INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, Applicant v EDMONTON EXCHANGER & REFINERY SERVICES LTD., Respondent and NATIONAL MAINTENANCE COUNCIL FOR CANADA, Intervenor

LRB File No. 116-19; October 27, 2020
Chairperson, Susan C. Amrud, Q.C.; Board Members: Laura Sommervill and Shawna Colpitts

For International Brotherhood of Boilermakers:	Greg Fingas
For Edmonton Exchanger & Refinery Services Ltd.:	Glen Tardif
For National Maintenance Council for Canada:	Robert Blakely, Q.C.

Unfair Labour Practice Application – Alleged contravention of collective agreement – Dispute as to applicable collective agreement.

Participation Agreement signed by Allied Council on behalf of certified Union – Employer cannot choose to apply different collective agreement – Employer is bound by Participation Agreement it signed, that adopted project agreement as its collective agreement – Employer must comply with its duty to bargain in good faith.

Adverse inference drawn against Intervenor for failing to call evidence.

At Union's request, application for Order determining whether Employer engaged in unfair labour practice deferred pending completion of grievance process under project agreement.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On May 8, 2019, the International Brotherhood of Boilermakers ["IBB"] filed an Unfair Labour Practice Application against Edmonton Exchanger & Refinery Services Ltd. ["Employer"][1]. In addition to an Order determining that the Employer has been engaged in an unfair labour practice, the IBB asked for an Order "determining the collective agreement binding upon the Respondent Employer".

[1] LRB File No. 116-19.

[2] On November 4, 2019, the Board granted the National Maintenance Council for Canada ["NMC"] standing as a direct interest intervenor in this matter, to provide evidence and argument with respect to the National Maintenance Agreement for Saskatchewan ["NMA"][2].

[3] The issue in this case revolves around maintenance work performed by the Employer at the Husky Upgrader at Lloydminster, Saskatchewan, and which collective agreement applies to that work.

Evidence:

[4] Three witnesses provided evidence: Cory Channon and Kentford Raeburn Oliver on behalf of the IBB and Glen Tardif on behalf of the Employer.

[5] A Certification Order was granted by the Board on May 6, 1991 naming the IBB as the union representing the boilermakers, boilermaker apprentices and boilermaker foremen employed by the Employer.[3] The Union Local for Manitoba and Saskatchewan is Lodge 555. The IBB and Lodge 555 work closely together.

[6] The Saskatchewan and Northwest Territories Allied Council ["Allied Council"] negotiated a Project Agreement with the then-prime contractor performing maintenance work at the Husky Upgrader, LML Industrial Contractors Ltd., effective September 1, 2014 to April 30, 2018 ["LML Agreement"][4]. Article 30:01 states that the Agreement continues in full force and effect from year to year after April 30, 2018, subject to the right of either party to give notice to bargain its revision. The LML Agreement states that it is entered into with "those INTERNATIONAL UNIONS OF THE AFL-CIO who are affiliated to" the Allied Council[5]. It then names Lodge 555 as one of those unions, even though the IBB is the International Union, and the IBB's evidence indicated that it is affiliated with the Allied Council.

[7] The Employer initially applied the LML Agreement to its boilermaker work at the Husky Upgrader by verbal agreement. For the work to be performed by the IBB/Lodge 555 members in 2017, the Employer negotiated an amendment to the wage rate in the LML Agreement. This was

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[2] *National Maintenance Council for Canada v International Brotherhood of Boilermakers and Edmonton Exchanger & Refinery Services Ltd.*, 2019 CanLII 107117 (SK LRB).
[3] LRB File No. 079-91.
[4] Exhibit U-1.
[5] At page 4.

confirmed in writing through a letter from Channon on behalf of the IBB and Lodge 555 to the Allied Council, and then by a letter from the Allied Council to the Employer.[6]

[8] In 2018 the Employer negotiated an amendment to the overtime provisions in the LML Agreement for work to be performed by the IBB/Lodge 555 members, confirmed in a letter from Channon on behalf of the IBB and Lodge 555 to the Allied Council.[7] The Employer also signed a Participation Agreement with the Allied Council in which the Employer agreed to be bound by the LML Agreement for "all work performed during the spring 2018 shutdown at the Husky Lloydminster Upgrader"[8].

