervention or other process in any manner and on any terms that the board considers just, and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings.*

Argument on behalf of the Insulators

[11] The Insulators argued that a successorship declaration should be granted on the basis of three factors:

(a) A transfer of work in the context of an existing contract for which specific bargaining concessions were made;
(b) Common control and resources between the predecessor and successor employers; and
(c) The deliberate use of the transfer of work to enrich the ultimate corporate parent at the expense of certified bargaining agents and their members.

[12] They argue that the Board should apply a purposive interpretation to successorship applications, focusing on the importance of ensuring the preservation of bargaining rights in the face of unilateral employer action.

[13] They relied first on *North American Construction Group Inc. v IUOE, Local 870*, 2013 CarswellSask 674 (LRB) ["*NA Caisson*"], where the Board held that a successorship had been

established. They referred the Board to paragraphs 44 to 49 as establishing key principles for the Board to consider in this matter, including the following:

> *In our opinion, there can be little doubt that NA Caisson Ltd. is a successor to the business activities previously carried on by NA Construction Ltd. in Saskatchewan in 1992 (when it was certified) and thus it is a successor to NA Construction Ltd.'s collective bargaining obligations. There is a clear nexus between the business previously carried on by NA Construction Ltd. in Saskatchewan in 1992 and the work subsequently performed in Saskatchewan by NA Caisson Ltd. in the transfer of key personnel from one subsidiary to another. Mr. Humphries' testimony established a clear continuity of business activity, together with his own movement from NA Construction Ltd. to NA Caisson Ltd.*[8]

In their view, a clear continuity of business activity has been established here.

[14] Next the Insulators turned to *CJA, Locals 1805 & 1990 v Cana Construction Co.*, 1984 CarswellSask 888 (SK LRB) ["*Cana Construction*"]. The reference in the following paragraphs to common ownership are relevant here:

> *54 Notwithstanding the absence of provisions in The Trade Union Act permitting the Board to treat two or more associated companies as one employer, common ownership or, more importantly, practical operational control may not be irrelevant in determining whether there has been a disposition of a business or part thereof from one company carrying on business in the construction industry to another. When two closely related, functionally interdependent entities have a single guiding force in their day-to-day operations or actual control through shareholdings it may as a practical matter facilitate an inference that one entity has acquired the business of the other and not simply a collection of assets, particularly when it has been activated specifically to engage in business as a non-union company.*
>
> *55 It is a natural assumption that when a contractor avoids the effects of a certification order by transferring his business from one corporation which he owns and controls to another corporation which he also owns and controls, he intended the natural consequences of his actions. That assumption will be minimized or eliminated by evidence that the transaction took place between the two associated companies for reasons unrelated to the certification order. Furthermore, the fact that two employers in the construction industry are independent in terms of ownership and control or bid competitively against one another may indicate that there has been no transfer of a business from one to the other but only a transfer of assets. (See Cafas Inc. and International Association of Machinists and Aerospace Workers et al, 7 CLRBR (N.S.) 1)*
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> *. . .*
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> *63 All of the foregoing factors are not of equal importance and weight but on balance the Board finds that Pan-Western acquired more than a mere collection of assets from Cana - it acquired a business or part of a business in the form of an active, severable and coherent part of a functional economic vehicle. In our view the knowledge, experience, and abilities acquired by Pan-Western from Cana's management group, together with other*

[8] At para 49.

> *tangible and intangible elements of a business acquired from Cana, gave Pan-Western its economic life.*

[15] *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 179 v Monad Industrial Constructors Inc. and Construction Workers Union (CLAC), Local No. 151*, 2013 CanLII 83710 (SK LRB) ["*Monad*"] was cited as authority that the continuation of specific work is viewed by the Board as a significant factor supporting a finding of successorship:

> *However, following the assets which were transferred to MICI by MCL, those assets were used by MICI to continue the industrial construction business formerly carried on by MCL. This is shown by the retention of key personnel, the retention of the offices of MCL by MICI, the use of the same telephone and fax numbers, and the use of the same or similar logo. Furthermore, MICI took over the completion of the Borden Chemicals Inc. Formaldahyde Plant from MCL, something which was not dealt with in the Asset Purchase Agreement.*[9]

