

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), Applicant v VARSTEEL LTD. and EVRAZ INC. NA CANADA, Respondents

LRB File No. 180-20; October 29, 2021

Chairperson, Susan C. Amrud, Q.C.; Board Members: Shawna Colpitts and Laura Sommerville

For United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial
and Service Workers International Union:

Heather M. Jensen

For Varsteel Ltd.:

Tom Waller and Jessica Waller

Application for Employer Successorship granted – Successorship occurred in 2014 when Varsteel purchased business from Evraz as a going concern – Temporary arrangement to have Evraz employees carry out work until Varsteel moved business to its own premises and hired its own workers does not prevent there from being a successorship.

Application for amendment of Certification Order – Over six years after successorship occurred, Varsteel moved its business to its own building – Evidence does not establish that this was a different business – Certification Order to be amended to reflect current geographic location of Varsteel’s businesses – All affected employees to be made whole of all losses as a result of Varsteel’s failure to recognize Union and apply Certification Order and collective agreement.

Representational vote not required – None of the circumstances requiring a representational vote on a successorship exists here – Successorship occurred over six years ago – Representational vote not required when business moves its location or updates its equipment.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson:** Prior to June 26, 2014, Evraz Inc. NA Canada [“Evraz”] operated a cut-to-length business that cut large steel plates from coils of rolled steel. On that date it entered into a Purchase Agreement and an Operating and Support Agreement [“OSA”] with Varsteel Ltd. [“Varsteel”], providing for Varsteel to take over that business. On December 4, 2020 the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) [“Union”] filed an Application for

Employer Successorship and Application to Amend Certification Order with respect to that transaction.

[2] The OSA was entered into evidence. It includes a number of provisions that are critical to understanding and analyzing the transaction entered into between Evraz and Varsteel. The definitions of note are as follows:

“Business” means the business to be carried on by Varsteel using the Purchased Assets at the Licensed Premises.

“Evraz Representative” means the person designated by Evraz from time to time as being the intermediary between the Varsteel Personnel and Evraz Personnel and to accept instructions from the Varsteel Representative regarding the conduct of the Business and the utilization and duties of the Evraz Personnel.

“Varsteel Representative” means the person designated by Varsteel from time to time as being the intermediary between Varsteel Personnel and Evraz Personnel and to deliver instructions to the Evraz Representative regarding the conduct of the Business and the utilization and duties of the Evraz Personnel.

[3] Section 3.1 of Article 3, Retainer, reads as follows:

Varsteel hereby retains Evraz to provide the services of Evraz Personnel to act in accordance with instructions delivered from the Varsteel Representative to the Evraz Representative, and to assist Varsteel in the conduct of the Business in accordance with this Agreement, during the Term.

[4] Article 3 then goes on to explain that Evraz agrees to make available the services of its personnel who are members of the Union to perform work with respect to the cut-to-length business, but that those personnel will continue to be employees of Evraz. In other words, the employees were not transferred to or employed by Varsteel in conjunction with the transfer of the equipment. As part of its purchase of the business Varsteel contracted with Evraz for the provision of employees. The persons performing the work were Evraz employees and continued to be Evraz employees throughout the term of the OSA.

[5] Section 3.2.5 of the OSA provides as follows:

Concurrent with the execution and delivery of this Agreement, Varsteel shall deliver to Evraz, a form of acknowledgment and agreement satisfactory to Evraz, whereby Varsteel acknowledges and agrees that the sale by Evraz of the Purchased Assets to Varsteel may constitute the disposal of a business or part of a business within the meaning of the Saskatchewan Employment Act and other Applicable Laws.

[6] An Acknowledgment to that effect was signed by the President of Varsteel, dated “the ____ day of June 2014”.¹

[7] Article 4, Occupancy, indicates in section 4.1 that “Evraz hereby grants to Varsteel a license to use the Licensed Premises during the Term for the carrying on of the Business”. Section 4.4 indicates that “Varsteel shall occupy the Licensed Premises at its own risk”, and requires Varsteel to procure insurance policies covering its use of Evraz premises.

[8] Section 5.4, Products, also emphasizes that it is Varsteel that will be carrying on the cut-to-length business following the execution of the OSA:

As Evraz Personnel shall be acting at the direction of the Varsteel Representative and Varsteel Personnel, in no event shall Evraz be liable for any insufficient or defective product produced with the Purchased Assets acquired by Varsteel under the Purchase Agreement or for any delays in delivery that may occur not due to the fault of Evraz, provided that Evraz has met the standard set out in Section 5.4.