[9] In 2019 the Employer did not attempt to negotiate amendments to the LML Agreement for the IBB/Lodge 555 members. Instead, on February 13, 2019 the Employer sent an email to Lodge 555 confirming that it was using the NMA for the Husky Upgrader work it was then undertaking.[9]

[10] A collective agreement to apply to maintenance work in Saskatchewan was first considered by the NMC in 2013. The IBB filed notes of a March 5, 2013 meeting of the NMC's General Presidents' Maintenance Committee for Canada ["GPMC"] entitled "Saskatchewan Experience Review", that included the following comments under the heading Province Wide Maintenance Agreement:

> - *The Committee representatives and the Local Union representatives discussed the request received by the GPMC office to consider the creation and implementation of a province wide National Maintenance Agreement, similar to the one currently in place in Alberta. Consensus amongst those in attendance was to move forward with this initiative providing there were legitimate opportunities in the maintenance industry which are not presently captured by any existing agreements.*
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> - *The GPMC committed to canvassing existing maintenance contractors to ascertain if there are existing maintenance opportunities which can be secured. Should this prove to be positive the Committee will develop a draft Agreement and meet with the Local Union representatives to review and finalize.*[10] (emphasis added)

[11] By letter dated October 15, 2013[11] GPMC wrote to its members to report on progress on this matter, which it described as follows:

> *During discussions at the annual Saskatchewan Experience Review meeting held earlier this year in Regina, representatives from the Local Unions and representatives from the*

[6] Exhibits U-4 and U-5.
[7] Exhibit U-6.
[8] Exhibit U-3.
[9] Exhibit U-16.
[10] Exhibit U-8.
[11] Exhibit I-2.

> *General Presidents' Maintenance Committee agreed to examine the possibility of creating a province-wide National Maintenance Agreement for Saskatchewan. Through the discussion process the participants indicated that there may be some opportunities for our maintenance contractors to secure both short term and long term maintenance contracts at various facilities which are not currently covered by existing maintenance agreements or currently being executed under the terms and conditions of the existing construction agreements.*
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> *A small Sub-Committee has been working on this initiative and has established a working agreement to be reviewed by the Committee Members and Local Union Representatives prior to discussions/bargaining with interested signatory contractors.*
>
> *Chairman Tozer has scheduled a meeting for Wednesday November 6, 2013 commencing at 9:00 am in the Qu'Appelle room at the DoubleTree Hotel (1975 Broad Street, Regina SK) to review the aforementioned.* (emphasis added)

[12] The GPMC's notes from that November 6, 2013 meeting[12] ["November 6, 2013 notes"] commenced with the following comment:

> - *As a result of our SK experience review the parties committed to look at the establishment of a province wide NMA Agreement to capture new maintenance work opportunities within the province* (emphasis added)

The last item under the heading "Local Union Issues" stated:

> *SK Power – no agreement in place – if there is an existing maintenance agreement in place they will not use the NMA ---*

[13] The NMA[13] was successfully negotiated and signed, became effective January 1, 2015 and was to remain in full force and effect until December 31, 2016 and from year to year after December 31, 2016 unless written notice to terminate or modify it was filed by either party at least 90 days prior to the expiry date. The NMA indicates that it is an agreement between the employers described in Appendix B (which includes the Employer) and the unions who compose the NMC (which includes the IBB), for "Maintenance, Repair, Revamp, Renovation and Upkeep of Various Operating Facilities in the PROVINCE OF SASKATCHEWAN as agreed by the Council and specified in Appendix C"[14]. Appendix C – Geographical Scope says "The Agreement applies to Projects in the Province of Saskatchewan". There is no dispute that the NMA was in effect with respect to the IBB in February 2019. The issue is whether it applies at projects with pre-existing maintenance agreements.

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[12] Exhibit U-9.
[13] Exhibit U-11.
[14] Cover page and page 4.

[14] At the October 27 & 28, 2015 meeting of the GPMC it was noted that no hours had been reported under the NMA.[15] The Minutes of the GPMC annual general meeting on November 27, 2018 ["November 27, 2018 minutes"] include the following note:

> *The Committee discussed whether or not it was time to transition in the province of Saskatchewan and use the existing Saskatchewan NMA for all maintenance work. The consensus was that there were no issues using the NMA for work at Husky and any of the Sask Power sites. Work at these sites has been historically executed under the Allied Council and Sask Power Agreements.*[16]

No representative of the IBB was present when this discussion occurred. The NMC called no witnesses, therefore the Board has no evidence about how this cryptic comment is to be interpreted.