[16] In *CUPE, Local 1975-01 v Versa Services Ltd.*, 1993 CarswellSask 627 (SK LRB) ["*Versa Services*"], in finding that a successorship had occurred where part of a business was transferred, the Board held:

> *28 As we have suggested earlier, to establish that an employer is a successor in the sense envisaged by Section 37, it must be established that something of a coherent and dynamic nature, something which may enjoy a separate existence as a "business," was passed on from the original employer to the successor. To quote the Board in the Headway Ski Corp. case, we must look to whether there is "a discernible continuity in the business or part of the business formerly carried on by the predecessor and now being carried on by the successor."*
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> *. . .*
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> *32 It is clear that, however the "business" of the University of Regina is defined, it included at one time the provision and control of food services on the campus. The University apparently came to regard this aspect of their operation as more of a nuisance than it was worth, and decided to hive it off and put it into the hands of a commercial firm. Thought [sic] it may have been an inconsiderable portion of the overall operation of the University, it can still be identified as a discrete business opportunity for Versa Services Ltd., who presumably took it on for that reason. Though Versa Services Ltd. obviously brought their expertise and experience, they also received from the University "part of a business," as a going concern, which included distinctive space, a large pool of customers, and the established habits of those customers. In addition, we conclude that they inherited established bargaining obligations.*

[9] At para 78.

[17] On a reconsideration application, the British Columbia Labour Relations Board upheld a finding of successorship, in *Construction Labour Relations Assn. (British Columbia) v J.H. McRae Co.*, 1986 CarswellBC 2947 (BC LRB), another case where only part of a business was transferred.

[18] The Insulators cited *Frank Browne Acoustics Kamloops (1982) Ltd. and UBCJA, Re*, 1984 CarswellBC 3963, 6 CLRBR (NS) 247 (BC LRB) as an example of a case where a successorship was found even though the predecessor company continued in operation and in competition with the successor.

[19] The Insulators referred to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Diogenes Investments Ltd.*, LRB File No. 072-83 ["*Diogenes Investments*"] as authority for its position that a more rigorous analysis is required when there are common shareholders and management connections between the predecessor and successor corporations:

> *Neither the shareholders or the creditors of H.P.J. Caterers Ltd. [predecessor corporation] received any benefit or advantage, directly or indirectly. There is no hint of a pre-existing corporate or management connection between the former owner and the Respondent which could cause the Board to infer a "disposition", or any sort of scheme to subvert the effect of the certification order.*[10]

[20] All of the parties referred to *Lester (W.W.) (1978) Ltd. v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 SCR 644, 1990 CanLII 22 (SCC) ["*Lester*"], in which the Supreme Court of Canada undertook a thorough analysis of the successorship issue. In *Lester*, the Supreme Court of Canada found there needs to be evidence of the disposition of "something". In the Insulators' view, the evidence in this matter indicated that there was a disposition:

(a) Both Aluma and BESC engaged in Husky's process in 2016 to obtain MSAs and specific scopes of work.
(b) The Husky upgrader shutdown work went to Aluma in 2017.
(c) Aluma approached both the Insulators and the Carpenters for enabling assistance in obtaining that work.

[10] At page 44.

(d) Aluma's business people did not pursue further work under the MSA in 2018 or 2019, to facilitate BESC getting the work. This can be interpreted as a transfer of business functions.

[21] A further consideration for the Board, they argue, is the common corporate control and operations:

(a) Aluma and BESC have the same immediate and ultimate parents, common director and general counsel.
(b) They are subject to similar obligations and all of their profits go to the same shareholders.
(c) They are subject to decision-making by the same parent company.

[22] The Insulators also drew to the Board's attention the following important comment in *Lester*:

> *48 In keeping with the purpose of successorship provisions -- to protect the permanence of bargaining rights -- labour boards have interpreted "disposition" broadly to include almost any mode of transfer and have not relied on technical legal forms of business transactions. As explained by the Ontario Board in United Steelworkers of America v. Thorco Manufacturing Ltd. (1965), 65 CLLC {PP} 16,052, an expansive definition accords with the purpose of the section -- to preserve bargaining rights regardless of the legal form of the transaction which puts bargaining rights in jeopardy.*

[23] The Insulators view the transfer of the 2018 upgrader shutdown work as an attempt to interfere with their bargaining rights. The transfer of the 2018 upgrader shutdown work by Aluma to BESC was to assist Aluma in attempting to force concessions from the Insulators and Carpenters. Aluma could have pursued the 2019 work, but chose not to. In their view, Aluma is attributing to Husky decisions made by Aluma.