[9] In accordance with the OSA, the Evraz Union members who had previously performed the work of producing cut-to-length steel plates continued to perform that work, as Evraz employees, after the OSA was signed. Although the term of the OSA initially contemplated was the lesser of 18 months or the date that Varsteel removed its assets from Evraz property, the OSA actually continued until March 2021. During that time period Varsteel was making plans to move the business. It initially planned to move the business to its property at 3090 Industrial Drive North in the Rural Municipality of Sherwood [“Main Plant”].

[10] Coincidentally, the employees of Varsteel who work at the Main Plant are also represented for collective bargaining by the Union. In the course of a discussion with the Union respecting an issue regarding that bargaining unit, counsel for Varsteel wrote as follows on January 12, 2016:

In 2014, Varsteel acquired a cut-to-length line from Evraz Inc. The line has been operated at the Evraz Plant but is to be moved to the main plant in Regina. It is our understanding that Evraz employees, represented by the Steelworkers Local at Evraz, have continued to operate the cut-to-length line but that these employees are not expected to come to the Varsteel Plant when the relocation is concluded. On that basis, it is our client’s expectation that individuals who are hired to operate the cut-to-length line will simply be covered by the existing Certification Order and, for that reason, it is not mentioned in the unit description.²

¹ Exhibit U7.

² Exhibit U1.

[11] In the end, as a result of the municipality's building code requirements, Varsteel's plans changed. Instead of moving the cut-to-length business to the property where the Main Plant is located, it was required to purchase land nearby, and build a new building to house the cut-to-length business. At the same time, Varsteel made a decision that the old equipment purchased from Evraz needed to be updated, and it purchased new cut-to-length equipment that was installed in the new building.

[12] On August 11, 2020, the Union sent an email to Varsteel's Human Resources Manager:

The union is aware that Varsteel is in the process of building a new cut to length plate facility (CTL) on Inland Drive not far from the current facility.

It is USW's position that workers at this new building/Plant would fall under the current Varsteel, Regina CBA as per the certification.

[13] On August 19, 2020 Varsteel advised the Union that it did not agree. Further elaboration was provided by email on October 9, 2020:

We believe it is clear based on the wording of the Certification Order and the location of the new plant that it does not fall within the scope of the Certification Order. The Certification Order that is in place is the Order dated December 1, 2015 which defines the bargaining unit as:

- (a) that all employees employed by Varsteel Ltd;*
 - i. in Regina, Saskatchewan including the current premises at 3090 Industrial Drive North and excluding Inside and outside sales representatives, foreman, those above the rank of foreman and employees at the metal processing centre at 2300 Industrial Drive North, and,*
 - ii. in Estevan, Saskatchewan, all employees except office staff, salespersons, branch manager and those above the rank of branch manager, is an appropriate unit of employees for the purpose of bargaining collectively;*

The bargaining unit is defined by reference to geographic location and that geographic location is Regina and the specific locations of 3090 Industrial Drive and 2300 Industrial Drive North. The existing Order does not cover a plant located in the Rural Municipality of Sherwood and, unlike the plants at 3090 Industrial Drive and 2300 Industrial Drive North, Varsteel has not agreed to recognize the union as the agent of employees at the new location for collective bargaining purposes.³

[14] When Varsteel started hiring employees to operate its cut-to-length business at its new building, it did so without recognizing that they would be members of the Union. It is not applying either the Varsteel collective agreement or the Evraz collective agreement to those employees.

³ Exhibit U2.

Argument on behalf of Union:

[15] The cut-to-length steel processing operation was a part of Evraz's business that was sold to Varsteel. It was sold as a going concern. Since that time equipment changes to update the technology and a relocation of the business to a different building have not changed the nature and effect of Varsteel's 2014 acquisition of a business from Evraz. The Evraz collective agreement and the Union's right and obligation to represent the employees of the Varsteel cut-to-length business continue at its new location. The collective agreement between Evraz and the Union applies to the employees at the new cut-to-length building.