[15] Glen Tardif, Vice President of Operations for the Employer, gave evidence on its behalf. He testified that in years prior to 2019 the Employer paid IBB members in accordance with the LML Agreement because Husky encouraged all contractors to apply that Agreement. The only Participation Agreement[17] it signed applied only to the spring 2018 shutdown.

[16] He testified that he was the president of the contractors' NMC bargaining committee for Saskatchewan and never heard any mention of an exclusion for Husky Upgrader or SaskPower work during negotiation of the NMA. In reference to the comment in the November 6, 2013 notes that "if there is an existing maintenance agreement in place they will not use the NMA", he indicated that these were the unions' notes of their discussion. That conversation did not take place in the contractors' room. They were in separate rooms.

[17] Tardif advised that it was Husky's decision to use the NMA for the February 2019 maintenance work[18]. After the February 2019 job, the Allied Council and NMC each pitched their agreements to Husky. At Husky's request he attended a June 26, 2019 meeting where this occurred. Channon was not in attendance at the meeting, but sent a letter[19] that was read out at the meeting, voicing the IBB's strong opposition to the Employer's use of the NMA at the Husky Upgrader. According to Tardif, following this meeting Husky decided to require its contractors to use the NMA. For all work since February 2019 the Employer has applied the NMA to the maintenance work it undertakes at the Husky Upgrader.

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[15] Exhibit U-12.
[16] Exhibit U-15.
[17] Exhibit U-3.
[18] Exhibit E-1: February 14, 2019 email Husky to Employer.
[19] Exhibit U-17.

Argument on behalf of the IBB:

[18] In the IBB's view, since construction of the Husky Upgrader was completed in the early 2000s, the LML Agreement was used by unionized contractors, until 2019. With respect to the Employer, this arrangement was reduced to writing in 2018.

[19] With respect to the issue of whether the Participation Agreement continued to apply after the spring 2018 shutdown, the IBB relied on *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc.*[20] ["*URSU*"]. According to the IBB, it does not matter who originally signed the LML Agreement. It came to apply between these parties. As in *URSU*, this Employer entered into a bargaining relationship voluntarily. The Participation Agreement and manpower requisitions show that the IBB and the Employer agreed to be bound by the LML Agreement. There was a longstanding bargaining relationship by handshake between the Employer and the IBB; the Participation Agreement put it into writing. The LML Agreement remains binding and in force from year to year by virtue of section 6-39 of the Act. It remains in place until bargaining occurs.

[20] The Employer's position, that it can choose which agreement to apply to particular work, is contrary to clauses 6-39(1)(a) and (b), subsection 6-39(2) and clause 6-41(1)(c) of the Act. The IBB relies on *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v AlumaSafway*,[21] ["*AlumaSafway*"] in support of this position:

> *The Local is the exclusive bargaining agent, and unlike in many voluntary recognition cases, AlumaSafway is bound by the existing certification orders. AlumaSafway, through its representative, ought to have been aware of the Local's disagreement with a supposed transition to the NMA. In light of its bargaining relationship and its awareness of this controversy, AlumaSafway should not be entitled to rely on a Memorandum of Understanding that was signed under false pretenses. It appears that AlumaSafway has attempted to circumvent the Local by negotiating directly with the International. In doing so, it should not be permitted to unilaterally choose its negotiating partner, in denial of its bargaining relationship, and based on whichever terms are more favourable to its business model.*

[21] The NMA does not override the LML Agreement. The NMA should be interpreted to allow the LML Agreement to remain in effect.

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[20] 2017 CanLII 44004 (SK LRB), paras 54 – 62.
[21] 2019 CanLII 120651 (SK LRB) at para 105.