Argument on behalf of the Carpenters

[24] The Carpenters' argument that a successorship is established in this matter is based on two transfers. First, as do the Insulators, they point to the 2018 upgrader shutdown work and their view that this work was reassigned within the same corporate family. The transfer of the upgrader shutdown work from Aluma to BESC meets the requirements to constitute the transfer of part of its business.

[25] In evaluating a successorship application, the strict legal or technical nature of how the transfers took place is not what is important. Instead, the Board must consider the labour relations effect. As did the Insulators, the Carpenters relied on *NA Caisson*:

> *As was noted by this Board in the Cana Construction case, in making a determination pursuant to s. 37, it is not necessary that we find that there has been a transfer or sale of a business in a strict legal sense. Rather, in determining whether there has been a sale, transfer or disposition of a business (or part thereof), the practice of the Board has been to look to see whether there is a discernable continuity in the business formerly carried on by the predecessor employer and subsequently carried on by the successor employer. The vital consideration for the Board is whether or not the effect of the transaction (whether it be a sale, transfer or other disposition) was to put the transferee into possession of the essential elements of a business. To make a finding of successorship, the issue is not so much the legal or technical nature of how the transfer took place but rather whether or not the Board is satisfied that the new owner acquired the essential elements of a business and that those business interests can be traced back to the business activities of the previously certified owner. In other words, the fundamental question is whether there is evidence of a discernable continuity of the subject business (or part thereof). See also: Canadian Union of Public Employees, Locals 832-02 & 832-03 v. Conseil Scolaire Fransaskois de L'Ecole Saint Isidore, [1995] Sask. Labour Rep. (3rd Quarter) 184, LRB File No. 110-95.*[11]

[26] In *G.A. Hawkins Construction Co. v Drywall Acoustic Lathing and Insulation (UBCJA, Local 675)*, 2010 CarswellOnt 11263, the Ontario Labour Relations Board made the following comment:

> *With respect to businesses in the construction industry the Board has frequently noted that the essence of a "business" in a bid-oriented sector of the construction industry frequently resides in the experience and expertise of its management personnel, rather than, for example, in physical assets such as tools or a specific location and, as a result, the transfer of a key person to a new or established business may constitute a "sale" of all or part of the business where that person is fundamental to the success of the business.*

[27] The Carpenters discounted the significance of *Lester* to this matter. The facts in *Lester* are distinguishable, they say, because in *Lester*, nothing was transferred; the work of one corporation was not available to the other.

[28] The second basis on which the Carpenters argue that the Board should find a successorship is the transfer of the right to the use of the name Brand. Aluma acquired the name Brand in Saskatchewan when Aluma merged with Brand Scaffold. The Brand name was not used in Saskatchewan after that time until 2017. The Carpenters are of the view that when BESC began using the Brand name with respect to scaffolding work in Saskatchewan, their certification order

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[11] At para 45.

attached to that business. Brand Scaffold (through the merged Aluma corporation) effectively transferred to BESC the right to use the Brand banner in relation to the carpentry and scaffolding business in Saskatchewan. This informal transfer of assets between related corporations in a corporate family is a significant benefit that allowed BESC to operate under a known and trusted name and reputation in Saskatchewan. This is a key asset, and among corporations with a clear corporate inter-relationship and common ownership, indicates successorship and the need to protect the continuity of bargaining rights.

[29] However, the Carpenters also argued, at paragraph 22 of their Written Submissions: "Aluma allowed the Brand name asset to be transferred to its sister company, Brand Energy Solutions. In so doing, Brand Energy Solutions has the ability to be the exclusive representative of the 'Brand' banner, and draw upon a reputation and the connection to a massive and valuable American name, in the ongoing business operations of 'Brand' in Saskatchewan".