[16] The transaction must be examined at the time it occurred, in 2014:

- (a) there was a significant transfer of equipment;
- (b) the equipment was operational and cutting coiled steel into flat plates before and after the transfer;
- (c) the business was sold as a going concern; there was no break in production;
- (d) the same employees continued to work for the business before and after the transfer;
- (e) the Evraz collective agreement continued to apply to the employees employed at the business until it was relocated in 2021;
- (f) there was a transfer of operations and management expertise;
- (g) Varsteel leased building space and equipment from Evraz that Varsteel required to operate the cut-to-length business and keep the business going;
- (h) Varsteel started processing cut-to-length plate from coiled steel and Evraz ceased processing cut-to-length plate from coiled steel;
- (i) Varsteel acknowledged that the sale may constitute a successorship.

[17] Varsteel represented to the Union in 2016 that it agreed that the employees of the cut-to-length business would be represented by the Union after the relocation of the cut-to-length business from Evraz property.

[18] From 2014 until early 2021, Varsteel operated its cut-to-length business on Evraz property and contracted with Evraz to use Evraz's skilled personnel and location. The upgrading of the equipment and relocation of the business in late 2020 and early 2021 does not change the fact that a successorship occurred in 2014. Varsteel continues to produce the same type of product,

using the same management who had gained experience at the Evraz site. The same customers bought the cut-to-length steel plates before and after Varsteel acquired the equipment from Evraz. When Varsteel direct-hired employees, those employees continued to be entitled to the terms and conditions under the Evraz collective agreement.

[19] The relocation of the cut-to-length line in 2021 and purchase of new equipment did not change the nature of the business. This was just the normal evolution of the business that Varsteel already owned and had been operating since 2014. It implemented its plan to have the business continue to evolve and continue to exist.

[20] The fact that none of the employees working at the Evraz location were hired to work at the new building does not defeat the Union's bargaining rights. If that were so, employers could avoid a union by dismissing employees and hiring a new workforce.⁴

[21] Finally, the Union argues that no representational vote is required in these circumstances. *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatoon Co-operative Association Limited and United Food and Commercial Workers, Local 1400*⁵ is not relevant. In that case the Board had to determine which of two unions would represent employees. That is not an issue here. Varsteel's refusal to comply with section 6-18 of *The Saskatchewan Employment Act* ["Act"] is not an appropriate basis for a vote.

Argument on behalf of Varsteel:

[22] Varsteel argues that the Union is required to establish first that by purchasing the equipment and entering into the OSA there was a disposition of a business by Evraz to Varsteel and second, that, even if there was a sale or transfer of a business, the construction and opening of the new facility with new equipment, outside the geographical area of the Varsteel certification order continues the successor relationship.

[23] Varsteel says that there was no disposition of a business. Varsteel argues that under the OSA, Evraz continued to operate the business and produce the cut-to-length product using its employees and that, in effect, the agreement merely provided that Varsteel was the sole customer for the product produced by Evraz.

⁴ *Teamsters Canada Rail Conference v Big Sky Rail Corp*, 2015 CanLII 19985 (SK LRB).

⁵ 2018 CanLII 68443 (SK LRB).

[24] Varsteel argues that there was no disposal of the cut-to-length business from Evraz to Varsteel in 2014 on the basis of the following:

- (a) Evraz employees continued to operate the equipment;
- (b) the process continued to be carried out at the same location within the Evraz plant;
- (c) Evraz out-of-scope employees continued to assign and supervise the work being done by its employees under the terms of the Evraz collective agreement;
- (d) Varsteel had no role to play in the assignment of specific individuals to do the work nor did it have the ability to impose discipline on those employees;
- (e) the sale of the equipment and the arrangement outlined in the OSA had no impact on those Evraz employees;
- (f) Evraz retained the right to make decisions that impacted production;
- (g) the decision to end the arrangement and cease operation of the line was made by Evraz;
- (h) the ending of production had no effect on the terms of employment for Evraz employees and none lost their jobs.

[25] The sale of the equipment alone does not constitute the essential elements of a business and is not of a sufficiently dynamic and coherent quality to be considered a going concern.

[26] Varsteel denied that it intended by the January 12, 2016 letter to acknowledge that the situation at Evraz was a disposal of part of a business to Varsteel by Evraz. Since no agreement was reached on the other issues discussed in the letter, Varsteel argues that it should not be bound by this statement. It also argues that since the original plan to move the equipment to the Main Plant did not proceed, no successorship occurred.