[22] The NMA says it applies at "various" operating facilities "as agreed by the council" and "specified" in Appendix C. No facilities are specified in Appendix C. Accordingly, it should be interpreted in accordance with the parties' intention. If the parties had intended that the Agreement apply to all maintenance projects, it would not have used this wording. No evidence was provided of NMC's intention. Tardif said he could not remember a discussion of scope. The only evidence respecting the interpretation is:

a. *The notes from the Experience Review among Saskatchewan's building trade unions which gave rise to the development of the NMA: Exhibit U-8 (Binder Tab 6), GPMC Experience Review Notes at p. 4:*

> *The Committee representatives and the Local Union representatives discussed the request received by the GPMC office to consider the creation and implementation of a province wide National Maintenance Agreement, similar to the one currently in place in Alberta. Consensus amongst those in attendance was to move forward with this initiative providing there were legitimate opportunities in the maintenance industry which are not presently captured by any existing agreements.*

b. *The NMC's own correspondence immediately preceding the negotiation of the NMA: Exhibit I-2 (Binder Tab 6), Correspondence of S.M. Smillie to Members of the General Presidents' Maintenance Committee of Canada:*

> *Through the discussion process the participants indicated that there may be some opportunities for our maintenance contractors to secure both short and long term maintenance contracts at various facilities which are not currently covered by existing maintenance agreements or currently being executed under the terms and conditions of the existing construction agreements.*

c. *The GPMC's notes from bargaining with participating contractors, in which the following union statement was met with no employer rebuttal:*

> *SK Power – no agreement in place – if there is an existing agreement in place they will not use the NMA- - -*

d. *The testimony of Cory Channon, consistent with all of the documentary evidence presented, to the effect that:*

> *i. "everyone" (including himself and the local lodges) stated and took the bargaining position the NMA was not to infringe on the existing maintenance sector, and*
>
> *ii. there was no disagreement or pushback from the contractors as to this position in the course of bargaining.*[22]

[23] The only reasonable interpretation of the November 6, 2013 notes is that the contractors knew the unions' intention was that the NMA would not apply at facilities where an existing maintenance agreement was in place.

[22] Brief of Argument on behalf of the Applicant, IBB, at para 28.

[24] The NMA came into effect January 1, 2015, and was not applied at sites with existing agreements. The November 27, 2018 minutes confirm this. No agreement to change the NMA's scope exists.

[25] The Board should draw an adverse inference against the NMC for calling no evidence, when the whole purpose of its intervention was to provide evidence about the negotiation of the NMA.

[26] The IBB is not asking the Board to decide at this time that an unfair labour practice occurred. It asks that an Order be made determining whether the LML Agreement continues to apply, and deferring a decision on the unfair labour practice application until the grievance process is concluded.

Argument on behalf of the Employer:

[27] The Employer argues that, since it signed the NMA, that is the collective agreement that applies to it. On its face the NMA does not exclude maintenance work at the Husky Upgrader.

[28] It did not sign the LML Agreement. It only applied the LML Agreement in 2018. Therefore, it is not bound by the LML Agreement.

[29] For the small project it performed in February 2019 and since that date, it has applied the NMA, at Husky's direction. It is obligated to comply with Husky's direction, otherwise it will not receive any work from Husky.

Argument on behalf of the NMC:

[30] The Certification Order with respect to this Employer is with the IBB, not Lodge 555. Lodge 555 is not a party or a witness in this matter. In cross-examination, Channon agreed that the IBB and Lodge 555 are separate entities.[23]

[31] The LML Agreement cannot override the NMA. In the LML Agreement, "Company" means LML Industrial Contractors Ltd. Article 1 of the LML Agreement says it applies to employees of LML Industrial Contractors Ltd., not every employer, and LML Industrial Contractors Ltd. is no longer working at the Husky Upgrader. There is no logic in requiring the Employer to use an

[23] *Universal Workers Union, Labourers' International Union of North America Local 183 v. Romac Heating Co. Ltd.*, 2002 CanLII 26518 (ON LRB*); Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 (CanLII), [2010] 1 SCR 132.

agreement signed by a contractor that is no longer on the site. There is no evidence to show that other contractors signed the LML Agreement.

[32] The Employer never voluntarily recognized the LML Agreement; it just agreed to apply some of its terms for a fixed period. The Participation Agreement was a time limited agreement. It is not clear what agreement it purports to adopt. It was signed with Lodge 555 when the IBB was the certified union.