[30] The Carpenters also relied on *Monad*, as an example of a company that had been dormant for 20 years, came back in a slightly different form, but bargaining rights did not disappear and successorship was granted. The Carpenters say that they had a certification order against Brand Scaffold in Saskatchewan and it continues in effect against BESC. The absence of a straight line between Brand Scaffolding and BESC is not determinative and not expected.

[31] The Carpenters argue that evidence of an intention to evade bargaining rights is not required; the Board is to consider the effect of the disposition, not the parties' intention. The effect of setting up the framework in this case was to erode bargaining rights. Work and the Brand name have left one company and shown up in another: that fits the requirement of "other disposition".

Argument on behalf of AlumaSafway

[32] AlumaSafway argues that in *Lester*, the Supreme Court of Canada confirmed that a two-part test is to be applied in determining whether a successorship has been established: there must be a disposition of a business and the business must be acquired as a going concern. The presence of two businesses operating side by side is not sufficient. Where the businesses are related, the Board will apply a less restrictive approach, but there still needs to be a disposition:

> *50 Notwithstanding the broad discretion in labour boards to determine whether or not the mode of disposition constitutes successorship, the fact remains that in virtually all jurisdictions something must be relinquished by the predecessor business on the one hand and obtained by the successor on the other to bring a case within the section.*
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> *. . .*
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> *53 To determine whether or not the business or part of the business has been disposed of, most boards examine the nature of the predecessor business, and the nature of the successor business determines if the business of the predecessor is being performed by the successor. Most boards approach the issue by examining factors like the work covered by the terms of the collective agreement, the type of assets that have been transferred, whether goodwill has been transferred, whether employees are transferred, whether the business is operating in the same location, whether there is continuity of management, and whether there is continuity of the work performed: Lyric Theater Ltd. v. International Alliance of Theatrical Stage Employees, [1980] 2 Can LRBR 331 (B.C.); Canadian Union of Public Employees v. Metropolitan Parking Inc., 1979 CanLII 815 (ON LRB), [1980] 1 Can LRBR 197 (Ont.). No single factor is determinative, since factors which are sufficient to support a successorship finding in one type of industry may be insufficient in another: International Longshoremen's Assn. v. Terminus Maritime Inc. (1983), 83 CLLC {PP} 16,029. In each case the Board must determine if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor. Because a business is not merely a collection of assets, the vital consideration "is whether the transferee has acquired from the transferrer a functional economic vehicle": Metropolitan Parking Inc., supra, at p. 209.*
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> *. . .*
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> *59 Review of numerous decisions in the construction industry makes it clear that in all cases where successorship was established either a central principal left the first company (such that even if the first company remains operational a part of the business may have been disposed of) or the first company is wound down or at least has suffered a decline in business because of the presence of the non-union company. However, where both companies remain fully operational and where principals continue to work for both companies, boards have not found successorship as there is no identifiable disposition: see, for example, Viandes Seficlo Inc. v. Union des Employés de Commerce (1984), 84 CLLC {PP} 14,047 (Que.); International Brotherhood of Electrical Workers v. Minas Electric Co. (1976), 77 CLLC {PP} 16,075 (N.S.); Labourers' International Union of North America v. Elmont Construction Ltd., [1974] OLRB Rep.June 342. To put it another way, there is nothing within the successorship provisions to bar an individual from owning or working for more than one company or to bar a company from operating union and non-union branches.*
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> *. . .*
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> *61 But while the existence of related companies may justify a less restrictive approach to the question of whether or not successorship has occurred, the fact remains that corporate interrelationship without some evidence of disposition will not be sufficient to trigger the successorship provisions. (emphasis in original)*

[33] AlumaSafway argues that there is no evidence of a disposition that could lead to a finding of a successorship. As did the Carpenters, they referred the Board to paragraph 45 of *NA Caisson*.