[27] Varsteel argues that the product produced by the new equipment at the new building is different than that produced on the old equipment that Varsteel purchased from Evraz. It argues that the work performed by the new employees it has hired to operate the new equipment is more complex than the work required to operate the old equipment.

[28] Varsteel argues that it has begun a new business using new equipment and a new process to manufacture a new product. No in-scope employees have come from the operation at Evraz and the new duties are more complex than what existed at the Evraz site. The only commonality

between the two operations is out-of-scope employees. In effect, when Evraz terminated the OSA, Varsteel brought production in-house for product it previously purchased from Evraz. The two locations operated simultaneously for a period of time, and Varsteel only ceased operations at the Evraz facility on notice of termination of the arrangement by Evraz.

[29] Finally, Varsteel argues that, if the Board finds that a successorship did occur, the new employees should be given an opportunity to vote on whether they want to be represented by the Union. Depriving the employees of their right to choose whether to be represented by the Union would be a contravention of their freedom of association pursuant to section 2(d) of the *Canadian Charter of Rights and Freedoms*.⁶

[30] Evraz did not file a Reply or participate in the hearing of this matter.

Relevant Statutory Provisions:

[31] The Union relies on the following provisions of the Act in its application:

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.*

(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;*

(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;*

(c) *determining what union, if any, represents the employees in the bargaining unit;*

(d) *directing that a vote be taken of all employees eligible to vote;*

(e) *issuing a certification order;*

(f) *amending, to the extent that the board considers necessary or advisable:*

⁶ *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatoon Co-operative Association Limited and United Food and Commercial Workers, Local 1400*, 2018 CanLII 68443 (SK LRB).

- (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).

Board powers

6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:

- (f) rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;
- (g) amending a board order if:
 - (i) the employer and the union agree to the amendment; or
 - (ii) in the opinion of the board, the amendment is necessary;
- (h) notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order.

Analysis and Decision:

Successorship:

[32] The first issue for the Board to determine is whether a successorship occurred in June 2014, when Evraz and Varsteel signed the Purchase Agreement and OSA.

[33] In *Applicant v. Charnjit Singh and 1492559 Alberta Inc.*,⁷ the Board made the following comments about successorship:

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

[41] Like so many other areas of labour legislation, the statutory provisions dealing with successorship are policy laden and represent an attempt to balance competing interests;

⁷ 2013 CanLII 3584 (SK LRB).

in this particular case, the right of owners to freely dispose of their property and the expectation of employees that their collective bargaining rights will have some reasonable permanency irrespective of changes in ownership of their workplace. . . .

...

[46] In the end, the vital consideration for the Board is whether or not the effect of the transaction was to put the transferee into possession of something that could be considered a “going concern”; something distinguishable from an idle collection of surplus assets from which the new owner has organized a new business. To make a finding of successorship, the Board must be satisfied that the new owner acquired the essential elements of a business or part thereof; something of a sufficiently dynamic and coherent quality to be considered a going concern; and that the said business interest can be traced back to the business activities of the previous certified owner. In making this determination, this Board has cautioned that the test is not whether the business activities of the new owner resemble the previous certified business; but whether or not the business carried on after the transaction was acquired from the certified employer. . . .

[34] The facts in this matter establish that a successorship occurred on or about June 26, 2014. The business to which the collective bargaining rights are attached was transferred from Evraz to Varsteel, and the collective bargaining obligations flowed with the transaction through to Varsteel.

[35] Varsteel’s own documents prove that to be the case, particularly the OSA. It set out clearly that the business was to be “carried on by Varsteel”. In the temporary arrangement envisioned by the OSA, Evraz’s employees would continue to carry out the work. However, that work was being done in accordance with instructions provided by Varsteel management. The OSA contemplated that Varsteel management would provide instructions to Evraz management. Evraz management would then pass on that instruction to its Union employees. In the Board’s view, this arrangement is evidence that Varsteel farmed out the work to Evraz in the beginning, as it was becoming familiar with operating the business. It is not evidence that Evraz continued to operate the business.

[36] There are numerous other indicia of successorship:

- (a) in the OSA Varsteel acknowledged that a successorship may have occurred;
- (b) a significant transfer of equipment occurred, not of a collection of machines sitting idle, but of an operating business;
- (c) Varsteel’s witness (Wayne Schmidt, General Manager and Director of Business Development for Varsteel) indicated that the reason for the transaction was that steel service centres like Varsteel were getting into the cut-to-length business and steel mills like Evraz were getting out of that business; Evraz wanted out of the business and Varsteel wanted in to the business;

- (d) the business was sold as a going concern; there is no dispute that the equipment was in operation as a business at the time it was transferred;
- (e) when Varsteel purchased the cut-to-length business it moved two out-of-scope employees to the Evraz premises to supervise the operation of the business; those two supervisors moved with the business to the new premises.