[33] The decision in *URSU* is not comparable to this matter. It was based on the four decades of bargaining between the parties. This Employer is certified. The LML Agreement is a voluntary agreement that does not supersede the NMA or the Certification Order.

[34] The NMA was signed by the IBB. It was in effect in February 2019. It has no exclusions or reservations on its face. There are no exclusions in Appendix C. Tardif testified that nothing respecting exclusions was presented to the contractors during negotiation of the NMA. No evidence was provided of an express or implied undertaking that the NMA cannot apply to work at the Husky Upgrader.

[35] The NMA does not exclude work at the Husky Upgrader. Nowhere in the NMA does it indicate that it only applies to projects that did not already have an agreement in place. On cross-examination, Channon agreed there is nothing in the NMA that says the Employer cannot use it for work at the Husky Upgrader. The IBB is asking the Board to read down the NMA, and there is no basis on which to do that.

[36] The NMC agrees with the Employer that it is the Employer's choice which agreement to use. The Employer can choose the NMA because it says it applies throughout the province. Appendix C says what it says; normal interpretation rules apply. The evidence respecting bargaining is clear. Tardif said an exclusion for Husky was not discussed with the contractors. The November 6, 2013 notes do not prove that the contractors were made aware of the unions' intention. Based on the wording of Appendix C, at most the Board should interpret the unions' intention as a bargaining proposal that was not agreed to by the contractors.

[37] The comment in the November 27, 2018 minutes, that the NMA was not historically used at all sites, does not mean it cannot be used. The IBB signed the NMA and is bound by it.

[38] Section 6-41 of the Act, which provides that a collective agreement is binding on its signatories, applies to the IBB. The NMA is an agreement binding on the IBB. The IBB is bound

to comply with the agreement it signed. The IBB reviewed the NMA then signed it. Its notices to bargain on termination show it has continued to use the NMA.[24]

[39] The NMC argues that *AlumaSafway* is not comparable to this matter and should be disregarded by the Board. It cited a number of factual differences between the two cases. For example, in *AlumaSafway*, the Local was the certified union; here the Local is not the certified union. The agreement in question in *AlumaSafway* was negotiated by the Construction Labour Relations Association of Saskatchewan Inc. on behalf of its member contractors; LML Industrial Contractors Ltd. was not representing other contractors when it negotiated and signed the LML Agreement. Where the facts in the two cases appear to line up, the NMC argues that the witness in *AlumaSafway* was mistaken in his evidence.

[40] The NMC relied on *URSU*[25] to argue that the onus of proof in this matter is on the IBB. The IBB has not provided the necessary clear, convincing and cogent evidence that the Employer has engaged in an unfair labour practice.

[41] The NMC also relied on *International Brotherhood of Electrical Workers, Local 2038 v Waiward Steel LP*[26] ["*Waiward*"]:

> *[78] According to Waiward, IBEW has the onus to prove that Waiward and IBEW reached a voluntary recognition agreement. Waiward argues further that if the evidence of such an agreement is ambiguous and not sufficiently clear, convincing and cogent to convince the Board that Waiward voluntarily recognized IBEW, then IBEW's application must be dismissed.*
>
> *[79] The Board agrees that the case law is clear that, in demonstrating that the respondent committed an unfair labour practice, the applicant is required to present evidence that is "sufficiently clear, convincing and cogent". If this standard is not met, then the application should be dismissed.*

[42] The IBB, it argues, has not proven that the Participation Agreement is a voluntary recognition agreement. The IBB did not prove that it does not need to honor the agreement it signed.

[43] The NMC argues that the IBB's request, that the Board draw an adverse inference against it for calling no evidence, is a red herring. The NMC chose to call no evidence because it was content with the evidence. It argues that no other evidence could have been produced that was

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[24] Exhibits I-8 (letter dated November 19, 2019) and I-11 (letter dated September 30, 2019).
[25] At paras 85 and 86.
[26] 2019 CanLII 57388 (SK LRB).

not provided by the IBB. The IBB entered the NMC's documents as exhibits. There was no need to call evidence, because the IBB did not prove its case.

[44] The NMC is asking for a declaration that the NMA operates throughout Saskatchewan.

Relevant Statutory Provisions:

[45] The parties referred the Board to numerous provisions of *The Saskatchewan Employment Act* ["Act"]:

> ***Interpretation of Part***
> *6-1(1) In this Part:*
>
> > *(d) "collective agreement" means a written agreement between an employer and a union that:*
> >
> > > *(i) sets out the terms and conditions of employment; or*
> > >
> > > *(ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees;*
> >
> > *(k) "labour organization" means an organization of employees who are not necessarily employees of one employer that has collective bargaining among its purposes;*
> >
> > *(p) "union" means a labour organization or association of employees that:*
> >
> > > *(i) has as one of its purposes collective bargaining; and*
> > >
> > > *(ii) is not dominated by an employer;*
>
> ***Capacity of unions***
> *6-3 For the purposes of this Act, every union is deemed to be a person.*
>
> ***Period for which collective agreements remain in force***
> *6-39(1) Except as provided in this Subdivision, every collective agreement remains in force:*
>
> > *(a) for the term provided for in the collective agreement; and*
> >
> > *(b) after the expiry of the term mentioned in clause (a), from year to year.*
>
> *(2) Subject to subsection (3) and section 6-40, a collective agreement is deemed to have a term of one year after the date on which it becomes effective if the collective agreement:*
>
> > *(a) does not provide for a term;*
> >
> > *(b) provides for an unspecified term; or*
> >
> > *(c) provides for a term of less than one year.*
>
> ***Parties bound by collective agreement***
> *6-41(1) A collective agreement is binding on:*

(a) a union that:

(i) has entered into it; or

(ii) becomes subject to it in accordance with this Part;

(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and

(c) an employer who has entered into it.

. . .

(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

Unfair labour practices – employers
6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

Powers re hearings and proceedings
6-111(1) With respect to any matter before it, the board has the power:

(r) to decide any question that may arise in a hearing or proceeding, including any question as to whether:

(i) a person is a member of a union;

(ii) a collective agreement has been entered into or is in operation; or

(iii) any person or organization is a party to or bound by a collective agreement;

Analysis and Decision:

[46] The onus of proof is on the IBB[27]. It must satisfy the Board, with clear, convincing and cogent evidence, that the LML Agreement is binding on the Employer.

[47] The first issue the Board will address is the NMC's argument that the LML Agreement is not binding on the Employer and the IBB because it was signed by Lodge 555, and not by the IBB. The cases relied on by the NMC do not, as it suggests, stand for the rule that a parent union and a local union are always to be treated as separate entities. As *Fullowka v Pinkerton's of Canada Ltd.*[28] stated:

[27] *URSU*, paras 85 and 86; *Waiward*, paras 78 and 79.
[28] 2010 SCC 5 (CanLII), [2010] 1 SCR 132 at para 119.

> *There is no doubt that union locals may have an independent legal status and obligations separate from those of their parent national unions. Whether they do depends on the relevant statutory framework, the union's constitutional documents and the provisions of collective agreements.*

[48] Are the obligations of Lodge 555 and the IBB so different in this matter that the Board should treat them as separate entities with separate obligations? Many of the exhibits filed in this matter show that the IBB, Lodge 555 and the Employer treated the IBB and Lodge 555 as interchangeable. The evidence shows that, in this situation, they were not operating as separate entities with separate obligations. However, even if the Board had found otherwise, whether or not the IBB and Lodge 555 are separate legal entities and/or have separate obligations is irrelevant. When the evidence is examined closely, it is clear that the Participation Agreement was signed by the Allied Council on behalf of the IBB.

[49] This is not a situation like *AlumaSafway* where the employer attempted to circumvent the certified Local by negotiating directly with the International. Here the evidence[29] shows that the negotiations in 2017 and 2018 involved both the IBB and Lodge 555. They worked together in arriving at a collective agreement with the Employer. The Allied Council signed the Participation Agreement on their behalf. The fact that the LML Agreement names Lodge 555 as the affiliated International Union is factually inaccurate, inconsistent with the evidence, and a red herring. Channon confirmed that the Participation Agreement, which adopted the terms and conditions of the LML Agreement, was signed by the Allied Council on the IBB's behalf.

[50] Therefore, the Board does not accept the suggestion that the Employer was voluntarily recognizing Lodge 555 and that this is a situation similar to *URSU*. Even if the Board was to have found that this case involved voluntary recognition of Lodge 555 by the Employer, *AlumaSafway* made the following findings, which the Board adopts in this matter:

> *[92] The more appropriate question is whether the unfair labour practice provisions, and clause 6-62(1)(r) specifically, apply to agreements in circumstances involving voluntary recognition. In Saskatchewan, there is a lack of definition around the full extent of legal status accorded to voluntary recognition agreements. But, for the following reasons, the Board finds that clause 6-62(1)(r) does apply to circumstances involving voluntary recognition.*
>
> *. . .*
>
> *[96] The Board adopts the reasoning set out in CUPE such that clauses 6-1(1)(d) (definition of collective agreement), 6-1(e) (definition of collective bargaining), and 6-1(p) (definition of union), and section 6-39 (period in force) are "elastic enough to include*

[29] Exhibits U-4 and U-6.

> *collective agreements between a voluntarily recognized union and an employer". As the Board in that case explained, "none of [these provisions] reference a certification Order nor stipulate that the union must be certified as the exclusive bargaining agent of the employees as a pre-condition of their operation".*
>
> *[97] Further to section 6-7, every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to Part VI or by an order of the Board. According to section 6-41, a collective agreement is binding on a union that has entered into it and on an employer who has entered into it. A collective agreement means a written agreement between an employer and a union that sets out the terms and conditions of employment; or contains provisions respecting rates of pay, hours of work or other working conditions of employees.*

[51] NMC suggests that the Board disregard the Participation Agreement because it did not state to which collective agreement it was referring. The Board rejects this argument. The Participation Agreement is entitled "Project Agreement for a Maintenance Service Contract for the Husky Lloydminster Upgrader in Lloydminster Saskatchewan", which is the name of the LML Agreement. No evidence was provided of any confusion among the parties as to which collective agreement they were adopting when they signed the Participation Agreement.

[52] Next the NMC argues that the Board should disregard the Participation Agreement because it was time limited. The Board does not accept this argument. The Act states, in section 6-39, that every collective agreement remains in force for the term provided for in the collective agreement and, after the expiry of that term, from year to year. Subsection 6-41(6) of the Act provides that if there is any conflict between a provision of a collective agreement and a requirement of Part VI, the requirement of Part VI prevails. The Participation Agreement, through its adoption of the LML Agreement, meets the criteria set out in clause 6-1(1)(d) and is therefore a collective agreement. Accordingly, the Participation Agreement remains in force and continues to bind the parties unless and until they subsequently negotiate a different collective agreement.

[53] The Employer cannot just choose to use a different collective agreement. If it wanted to apply different terms to the IBB members' work (whether at its own initiative or at Husky's urging) it cannot just impose new terms, it must bargain them. Allowing the Employer to unilaterally change the terms and conditions of employment of its unionized employees would be contrary to its duty to bargain in good faith.

[54] The Employer and the IBB worked under the terms and conditions of the LML Agreement for a number of years by oral agreement, and then committed this arrangement to writing in 2018. The Employer adopted the LML Agreement as its collective agreement with the IBB. It negotiated amendments to the Agreement in 2017 and 2018. The Participation Agreement and manpower

requisitions[30] show that the IBB and the Employer agreed to be bound by the LML Agreement. It does not matter that the Employer did not sign the LML Agreement; it signed the Participation Agreement, thereby adopting the terms and conditions of the LML Agreement as its collective agreement with the IBB.

[55] Next, the Board will consider the arguments of the Employer and the NMC that the NMA should be interpreted to override and supplant the Participation Agreement. The Board agrees with the IBB that even though a specific exception for sites with pre-existing agreements was not written into the NMA, its application must be interpreted in that manner. The cover page confirms that it was not intended to apply to maintenance of all facilities in Saskatchewan, but only to "various" facilities "specified" in Appendix C. The NMC was given an opportunity to provide the Board with evidence about why these words were chosen for the title to this document, but it declined to do so.

[56] How the NMA was applied supports the IBB's interpretation of the scope of the NMA. It came into effect January 1, 2015, but was not applied to sites with pre-existing agreements. The evidence indicated that following its adoption, the NMA was used with respect to maintenance work in potash and at the Regina Co-op Upgrader. However, it was not applied by the Employer and the IBB at the Husky Upgrader. Instead, they continued to apply the LML Agreement as their collective agreement. They negotiated amendments to it that the IBB adopted by letters dated November 14, 2016 and August 9, 2018, long after the NMA was signed. The Employer signed the Participation Agreement April 2, 2018, providing written confirmation that it considered the LML Agreement to continue to be the collective agreement that applied to its work at the Husky Upgrader. This approach supports the IBB's argument that there was an understanding that the NMA did not apply to work, like that at the Husky Upgrader, where there was already a site specific pre-existing collective agreement.

[57] The suggestion in the November 27, 2018 minutes, that there was a consensus to transition to the NMA, stands in direct contradiction to the IBB's evidence. The NMC provided no evidence about what that comment meant. The interpretation proposed by the IBB, that this meant steps could be taken to change the scope of the NMA, is consistent with the actions of the IBB and the Employer between 2015 and 2019. As the IBB pointed out, no negotiations have been undertaken since that meeting to change the NMA's scope.

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[30] Exhibits E-2 and U-22.

[58] The NMC relied on Tardif's assertion that the exclusion of the Husky Upgrader from the scope of the NMA was not discussed with the contractors. The evidence, however, shows clearly that the NMC was aware that this was the unions' position. It cannot rely on its own failure to provide evidence to justify its interpretation of the NMA.

[59] The NMC was granted standing as a direct interest intervenor in this matter, to provide evidence and argument with respect to the NMA, on the basis that:

> *The Board is satisfied that the NMC will bring a perspective to the issues surrounding the NMA that the parties will not bring, and accordingly will be of assistance to the Board in deciding the Main Application.*[31]

[60] The NMC chose not to provide any evidence, stating in argument that the IBB had entered the evidence necessary for the determination of this matter. The Board disagrees. The interpretation of many of the NMC's documents is at the core of this matter. The Board received evidence supporting the IBB's interpretation, but no evidence supporting the alternative interpretation that the NMC is urging in its argument. The Board agrees with the IBB's argument that this absence of evidence must be interpreted against the NMC. In particular, no alternative explanation or interpretation of the November 6, 2013 notes, the November 27, 2018 minutes or the NMA's title page and Appendix C was offered by the NMC, and these are its documents. The Board therefore draws an adverse inference against the NMC and presumes its evidence would not have supported its arguments.

[61] The Employer justified its actions by arguing that, if it did not apply the NMA to the Husky Upgrader work, it would lose that work to a non-unionized contractor. That argument does not justify its failure to engage in collective bargaining with the IBB. The evidence indicates that in 2017 and 2018, the IBB agreed to modifications to the terms and conditions of the LML Agreement, for the purpose of assisting the Employer to retain the Husky Upgrader work. No explanation was provided as to why the Employer did not take this same approach in 2019 and instead failed to comply with its duty to bargain in good faith.

[62] The Board echoes the following statement in *URSU*:

> *Part VI is intended to govern how all manner of industrial relations are to be conducted in Saskatchewan. Its objective is to encourage and enhance stable labour-management*

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[31] *National Maintenance Council for Canada v International Brotherhood of Boilermakers and Edmonton Exchanger & Refinery Services Ltd.*, 2019 CanLII 107117 (SK LRB) at para 23.

> *relationships, and to that end a paramount principle enshrined in Part VI is that all parties should comply with their statutory duties to bargain in good faith.*[32]

The Board will not allow the Employer to ignore its statutory duty to bargain in good faith.

[63] Accordingly, with these Reasons the Board will issue an Order providing that:

- The Employer is bound by the terms and conditions of the LML Agreement (as amended by agreement of the IBB and the Employer) with respect to its work at the Husky Upgrader.

- The IBB's application for an Order determining whether the Employer has engaged in an unfair labour practice is, at its request, deferred until the grievance process pursuant to the LML Agreement is concluded.

- This Panel will remain seized with this matter to hear further submissions from the parties with respect to the unfair labour practice application should there be outstanding issues remaining between them that are not resolved by the grievance process.

[64] The Board thanks the parties for their helpful submissions. All were considered in reaching this decision.

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

DATED at Regina, Saskatchewan, this **27th** day of **October, 2020.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson

[32] At para 56.