They also relied on paragraph 47, where the Board made the following comment respecting the indicia of successorship in the construction industry:

> *While the concept of successorship for employers operating in the construction sector is the same as in any other industries, the indicia of successorship in the construction industry can be very different; that's because there are certain features of companies operating in the construction sector that are unique to that industry. For example, some employers carry on business with very few tangible assets. In the construction sector, the key asset of an employer may simply be the skill, knowledge and expertise of its principals or its key personnel, together with that employer's reputation and credibility. As a consequence, labour boards have recognized that the movement of these key personnel from one employer to another in the construction sector can be indicative of the transfer of a business or part thereof, particularly so where one business is wound down and a new employer established to carry on that same work. See: United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd. et.al., [2003] Sask. L.R.B.R. 471, LRB File Nos. 014-98 & 227-00.*

[34] AlumaSafway urged the Board to follow *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v Cornerstone Contractors Ltd.*, 2015 CanLII 43777 (SK LRB), a case that found there was no successorship because nothing had been transferred:

> *When we consider the Culverhouse criteria as adopted in Versa Services, it is clear that no successorship has occurred in this case. However, even without referencing these criteria, there is one fundamental concern with the Union's argument concerning successorship. That is, that in order for there to be a successorship, there must be a transfer of a business or a part thereof, to another party. While the concept of "transfer" is rather broad, there must be an identifiable business which is being transferred between the parties. In this case we have no evidence of any transfer of any business, any assets utilized to operate a business, in short, no beating heart being transferred.*[12]

[35] There must be a disposition and there is no evidence of a disposition here. Performing the same work is not enough. The re-assignment of work by a third party is not a transfer of a business. For 2018 Husky made the decision to give the upgrader shutdown work to BESC instead of to Aluma. There is no evidence of a transfer of key personnel from Aluma to BESC. There was no transfer of anything from Aluma to BESC. A company operating two divisions is not a successorship.

[36] With respect to the Carpenters' argument that BESC is a successor to Brand Scaffold, the facts do not bear out that argument. The evidence indicates that Brand Scaffold was rolled into Aluma in 2005. BESC arose out of an acquisition of a completely separate business, MT Erectors Inc., and a name change in 2010. No evidence was provided to the Board that there was a transfer

[12] At para 46.

of any essential elements, including the name Brand, from Brand Scaffold to BESC. The evidence is that the essential elements of Brand Scaffold were transferred to Aluma.

Argument on behalf of BESC

[37] The Insulators and Carpenters must prove there was a disposition of a business or part of a business, and they have not done that. The Insulators and Carpenters thought Aluma had a three-year contract to do the upgrader shutdown work, but the evidence established that was not the case. BESC and Aluma each entered into an MSA with Husky in 2016. Each was awarded work under the MSA in 2017: Aluma at the upgrader and BESC at the refinery. BESC's work in 2017 was better, so in 2018 Husky gave them the upgrader work. The 2017 upgrader shutdown was the only work that Husky awarded to Aluma. Aluma and BESC are sister companies, yes, but they are competitors and they do not collaborate. The 2018 upgrader shutdown work was new work awarded by Husky to BESC, and not ongoing work that was taken from Aluma and given to BESC. Since it was new work, Aluma had no control over it and could, therefore, not transfer it.

[38] BESC relied on *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048, 1988 CanLII 30 (SCC). In that case, a school board awarded contracts for janitorial services at its schools on an annual basis. The work was awarded first to a union contractor and subsequently to a non-unionized contractor. The Supreme Court of Canada ruled that a successorship did not exist in this situation because the school board was the person that transferred the work:

> *199 For the purposes of interpreting s. 45, the requirement of a relationship of control between the employer and the undertaking seems to me to lead inevitably to two conclusions. First, the undertaking which is alienated or operated by another must be that of the employer in respect of whom the certification is issued or with whom the collective agreement is concluded. Second, the alienation or agreement must occur between the previous and the new employer.*

[39] When a customer cancels a contract with one contractor and enters into a new contract with a different contractor, that does not result in a successorship:

> *222 I can see no difference between the situation of a businessperson who withdraws when his contract ends and one who terminates his operations because of financial difficulty. No one would maintain that a businessperson acquires the undertaking of a rival who closes down, simply because he takes over his former competitor's customers; there is no reason for holding otherwise when a contract is lost by a business which nevertheless continues to operate elsewhere. In both cases the relationship between the undertaking and the customer*