[37] Varsteel represented to the Union that it would continue to recognize the Union when it relocated the business, both in the letter of January 12, 2016 and in a conversation that occurred between Paul Chevrier (President of Union Local 5917) and Wayne Schmidt shortly after Varsteel purchased the cut-to-length business. Varsteel is bound by the representation made in the January 12, 2016 letter. That statement was not part of the proposal made in the letter, but an explanation of the facts that led to the wording of the proposal. While the Board is not bound by these admissions, they are evidence that both parties understood and agreed that a successorship occurred in 2014.

[38] The Board does not agree with Varsteel's argument that the Union is attempting to extend bargaining rights to a non-unionized business. Varsteel acquired a unionized business. The successorship provisions in the Act provide that with that business Varsteel also acquired the certification order and the collective bargaining agreement, and they continue to apply to the employees that Varsteel eventually hired to run its cut-to-length business. Section 6-18 of the Act protects and preserves those employees' collective bargaining rights.⁸

[39] In *101297488 Saskatchewan Ltd. v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*⁹ the Board stated:

[25] From this analysis, we can distill some principles that will assist us to answer the questions posed in this case. Firstly, the purpose behind the successorship provisions represent an effort on the part of the Legislature to safeguard the protection that employees have achieved through the exercise of their rights under the Act, when the enterprise in which they are employed, is passed on as a result of negotiations or transactions in which they have no opportunity to participate.

[26] Secondly, the protection provided by these provisions does not apply to all cases where an employer disposes of a business, and the determination as to whether the means by which a business has changed hands brings the new entity under the obligations which flow from the successorship provisions is often a matter of some complexity.

[27] Thirdly, the application of the successorship provisions is not a "one size fits all" proposition. There is no factor or single set of criteria which defines whether or not a

⁸ *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatoon Co-operative Association Limited and United Food and Commercial Workers, Local 1400*, 2018 CanLII 68443 (SK LRB).

⁹ 2017 CanLII 43966 (SK LRB).

successorship has occurred. It may be obscured by a dizzying variety of technical legal or commercial forms.

[28] Fourthly, in order for there to be a successorship determined, the putative successor must draw from the transaction which produces the new entity some viable, independent business which can be the basis of a collective bargaining relationship. As was noted by the Board in SJBRWDSU, Local 544 v. Pauline Hnatiw, the Board must look to determine if the new business “drew its life” from that of the predecessor or, as described by the Board in other cases, whether the “beating heart” of the business had been transferred.

[29] Fifthly, the determination of the question is fact-driven. This fact-driven approach has been commented on and approved by the Saskatchewan Court of Queen’s Bench in SJBRWDSU v. K-Bro Linens System Inc. However, there is no list of significant considerations which could ever be complete. The number of variables with potential relevance is endless.

[40] There is no doubt that a “beating heart” was transferred by Evraz to Varsteel. It is clear that the business was transferred from Evraz to Varsteel as an operating entity. The transfer of the assets of the business, along with the right to operate the business, was effected by the agreements. There is a discernable continuity in the business formerly carried on by Evraz and subsequently carried on by Varsteel. The work undertaken by both businesses is the same. The business to which the collective bargaining rights are attached is now in the hands of Varsteel.

[41] Varsteel attempted to convince the Board that Varsteel’s actions of moving the business to a different location or upgrading the equipment used in the business was somehow relevant to the successorship issue. They are not. The successorship occurred in 2014.

[42] Varsteel also attempted to convince the Board that its decision to initially use Evraz employees to carry out the work was relevant. It is not. Varsteel was bound by the Evraz certification to the Union as of 2014. It chose not to hire its own employees to perform the work for over six years. Once it made the decision to hire its own employees to perform the work, the Certification Order and Evraz collective agreement continued to bind it.

[43] Contrary to what Varsteel argued, Evraz did not make a decision to cease operation of the cut-to-length business. It decided to stop providing its employees to Varsteel for the operation of Varsteel’s business:

The EVRAZ employees who performed services for Varsteel under the Operating Agreement will be transitioned back into our workforce.¹⁰

¹⁰ Exhibit E1.

This resulted in Varsteel being required to hire its own employees to continue to operate its business. That is exactly what it did. This was not a surprise. This was the plan all along. Varsteel implemented its plans to have the business continue to evolve and continue to exist. In 2021 it continued its business in its own location with its own employees.

[44] Varsteel then argues that the business at the new building is a new, different business. The Board disagrees. It is the same business. Moving the business off of Evraz property was contemplated from the beginning. Upgrading of the equipment used to perform the business occurred from time to time while the business was being operated on Evraz property, and continued with the move. The business that Varsteel purchased from Evraz has grown and evolved since 2014. This evolution was expected and anticipated. From the beginning, Varsteel was looking to relocate the cut-to-length business from Evraz property to another location. By 2021 Varsteel had decided that it needed to significantly upgrade its cut-to-length equipment to maintain competitiveness. Although an upgrade to technology improved the quality of the end product, and has contributed to growth of the customer base, the essence of the business has not changed. The upgrading of the equipment and relocation of the business in 2021 does not lead to a conclusion that this is a different business.

[45] Varsteel's description of the facts did not accord with the evidence.

Representational Vote:

[46] The next question for the Board is whether a representational vote is required of the employees that Varsteel has hired while ignoring the Certification Order to which it is bound.

[47] In *Teamsters Canada Rail Conference v Big Sky Rail Corp*¹¹ ["*Big Sky Rail*"], the Board found that a representational vote was not required:

[22] In coming to this conclusion, we noted that s. 37(2)(d) of The Trade Union Act (as does s. 6-18(4)(d) of The Saskatchewan Employment Act) authorizes this Board to direct that a representational vote be taken of affected employees in determining the disposition of a successorship application. However, the long standing jurisprudence of this Board is not to do so except in specific circumstances. . . .

[48] The Board went on to determine that representational votes are only conducted in successorship applications in three types of circumstances:

¹¹ 2015 CanLII 19985 (SK LRB).

1. where multiple bargaining agents represent the same positions and it is not possible or appropriate to maintain separate bargaining units;
2. where the applicant union is seeking to add positions to its bargaining unit that were not previously included within that union's bargaining unit before the transfer of obligations;
3. if the bargaining unit would no longer be appropriate after the transfer.

[49] None of those circumstances is found here. This is not a situation where more than one bargaining agent is representing the same positions. Varsteel has not suggested that the bargaining unit is not appropriate for collective bargaining.

[50] The Board does not consider this application to be one where the Union is seeking to add or "sweep in" new positions. The Board provided this explanation of the sweeping-in situation, in *Big Sky Rail*:

[23] As noted above, there are various circumstances where a representational vote could be ordered by the Board following a finding that a sale or transfer of a business had occurred. On the other hand, doing so is not required in most cases. As this Board has noted in many decisions, successorship is a legislative vehicle to ensure that collective bargaining rights survive changes in the ownership and control of a business. The goal of the successorship provisions in The Saskatchewan Employment Act (as it was with The Trade Union Act) is the seamless transfer of collective bargaining obligations into the hands of a new owner of a previously organized business if there has been a sale or transfer of that business. . . .

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

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

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

[51] The fact that Varsteel did not acquire any employees from Evraz is not sufficient to justify or require a representational vote. Successorship is a vehicle to protect and preserve bargaining rights following a change in ownership or control of a business. Bargaining rights attach to the bargaining unit, whether or not those positions happen to be vacant at the time of the transfer. Because the Union is seeking to represent workers who are carrying out the same cut-to-length business that it previously represented, no employees are being swept in and thus no representational vote is required. The following finding in *Big Sky Rail* is particularly relevant in this matter:

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

[52] The Board is satisfied that the nature of the work being done in the cut-to-length business before and after the transfer of the business is unchanged. The choice of Varsteel to wait over six years after it acquired the business to hire its own employees to operate its business cannot lead to a conclusion that a vote should be held now. The successorship occurred in 2014. All that is occurring now is that the business is being moved to a different location. That certainly does not provide a basis for a representational vote.

[53] Varsteel attempted to argue that the treatment of the metal processing centre it briefly operated is relevant to and a precedent for this matter. It is not. When Varsteel purchased the non-unionized metal processing centre, it made an application to the Board¹² for a determination as to whether the Certification Order that applied to the employees at the Main Plant also applied to the employees at the metal processing centre. That application was settled, by the issuance of a Consent Order that the employees of the metal processing centre would vote on whether they would be represented by the Union. The determination that a vote would be held was not a Board decision, therefore it is not persuasive in this matter.

¹² LRB File No. 088-15.

[54] The cut-to-length business is a unionized business. When new employees are hired into a unionized business they do not vote on whether they support the union. Turnover and new hires do not affect bargaining rights. Growth of a business does not defeat or affect its employees' bargaining rights. This applies even if Varsteel did not advise the employees it hired for the cut-to-length business that they are governed by the rights and obligations in the Certification Order and Evraz collective agreement.

Remedies:

[55] In its application the Union asked for the following relief:

- (a) An Order that Varsteel is a successor employer to Evraz with respect to the cut-to-length business, and is bound by all Board orders and proceedings taken before the disposition of a part of the business and that all Board orders and proceedings continue.
- (b) An Order that the Evraz collective agreement applies to all employees of Varsteel at the cut-to-length facility, and that all employees affected by any delay or failure to apply the Evraz collective agreement be made whole in all respects.
- (c) An Order amending the Certification Order granted in LRB File No. 189-03 to include all employees in the bargaining units in Regina and the Rural Municipality of Sherwood.
- (d) An Order that all affected employees be made whole of all losses as a result of Varsteel's failure to recognize the Union.

[56] The Board is satisfied that it would be appropriate to grant the requested Orders. In closing argument, in response to a question from the Board, the Union suggested that the Board should also issue a declaration that Varsteel committed an unfair labour practice. While the Union's application alleged that Varsteel had committed an unfair labour practice, it did not request a remedy for that breach. Given the late attempt to add this proposal to the list of requested remedies, and the lack of argument addressing this issue, the Board will not add such a declaration to the remedies granted.

[57] In determining the appropriate wording for the amendment to the Certification Order, both parties referred to *United Steelworkers of America v Wheat City Steel*¹³, as Varsteel was the successor to Wheat City Steel. In that decision, an issue arose as to the proper description of the

¹³ [1996] Sask LRBR 532.

geographic scope of the Certification Order, since the premises occupied by the employer were not actually in Regina, even though it was described that way. The Board stated:

One of the sources of concern for the Union in this case may be that the current location of the Employer is not, strictly speaking, within the municipal boundaries of Regina, although it is popularly referred to as being in Regina. To clarify this, we will issue an Order describing the geographic scope as follows, "at Regina, Saskatchewan, including the current premises at 3090 Industrial Drive North." ¹⁴

[58] The evidence in this matter indicated that Varsteel continues to refer to its businesses as being at Regina, even though strictly speaking they are not within the municipal boundaries of Regina. The Board has determined that the confusion caused by the wording in the Certification Order should be addressed, and that the Certification Order should refer directly to the Rural Municipality of Sherwood, where Varsteel's businesses are actually located.

[59] The current Certification Order applies to the employees employed by Varsteel:

i. in Regina, Saskatchewan including the current premises at 3090 Industrial Drive North and excluding inside and outside sales representatives, foreman, those above the rank of foreman and employees at the metal processing centre at 2300 Industrial Drive North, and,

ii. in Estevan, Saskatchewan, all employees except office staff, salespersons, branch manager and those above the rank of branch manager. ¹⁵

Both parties agree that Varsteel is no longer operating the metal processing centre at 2300 Industrial Drive North, therefore reference to it can be removed from the Certification Order.

[60] The Certification Order will be amended to apply to the employees employed by Varsteel:

i. in Regina, Saskatchewan and the Rural Municipality of Sherwood, including the current premises at 3090 Industrial Drive North and 900 Inland Drive and excluding inside and outside sales representatives, foremen and those above the rank of foreman; and

ii. in Estevan, Saskatchewan, all employees except office staff, salespersons, branch manager and those above the rank of branch manager.

[61] This panel will remain seized with the implementation of the Orders that will be issued with these Reasons.

¹⁴ At page 537.

¹⁵ LRB File No. 189-03, dated December 1, 2015.

[62] 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 them may have been referred to in these Reasons, all were considered in making this decision.

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

DATED at Regina, Saskatchewan, this **29th** day of **October, 2021**.

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson