

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2038, Applicant v PS ELECTRIC LTD. and PS ELECTRIC (2020) LTD., Respondents**

LRB File No. 183-20; April 19, 2021

Chairperson, Susan C. Amrud, Q.C.; Board Members: Shelley Boutin-Gervais and Gary Mearns

For International Brotherhood of Electrical  
Workers, Local 2038:

Crystal L. Norbeck

For PS Electric Ltd. and PS Electric (2020) Ltd.:

No one appearing

**Application for employer successorship – Certified company in receivership – New company named successor – Directing mind and reputation of previous company moved to new company – Work undertaken by previous company moved to new company – Board finds discernable continuity of business despite interposition of receivership.**

**REASONS FOR DECISION**

**Background:**

[1] **Susan C. Amrud, Q.C., Chairperson:** By Order dated August 19, 1996, the International Brotherhood of Electrical Workers, Local 2038 [“IBEW”] became the bargaining agent for journeymen electricians, electrical apprentices, electrical workers and electrical foremen employed by PS Electric Ltd.<sup>1</sup> [“PS Electric”]. On December 7, 2020, IBEW filed an Application for Employer Successorship, naming PS Electric (2020) Ltd. [“PS 2020”] as the successor employer to PS Electric. Since that date, despite numerous communications from the Board, neither PS Electric nor PS 2020 has replied to or filed any response or submissions with the Board. Accordingly, on February 2, 2021, the Board determined that this matter would be decided on the basis of written submissions. IBEW filed an Affidavit and Brief of Law. Neither PS Electric nor PS 2020 filed any submissions.

**Evidence:**

[2] The evidence provided by Moe Kovatch, Business Manager and Financial Secretary of IBEW is as follows. His primary contact for PS Electric was President/Owner, Harvey King. As of October 16, 2020, three members of IBEW were employed by PS Electric performing work for SaskPower in Estevan. Their employment was terminated due to the appointment of a receiver for PS Electric. PS Electric ceased to carry on business and its assets were sold through the

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<sup>1</sup> LRB File No. 143-96.

receivership. On November 17, 2020 Harvey King told Kovatch that he still had work, including the SaskPower work that had been underway in October 2020. Harvey King advised Kovatch that PS 2020 has taken over the business previously carried on by PS Electric.

[3] Reports from the Saskatchewan Corporate Registry filed by IBEW indicate that Harvey King was President/Secretary and sole Director of PS Electric. Harvey King was the majority shareholder (51/100 shares), with the other 49 shares held by 101138446 Saskatchewan Ltd., a corporation of which Harvey Charles King was the sole director and shareholder. PS 2020 was incorporated on November 9, 2020. It has three directors: Donna J Fleck, Tyson Jeremy King and Harvey C King. Harvey C King is the President. The Corporate Registry report filed did not indicate the shareholders. The mailing address in the Corporate Registry is the same for both PS Electric and PS 2020.

[4] A screen capture of PS Electric's website as of February 11, 2021 indicates that it has been serving south east Saskatchewan since 1995.

**Argument on behalf of IBEW:**

[5] IBEW relies on *Prairie Arctic Regional Council of Carpenters, Drywallers, Millwrights v Ellisdon Corporation*<sup>2</sup>:

*[66] In Saskatchewan, successorship is now governed by s. 6-18 of The Saskatchewan Employment Act. In making a determination pursuant to s. 6-18, it is not necessary that we find that there has been a transfer or sale of a business in a strict legal sense. See: United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction Co. Ltd., et. al. [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84, 201-84, 202-84 & 204-84. 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. See: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Charnjit Singh and 1492559 Alberta Inc., supra. 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: 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. See also: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Charnjit Singh and 1492559 Alberta Inc. supra.*

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<sup>2</sup> 2014 CanLII 100507 (SK LRB).

*[67] As was noted by this Board in International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v. North American Construction Group Inc. et.al., (2014) 234 C.L.R.B.R. (2d) 168, 2013 CanLII 60719 (SK LRB), LRB File No. 051-13, the indicia of successorship in the construction industry can be very different from other sectors. This Board has recognized that certain features of companies operating in the construction sector 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.*

**[6]** *Applicant v. Charnjit Singh and 1492559 Alberta Inc*<sup>3</sup> ["Charnjit Singh"] is also applicable to the consideration of this application. In that decision, the Board held that it is the business, not a particular employer, to which the collective bargaining rights attach. If that business ends up in the hands of a new owner, the collective bargaining obligations flow with the transaction through to that new owner. In determining whether or not a new owner is a successor, it is not necessary that there has been a transfer of a business in the strict legal sense. Rather, the Board is to examine the practical effect of the transaction rather than its technical or legal form. The Board stated:

*[45] Numerous successorship cases have demonstrated a number of factors that have been considered by various labour boards to help in making this determination, including: the presence of any legal or familial relationship between the predecessor and the new owner; the acquisition by the new owner of managerial knowledge and expertise through the transaction; the transfer of equipment, inventory, accounts receivable, customer lists and existing contracts; the transfer of goodwill, logos and trademarks; and the imposition of covenants not to compete or to maintain the good name of the business until closing. While the presence of any of these factors can be indicative of successorship, their absence is often considered inconclusive. Labour boards have also considered factors such as the perception of continuity of an enterprise; whether or not the employees have continued to work for the purchaser; whether or not these employees are performing the same work; and whether or not the previous management structure has been maintained or if there has been a commonality of directors and other officers. If the work performed by the employees after the transfer is substantially similar to the work performed prior to the transfer, an inference of continuity can be drawn. Similarly, Labour boards have also considered whether or not there has been a hiatus in production or a shutdown of operations. Depending upon the industry, the longer a property lays dormant, the more difficult it is to draw an inference of continuity. Of course, this list is not exhaustive of the factors that may be considered, and, depending upon the situation, certain factors will be given more import than others. This concept was stated by the Board in Versa Services Ltd. v. C.U.P.E., supra, as follows:*

*No list of significance, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize,*

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<sup>3</sup> 2013 CanLII 3584 (SK LRB).

however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.

[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. See: *JKT Holdings Ltd. v. Hotel Employees and Restaurant Employees, Local 767*, [1990] 5 C.L.R.B.R. (2d) 316, LRB File No. 149-89. Tracing the business interest back to the previous owner is essential to a finding of successorship as this Board has rejected the proposition that, once a trade union becomes certified at a particular location for a particular type of work, anyone who subsequently opens a similar business at those premises is automatically a successor within the meaning of s. 37 of the Act. See: *United Steelworkers of America v. A-1 Steel & Iron Foundry Ltd., et. al.*, [1985] Oct Sask. Labour Rep. 42, LRB File No. 001-85.

[7] In *Charnjit Singh*, the Board also referred to *Hotel Employees and Restaurant Employees, Local 767 v. 603195 Saskatchewan Ltd. (Victoria Inn)*<sup>4</sup>, which included the following finding that is relevant here:

*The fact that the business is in a slightly bruised and battered state does not, in our opinion, alter that conclusion. The Board has in the past held, for example, that insolvency or the interposition of a receiver do not prevent a finding that a later enterprise is a successor; see, for example, Diogenes Investments Ltd. and Sask. Joint Board, R.W.D.S.U., Sask. L.R.B. (File No. 072-83); Regina Design Millwork Ltd. and I.W.A., Local 1-184, Sask. L.R.B. (File No. 344-80) [reported [1981] 2 Can LRBR 353]; West-Can Photo & Graphic Supply and Sask. Joint Board, R.W.D.S.U., Sask. L.R.B. (File No. 034-85). As the Board said bluntly in the Headway Ski decision, supra, “the fact that a business is losing money does not in itself mean it is not ‘a business’”.*

### **Relevant Statutory Provisions:**

[8] Section 6-18 of *The Saskatchewan Employment Act* [“Act”] sets out the rules that apply to an application for employer successorship:

#### ***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

<sup>4</sup> [1995] 25 CLRBR (2d) 137; 1994 Sask. Labour Report, 3rd Quarter, 136.

- (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:*
- (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).*

### **Analysis and Decision:**

**[9]** To make a finding of employer successorship, the Board must be satisfied that the new owner acquired the essential elements of a business, something of a sufficiently dynamic and coherent quality to be considered a going concern, and that the new business can be traced back to the business activities of the previous certified owner. The interposition of a receiver does not prevent a finding that a later business is a successor. It is the business, not the particular employer, to which the collective bargaining rights attach. If that business ends up in the hands of a new owner, collective bargaining obligations move to the new owner.

**[10]** The Board is satisfied that IBEW has provided sufficient evidence for the Board to determine that PS 2020 is the successor to PS Electric. There is a discernable continuity in the business formerly carried on by PS Electric and subsequently carried on by PS 2020. The work undertaken by both businesses is the same. The business to which IBEW's collective bargaining rights are attached is now in the hands of PS 2020.

[11] 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. The movement of key personnel from one employer to another in the construction sector can be indicative of the transfer of a business, particularly if one business is wound down and a new business is established to carry on the same work. That is exactly the situation that occurred here. After PS Electric went out of business through receivership, Harvey King and PS Electric's reputation moved to PS 2020. The directing mind of both businesses is the same. In Kovatch's dealings, Harvey King spoke for PS Electric and now speaks for PS 2020.

[12] The PS Electric/PS 2020 website indicates an intention on the part of PS Electric and PS 2020 to give a perception of continuity of the business. PS 2020 is advertising itself to clients as representing the same business. This signals continuity as between the two companies. King has indicated that the work and business previously carried on by PS Electric has been assumed by PS 2020.

[13] PS Electric and PS 2020 were given ample opportunity to respond to IBEW's application and submissions and have chosen not to respond. The Board also takes this into account in making this decision.

[14] IBEW asks for a declaration that the collective bargaining rights, privileges and/or duties of PS Electric have transferred to PS 2020. That declaration is granted. The Board finds that there was a disposal, within the meaning of section 6-18 of the Act, of the business to which IBEW's Certification Order is attached, from PS Electric to PS 2020. Accordingly, PS 2020 is bound by the Certification Order granted in LRB File No. 143-96. The Certification Order dated August 19, 1996 will be amended accordingly.

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

**DATED** at Regina, Saskatchewan, this **19th** day of **April, 2021**.

**LABOUR RELATIONS BOARD**

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Susan C. Amrud, Q.C.  
Chairperson