> *has ended and a successor who takes over the market by concluding a new contract with the customer in question, and who has no dealings with his predecessor through which he could acquire the components of the undertaking, is not subject to the application of s. 45.*

[40] In the alternative, even if the Board should find that the contract for the 2018 shutdown work was disposed of by Aluma to BESC, BESC argues that the transfer of that one contract is not sufficient to meet the requirement in section 6-18 of the Act that "a business or part of a business" be disposed of. For this argument it relied on several cases including *AUPE v Tri-Municipal Leisure Facility Corp*, 2002 CarswellAlta 1761 (ALRB):

> *27 It is well-established that labour boards will scrutinize dealings between related companies very closely in successorship cases: see Metropolitan Parking at pages 211-212 and Construction Workers Union, Local 63 v. Hartland Pipeline Services Ltd., [2001] Alta. L.R.B.R. 296 (Alta. L.R.B.) at para. 64. In the latter case, however, the Board noted that there must still be a disposition of some description before successor rights will flow. We would add that there must still be a transfer of a business or part of a business before a successorship can be found. Simply put, a transaction between related entities may require careful scrutiny and a somewhat less restrictive approach to the question of whether a successorship has taken place, but the fact of that close relationship cannot transform what is clearly not a transfer of a going concern into a successorship — and we find it does not do so here. (emphasis in original)*
>
> *. . .*
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> *29 The facts of this case are said to strike at the very purpose behind successorship legislation — to protect the continuity of statutory bargaining rights. But, it is not open to us to grant a successorship declaration simply because it might further the broader policy objectives underlying successorship legislation. In all cases, the Board must consider whether the specific elements of the statute are satisfied. Here, we find those elements have not been proven on the evidence before us, even when we take into account that the legislation must be given a broad and liberal interpretation.*

[41] With respect to the Carpenters' second argument, BESC states that it obtained its name and its goodwill from its parent, not from Brand Scaffold. Nothing was transferred from Brand Scaffold or Aluma to BESC,

Analysis and Decision

[42] Section 6-18 of the Act establishes two main prerequisites for the issuance of a successorship declaration:

- There must be a "disposal" from a unionized employer to another employer; and

- The disposal must be of a “business or part of a business”.

Subsection 6-18(1) of the Act defines disposal as “sale, lease, transfer or other disposition”.

[43] The case law relied on by all parties applies a consistent test for determining when a successorship has occurred, with the result that section 6-18 of the Act would apply and bind a successor business to a predecessor’s certification order. However, there is no one standard set of factors to be applied; each case must be decided on its own facts.

[44] The first “business” that the Insulators and Carpenters allege was disposed of is the upgrader shutdown work that Aluma performed for Husky in 2017 and BESC performed for Husky in 2018. Assuming for the moment that the Husky contract would qualify as a “business”, the Board must determine whether there was a disposition.

[45] In *Lester*, the Supreme Court of Canada noted that, to constitute a successorship, something must be relinquished from the first business and obtained by the second business.

> *66 Notwithstanding the broad discretion in labour boards to determine whether or not the mode of disposition constitutes successorship, the fact remains that in virtually all jurisdictions something must be relinquished by the predecessor business on the one hand and obtained by the successor on the other to bring a case within the section.*
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> *. . .*
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> *68 Case law from jurisdictions across Canada is to the same effect. While there are slight variations from province to province in terms of scope (i.e., some Acts speak only of disposition of a business whereas other Acts provide for disposition of a part of a business) a common theme throughout the jurisdictions is that something must be relinquished from the first business and obtained by the second.*
>
> *. . .*
>
> *78 But while the existence of related companies may justify a less restrictive approach to the question of whether or not successorship has occurred, the fact remains that corporate interrelationship without some evidence of disposition will not be sufficient to trigger the successorship provisions.*
>
> *79 The Newfoundland Labour Relations Board has until this case followed the same approach as other boards when addressing successorship in the construction industry. For example, in Re International Association of Machinists v. Professional Personnel Services Ltd. and C.P. Personnel Ltd. (Newfoundland Labour Relations Board, unreported, Sept. 1985) a unionized company had an airport security contract and later a non-unionized company was given the contract. Both companies were controlled and run by the same individual. The Board held that a disposition had not occurred and denied the successor rights application. The fact of*

> *common majority shareholdings and a possible relationship between the two companies was considered insufficient to invoke s. 89 because there must still be in fact a sale or other disposition.*
>
> *80 In United Brotherhood of Carpenters and Joiners v. N. D. Dobin Ltd. and Bradco Ltd. (Newfoundland Labour Relations Board, unreported without written reasons, March 1985 -- cited in dissenting opinion of the Board), a unionized and a non-unionized company were owned and run by the same principals, shared office space, personnel and expenses. The companies also shared equipment through inter-company rentals. The Board denied the union's s. 89 application because it found there was no disposition. One of the reasons for this finding was the fact that both companies were still active and ongoing enterprises.*
>
> *. . .*
>
> *86 I conclude that a finding of successorship based on common shareholdings and a common business enterprise is clearly insufficient on the established jurisprudence to bring the case within s. 89 of the Act. Nor is it sufficient to show that the same people own or work for both companies. What must be established is that the first company must have conveyed some aspect of the business to the second company.*

[46] The case law cited cautions the Board to take an expansive approach to the question of whether there was a disposition when, as here, there is a close relationship between the purported predecessor and successor companies. *Cana Construction*, for example, suggests that the Board consider whether there is evidence of: practical operational control; functional interdependence; a single guiding force in day-to-day operations; actual control through shareholdings. The Board has carefully considered these issues and found no evidence of any of them existing here. The evidence indicated that, even though AlumaSafway and BESC are sister companies, they are competitors and do not collaborate or even interact in their work. They bid competitively against each other. There is no functional integration or interdependence between them. In any event, corporate interrelationship without some evidence of a disposition is not sufficient to trigger the successorship provisions.

[47] Rick Moran is Aluma's General Manager for Central Alberta and the Lloydminster Upgrader. He gave evidence on behalf of Aluma at the hearing. The Board found Mr. Moran to be a particularly credible witness. Mr. Moran's evidence made it clear that Aluma did not relinquish anything. There was no identifiable disposition. The Insulators and Carpenters were disappointed that the upgrader shutdown work went to BESC in 2018. Aluma was equally disappointed. The Board accepts Mr. Moran's evidence that Aluma and BESC operate separately and compete for work, and that Aluma did not transfer anything to BESC. While the Insulators and Carpenters thought that Aluma could have tried harder to convince Husky to award the 2018 upgrader shutdown work

to it, Mr. Moran's evidence was that he did as much as he thought he could reasonably do without jeopardizing Aluma's relationship with Husky.

[48] The evidence indicates that no "disposal" happened. In 2016, Husky entered into a number of MSAs with companies it considered capable of performing work for it during its annual shutdowns, including Aluma and BESC. The signing of an MSA does not guarantee any work. For the 2017 shutdown, Husky awarded work to Aluma on the upgrader and to BESC on the refinery (the upgrader work being the more coveted). Due to issues with an Aluma non-unionized employee, its work did not go as smoothly as usual, or as smoothly as Husky expected. As a result, for 2018, Husky awarded the upgrader shutdown work to BESC and no work to Aluma.

[49] The Board heeds the caution in *NA Caisson* that:

> *The vital consideration for the Board is whether or not the effect of the transaction (whether it be a sale, transfer or other disposition) was to put the transferee into possession of the essential elements of a business. To make a finding of successorship, the issue is not so much the legal or technical nature of how the transfer took place but rather whether or not the Board is satisfied that the new owner acquired the essential elements of a business and that those business interests can be traced back to the business activities of the previously certified owner.*

In this case there was no "transaction" between Aluma and BESC. Further, the work in question did not constitute the "essential elements" of Aluma's business. The corporate connection alone is not sufficient to sustain a finding of successorship. Aluma did not relinquish a contract for the 2018 upgrader shutdown work – it never had one.

[50] *Monad* is not helpful to the Insulators and Carpenters here, despite the reference to the continuation of specific work being considered a significant factor supporting a finding of successorship. In that case there was a significant transfer of assets and a continuation of the industrial construction business by the successor company. In this case, the evidence indicated there was no transfer of assets, personnel or anything else from Aluma to BESC for the 2018 shutdown work or at any other time.

[51] In *Diogenes Investments*, the business running a cafeteria went bankrupt and the owner of the building that housed the cafeteria contracted with a different business to run the cafeteria. The Board did not find a successorship in that case, finding that the performance of a like function by another business entity is not sufficient to establish a successorship. There must be a transfer. The Board noted:

> *The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed but it did not do so.*[13]

[52] *Lester* noted another situation where a successorship application may be granted:

> *75 Successorship applications have also succeeded where it is established that because of the presence of the non-union company the union company is losing work, or the union company is wound down: see for example United Brotherhood of Carpenters & Joiners of America v. Cana Construction Co. (1984), 9 CLRBR (NS) 175 (Sask.); Doran Construction Ltd., Taggart Construction Ltd. and Taggart General Contractors Ltd.; Re Carpenters Union, Local 93, [1984] OLRB Rep.Aug. 1108 (Ont.); Gibraltar Development, supra, at p. 1108; Pinsent Construction Ltd. v. International Union of Operating Engineers, Local 904, supra.*
>
> *76 Review of numerous decisions in the construction industry makes it clear that in all cases where successorship was established either a central principal left the first company (such that even if the first company remains operational a part of the business may have been disposed of) or the first company is wound down or at least has suffered a decline in business because of the presence of the non-union company. However, where both companies remain fully operational and where principals continue to work for both companies, boards have not found successorship as there is no identifiable disposition: see, for example, Viandes Seficlo Inc. v. Union des Employés de Commerce (1984), 84 CLLC {PP} 14,047 (Que.); International Brotherhood of Electrical Workers v. Minas Electric Co. (1976), 77 CLLC {PP} 16,075 (N.S.); Labourers' International Union of North America v. Elmont Construction Ltd., [1974] OLRB Rep.June 342. To put it another way, there is nothing within the successorship provisions to bar an individual from owning or working for more than one company or to bar a company from operating union and non-union branches.*

[53] Aluma did not lose the upgrader work because of BESC's presence; it lost the work because of its own poor performance. There is no suggestion that Aluma is being wound down. They just lost one small contract. Both companies remain fully operational. The Board finds that there was no "disposal" as required by section 6-18 of the Act. Even if there was a disposal, the Work Authorization for the 2018 upgrader shutdown work cannot be characterized as a business or part of a business. To quote the Board in *Versa Services*, that small contract cannot be said to be "something of a coherent and dynamic nature, something which may enjoy a separate existence as a 'business'"[14].

[54] The second "business" that the Carpenters allege was disposed of was the right to the use of the name Brand. The Carpenters argue, on the one hand, that BESC is drawing on the

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[13] At page 44.
[14] At para 28.

reputation of Brand Scaffold and, on the other hand, that it is drawing on the reputation of the international company, BEIS Holdings Inc. It cannot be both. If BESC is drawing on the reputation of the international company, there is clearly no successorship. Alternatively, the evidence was clear that BESC took pains to distance itself from Brand Scaffold because of its poor reputation among past customers. There was no evidence that Brand Scaffold had a known and trusted name and reputation in Saskatchewan that was a valuable asset. The Carpenters did not provide any evidence from which the Board could reasonably infer that BESC, rather than Aluma, is the successor to Brand Scaffold. Applying all of the same tests to this argument brings the Board to the conclusion that there was no disposal of a business or part of a business as required by section 6-18.

[55] There was passing reference at the hearing to the issue of whether the shutdown work was construction work or maintenance work, and whether it was necessary for the Board to decide that issue. The Board is of the view that this is not an issue that needs to be decided for the determination of these applications.

[56] Accordingly, the applications of the Insulators and the Carpenters, to declare that a successorship exists, are dismissed.

[57] The Board thanks the parties for the comprehensive oral and written arguments they provided, which the Board has reviewed and found helpful. Although not all of the numerous arguments and authorities raised have been addressed in these Reasons, all were considered in making this decision.

[58] The remaining related applications will be placed on the July 2019 Motion Day agenda to determine next steps.

[59] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **4th** day of **June, 2019.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson