

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, Applicant v NSC MINERALS LTD., Respondent

LRB File No. 038-24; February 28, 2024

Chairperson, Michael J. Morris, K.C.; Board Members: Shelley Boutin-Gervais and Allan Parenteau

Counsel for the Applicant, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union:

Greg D. Fingas

Counsel for the Respondent, NSC Minerals Ltd.:

Kit McGuinness

Interim relief – Certification application filed – Employee terminated – Representation vote underway – Dispute regarding whether termination retaliatory for perceived support of union or due to safety violations.

Arguable case that employee’s termination due to anti-union animus – Potential chill on employees communicating in favour of union or voting in favour of union while representation vote underway – Balance of convenience favours reinstatement – Employee reinstated.

REASONS FOR DECISION

Background:

[1] **Michael J. Morris, K.C., Chairperson:** The Board issued an interim order with reasons to follow on February 26, 2024, following a hearing convened on February 23, 2024. These are the Board’s reasons for issuing that order.

[2] Based on the pleadings and evidence before the Board, the following chronology was disclosed.

[3] In January of 2024, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union [Union] was attempting to organize certain employees of NSC Minerals Ltd. [NSC]. More particularly, it was attempting to organize

employees at NSC's facility in Vanscoy, Saskatchewan.¹ NSC is in the business of processing and selling salt mineral crystals.²

[4] On January 30, 2024, NSC held a mandatory all-employee meeting for employees at the Vanscoy facility.³ This meeting was audio-recorded by employees, and a recording was filed with the Board.⁴

[5] The recording discloses the meeting beginning with NSC's management requesting a show of hands in response to the question "who likes working here?" Management then proceeds to indicate its awareness that employees have been contacted by a union, stating "I hope no one has been handing out people's personal cell numbers".

[6] Management discusses how working conditions will change for the worse if the workplace is unionized. Management then states: "The guys that have been approached, I don't know who you all are; I don't know how it's happening, why this is happening, who's driving it; I have no idea; Um, hopefully it doesn't go too much farther than that; If it does, or you other guys get calls or whatever, please feel free to reach out to Adam⁵ and let him know, if you can; Depending on your stance I guess, everybody has an opinion; Find out who they are and why they're phoning, how they got your number, all that stuff, write it down, so at least we can document some of that stuff; Because three weeks it comes around again, you know some people won't remember; The guys that have been contacted – you've done nothing fucking wrong; they contacted you."

[7] A short while later, management states "I thought it'd be good to sit everybody down and let you know what it looks like if they do, I say, weasel their fucking way in; But that's what'll happen." A few minutes after this, management states understanding that some of the new people "haven't gotten to get that taste, either" (in reference to overtime work), but asking them to not "base your ideas of this company from what you've seen this year; Try not to is what I'm asking because this is not reality for this company."

[8] A few minutes later there is discussion about who may be behind the unionization efforts. Management states "The one thing I find funny about that is that person doesn't have the balls to say... I'm not happy; Cuz I don't know who it is, but I guaran-fucking-tee you he's in this fucking

¹ Affidavit of Gord Hiebert [Hiebert affidavit], paras 2-6.

² Affidavit of Nelson Schutz [Schutz affidavit], para 3.

³ Affidavit of Jacob Thompson [Thompson affidavit], para 3.

⁴ Thompson affidavit, paras 3-5. Exhibit "B" to the Thompson affidavit is the audio recording.

⁵ Adam Rogne is the Plant Manager of the Vanscoy facility: Thompson affidavit, para 2.

room, guaran-fucking-tee, and he's going to ruin it for people that have invested a lot of fucking time into this place." Shortly after this, management states "If I ever found out who did it, that wouldn't be a very nice day for them; Simple as that; Because I put 11 years of my life into this place; And just for some fuckin disgruntled fuckhead with a burr in their ass, makes no sense to me." Immediately after this statement, management states "I also think a lot of people were under the assumption that this place, when they got hired, which a lot of people do talk, you're going to get tons of overtime, the cash is there... but a good piece of advice that I got from my dad... is I budget my paycheque, my bills and my life on 80 hours... and anything, overtime, bonuses, well that's extra."

[9] Near the end of the meeting, an employee asks "How would you like us to respond to them (i.e., those organizing)... go fuck yourself?". Management states "You can respond to them however you like; and if you so choose to respond to them like that, that is well within your means; I would ask them "who gave you my name and number?" This is followed by "For the people who get phone calls and stuff like that... it's not your fault that you're getting a phone call; Don't ever think that you've done something wrong because you got contacted by a union; I do appreciate when people let me know these things, that's very nice, for sure, but that's your business; it's why we're just having a general conversation on it."

[10] On January 31, 2024, the Union filed a certification application for employees at the Vanscoy facility [First Certification Application].⁶

[11] On February 1, 2024, the Union filed an unfair labour practice application [First ULP] on the basis of remarks made by management at the January 30th all-employee meeting. Relief sought includes, amongst other things, a direction for a vote if the Union has been unable to meet the support threshold,⁷ or a direction for a new vote if a vote is held and fails because of coercion and intimidation.

[12] On February 1, 2024, Bryce Nelson [Nelson] received a written warning for not cleaning equipment. Another employee, Mitchell, received the same discipline for not cleaning the same equipment, because management determined that both Nelson and Mitchell were equally responsible for the safety violation.⁸

⁶ LRB File No. 018-24.

⁷ Per ss. 6-9(2) and 6-12(2) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].

⁸ Schutz affidavit, paras 15-16.

[13] On February 6, 2024, Nelson Schutz [Schutz], NSC's Vice President and General Manager, called a staff meeting and delivered a presentation to employees at the Vanscoy facility.⁹ The purpose of this meeting was so that Schutz could "set the record straight with our staff regarding management's position on efforts to unionize our workplace".¹⁰ He had been advised of the January 30th meeting, after the fact, by management, while on vacation outside of Canada.¹¹ It seems he cut his vacation short in order to return to Saskatchewan to speak to employees. His prepared remarks for the February 6th meeting stated, in part:

Last week on January 30, management met with you to discuss some issues regarding union organizing at the site. As I understand it, some things were said at that time that could have been construed as threatening. There were suggestions that if you participate in union organizing or if a union comes into the facility, you might be subject to retaliation by the company.

I want you to know that those statements are not the official position of the company and are false. To the extent anything like that was communicated, I retract and repudiate any such message. I apologize to any of you who might have been negatively affected.

Let me set the record straight by stating the official position of the company: the company respects your right to lawfully engage in union organizing. Furthermore, the company respects your right to choose to be represented by a union. The company equally respects your right to refrain from union organizing and to choose not to be represented by a union. That is the company's position. Any suggestion otherwise by any member of management is incorrect.

Since the meeting on January 30th, members of management have been trained on these principles. They have been told that they are not to suggest you will suffer retaliation for engaging or not engaging in lawful union activity. Going forward, if you feel you have suffered retaliation for these activities, come directly to me. We will promptly look into any such concern. If substantiated, the company will take swift action to address the issue.¹²

[14] On February 8, 2024, the Union withdrew the First Certification Application.

[15] On either Sunday, February 11th, or Monday, February 12th, a safety incident with respect to the operation of a conveyor at the Vanscoy facility occurred. According to Nelson, it occurred on February 11th.¹³ According to Schutz, it occurred on February 12th.¹⁴ There appears to be no dispute that another employee, Nathan Varley [Varley], told Nelson that a conveyor had stopped working properly and that a replacement belt was needed.¹⁵ Varley asked Nelson to bring a belt,

⁹ Schutz affidavit, para 31.

¹⁰ Schutz affidavit, para 29.

¹¹ Schutz affidavit, para 29.

¹² Schutz affidavit, Exhibit "M".

¹³ Affidavit of Bryce Nelson [Nelson affidavit], paras 7-12.

¹⁴ Schutz affidavit, paras 17-19, 26.

¹⁵ Schutz affidavit, Exhibit "J"

which Nelson did. Nelson indicates that Varley was instructing him on how to replace the belt.¹⁶ A statement from Varley appended to the Schutz affidavit includes the following, in part:

I called Bryce and asked if he could get me a belt... At this point Bryce got there with new belt. I confirmed it was the right belt... I told Bryce we had to shut it all down to change the belt. At this time he grab the pull cord it stopped. He climb up to put the new belt on. We discussed what pulley to put the new belt on. Before we did anything Jody came over and called both of us to see him. We both went over to see Jody. he asked what we were doing and ask to see our revised FHLA. But didn't update mine and none did Bryce. Jody said they needed to be update before anything. Then he asked if it was locked out. We both said no because the pullicord was pulled. Jody said nothing happens until our FHLA were completed and it was locked out. Filled out a FHLA card and then locked it out with Bryce to complete the job.¹⁷

[16] The “Jody” referred to in Varley’s statement is Site Supervisor Jody Beauchemin [Beauchemin]. According to a statement from Beauchemin appended to the Schutz affidavit, he observed Nelson standing on the conveyor bracing working on the screen deck pulley.¹⁸ He put a stop to this, and advised Varley and Nelson that “a disciplinary will result for each of them for their roles in the incident.”¹⁹

[17] It is undisputed that Varley is a more senior employee than Nelson, with Varley having been employed with NSC for over two and a half years, and Nelson having been employed since October of 2023. There also appears to be no dispute that the proper lock-out/tag-out (LOTO) procedure was not followed prior to Beachemin’s arrival at the conveyor, including a “bump test”, or that Varley’s and Nelson’s Field Level Hazard Assessment (FLHA) cards were not revised prior to his arrival.

[18] After Beauchemin’s departure, Nelson continued with the rest of his shift, and worked two hours of overtime at management’s request.²⁰ According to Nelson, Beauchemin indicated that they would be discussing the matter the next day, after Beauchemin spoke with Plant Manager Adam Rogne [Rogne].

[19] On February 12, 2024, the Union filed a second certification application with respect to employees at the Vanscoy facility [Second Certification Application].²¹ The Second Certification

¹⁶ Nelson affidavit, para 7.

¹⁷ Schutz affidavit, Exhibit “J”.

¹⁸ Schutz affidavit, Exhibit “I”.

¹⁹ Schutz affidavit, Exhibit “I”.

²⁰ Nelson affidavit, para 11.

²¹ LRB File No. 032-24.

Application was received by the Board from the Union's counsel at 3:54 p.m. The Board's records indicate that it was sent to NSC's counsel at 4:25 p.m.

[20] Schutz authorized Nelson's termination on February 12th and/or on February 13th. His affidavit describes his authorization as having been given at both times.²²

[21] The Board's records reflect it having received an employee list from Schutz at 11:54 a.m. on February 13th, for the purposes of the Second Certification Application. The list did not contain the names of Nelson or another employee, Clayton Hamm [Hamm]. Both were still employed with NSC at the time the list was sent.²³

[22] Nelson was terminated at some point after 2:00 p.m. on February 13th. He was advised that this was due to safety violations with respect to the conveyor incident.²⁴ Hamm was apparently laid off at the end of the work day on February 13th, based on there being a lack of work.²⁵

[23] On February 14, 2024, the Union filed an unfair labour practice application²⁶ [Underlying ULP] due to Hamm and Nelson being laid off and terminated (respectively) on February 13th. The Underlying ULP is sworn by the Union's organizer, Gord Hiebert [Hiebert]. It avers that both Hamm and Nelson are Union members,²⁷ that both were perceived to be supportive of the Union,²⁸ and that their lay-off and termination were discriminatory action with a view to discouraging membership and activity in the Union.²⁹

[24] On February 15, 2024, the Board directed a representation vote for the Second Certification Application. The Notice of Vote indicated that both Hamm and Nelson would receive ballots, with the voting period concluding on March 7, 2024.

[25] On February 16, 2024, the Union filed an application for interim relief³⁰ in the context of the Underlying ULP. By this time, Hamm had been reinstated.³¹ The application for interim relief sought: (a) reinstatement of Nelson with back pay and other benefits owing to him; (b) that NSC

²² Schutz affidavit, para 20 (re: February 13th) and para 35 (re: late on February 12th).

²³ Hiebert affidavit, para 7.

²⁴ Nelson affidavit, para 14.

²⁵ Application in LRB File No. 035-24, para 10.

²⁶ LRB File No. 035-24 [Underlying ULP].

²⁷ Application in Underlying ULP, para 7.

²⁸ Application in Underlying ULP, para 7.

²⁹ Application in Underlying ULP, para 12.

³⁰ LRB File No. 038-24.

³¹ Application in LRB File No. 038-24, para 4.

be prohibited from terminating any employee within the proposed bargaining unit at its Vanscoy facility until final determination of the Second Certification Application, the First ULP and the Underlying ULP; and (c) that NSC be required to post the Board's reasons and order with respect to interim relief.³²

[26] The Union filed affidavits from Hiebert, Nelson, and Jacob Thompson [Thompson], a former employee of NSC. NSC filed an affidavit from Schutz. In addition, both parties filed written submissions with the Board, and made oral submissions on February 23, 2024. All of this was considered by the Board prior to issuing the February 26th interim order.

[27] The Union's affidavit evidence included the following:

- a) Thompson asked to be laid off on January 27, 2024, but was told on January 29, 2024 that Rogne could not approve this, because NSC had too much work.³³
- b) NSC employees have expressed concern to Hiebert that attempting to organize their workplace will result in the loss of their jobs.³⁴ Hiebert was advised of the January 30th meeting by NSC employees, and is concerned that organizing information may be being reported to Rogne.³⁵
- c) NSC employees have told Hiebert that Hamm and Nelson were perceived as the employees who got the Union involved in organizing the Vanscoy work site, prior to their termination.³⁶ NSC employees have also told Hiebert that they perceive a danger in admitting to having talked to the Union, even while continuing to support its efforts to organize.³⁷
- d) Nelson has previously worked in unionized environments and was aware of the benefits of doing so.³⁸ He perceived comments at the January 30th meeting as specifically targeted toward newer employees who had recently been hired and not received the overtime work and pay that had been available in previous years.³⁹ He understood that he was NSC's newest Vanscoy employee at the time, and one of very

³² Draft interim order in LRB File No. 038-24.

³³ Thompson affidavit, para 2 and Exhibit "A".

³⁴ Hiebert affidavit, para 3.

³⁵ Hiebert affidavit, para 4.

³⁶ Hiebert affidavit, para 5.

³⁷ Hiebert affidavit, para 5.

³⁸ Nelson affidavit, para 2.

³⁹ Nelson affidavit, para 5.

few employees who fit the description of not having been employed during previous busy seasons.⁴⁰

- e) Nelson was told by other employees that he was perceived as one of the individuals trying to bring in the Union.⁴¹
- f) With respect to the conveyor incident, Varley asked him to retrieve a belt for the conveyor, and said he would show him how to change it.⁴² He understood Varley had been employed by NSC for several years.⁴³ The emergency stop cord for the conveyor was pulled at the time Varley was instructing him on how to change the belt.⁴⁴ While this was occurring, Beauchemin approached and asked him and Varley for their FLHA cards, and why they didn't lock the conveyor out before installing the belt.⁴⁵ Beauchemin said he'd be speaking to Rogne and that he'd be speaking with Nelson the next day.⁴⁶ Nelson was permitted to finish his shift and, in addition, worked two hours of overtime at NSC's request.⁴⁷
- g) No one spoke to Nelson about the conveyor incident prior to his termination on February 13th, and he did not have the opportunity to explain that Varley, a more experienced employee, was showing him how to do the work in issue.⁴⁸
- h) Nelson checked NSC's scheduling software during the morning of February 13th and noticed that he had been removed from the schedule.⁴⁹ He tried phoning Rogne but Rogne wouldn't answer his calls.⁵⁰ He showed up for work for his 2:00 p.m. shift, and shortly afterward he was brought into a meeting with Beauchemin, Rogne and another supervisor.⁵¹ He was told that breaking the lockout protocol for the conveyor was a level four infraction and grounds for immediate termination.⁵² He was provided with a

⁴⁰ Nelson affidavit, para 5.

⁴¹ Nelson affidavit, para 6.

⁴² Nelson affidavit, para 7.

⁴³ Nelson affidavit, para 7.

⁴⁴ Nelson affidavit, paras 8-9.

⁴⁵ Nelson affidavit, para 9.

⁴⁶ Nelson affidavit, para 10.

⁴⁷ Nelson affidavit, para 11.

⁴⁸ Nelson affidavit, para 12.

⁴⁹ Nelson affidavit, para 13.

⁵⁰ Nelson affidavit, para 13.

⁵¹ Nelson affidavit, para 13.

⁵² Nelson affidavit, para 14.

termination letter, though it did not allege cause or state the reason(s) for his termination.⁵³

[28] NSC's affidavit evidence included the following:

- a) NSC takes safety violations very seriously.⁵⁴ LOTO violations are amongst the most serious and begin at Level 3 (of 4 levels) for progressive discipline.⁵⁵ Nelson had attended safety briefings related to LOTO procedures.⁵⁶
- b) Schutz understood the safety violations committed by Nelson with respect to the conveyor to be: (1) Failing to revise his FLHA card for a change in task; (2) Failing to lock out the conveyor/screen deck; (3) Standing on the conveyor structure to perform work instead of a platform away from the structure; and (4) not performing a bump test to see if the conveyor was de-energized before working on it.⁵⁷
- c) On the morning of February 13th, Schutz met with the management team to discuss whether it would be appropriate to discipline Nelson for the incident with the conveyor.⁵⁸ Schutz authorized Nelson's termination based on three key factors: (1) the severity of the violations, which he assessed as Level 4; (2) that Nelson had received a written warning for a safety infraction less than two weeks earlier;⁵⁹ and (3) that Nelson was a short tenure employee who was proving to be an ongoing serious safety risk at the work site.⁶⁰
- d) Varley did not receive any discipline for the conveyor incident, because management (apparently not Schutz) determined that he only observed safety breaches by Nelson, and did not actually participate in those breaches.⁶¹ Management determined that Varley was not instructing Nelson and was only waiting for the conveyor to become operational again.⁶² Instead, a meeting was held on February 13th between Rogne and Varley to discuss what could have been done differently when Varley observed Nelson acting in an unsafe manner.⁶³ Varley was given an opportunity to provide a statement with respect to

⁵³ Nelson affidavit, Exhibit "A".

⁵⁴ Schutz affidavit, para 5.

⁵⁵ Schutz affidavit, para 6.

⁵⁶ Schutz affidavit, paras 8-12, Exhibits "B", "C" and "D".

⁵⁷ Schutz affidavit, para 17.

⁵⁸ Schutz affidavit, para 20.

⁵⁹ Apparently his first while at NSC, it seems.

⁶⁰ Schutz affidavit, para 20.

⁶¹ Schutz affidavit, para 25.

⁶² Schutz affidavit, para 25.

⁶³ Schutz affidavit, para 24.

his role in the conveyor incident.⁶⁴ In terms of his discipline history, Varley has received a written reprimand from NSC for a safety incident in which he damaged a steel garbage bin with a loader in April of 2023.⁶⁵

- e) In 2023, NSC administered discipline on 21 occasions for safety violations⁶⁶. In the past two years or so, it has terminated Nelson and three other employees for cause due to safety violations.⁶⁷
- f) At the time he authorized Nelson's termination, Schutz was not aware of the Second Certification Application.⁶⁸ He was also not aware of whether Nelson supported the Union or not.⁶⁹ Based on his discussions with his management team, no one else indicated that they knew Nelson was involved with the Union or had a preference for unionization.⁷⁰
- g) Once he became aware of the Second Certification Application, Schutz considered whether NSC should cancel Nelson's termination and instead apply some other measure of workplace discipline.⁷¹ Upon considering the issue closely, he determined that Nelson's termination was still appropriate, and that allowing him to continue working at NSC would send a poor message to NSC's staff that safety is a secondary consideration in the workplace.⁷²
- h) Management and employees have expressed concern to Schutz about reinstating Nelson, as he is perceived as a safety risk.⁷³ Schutz is concerned that reinstating Nelson at the Vanscoy plant prior to a hearing on the merits of the Underlying ULP will damage workplace morale and create unnecessary safety risks for NSC employees.⁷⁴ It is his belief that reinstating Nelson will send a dangerous message that employees can ignore safety protocols with impunity, and that any negative consequences for dangerous behaviour such as termination of employment will be reversed by the Board solely on the basis of the Union's efforts to certify the workplace.⁷⁵

⁶⁴ Schutz affidavit, para 23 and Exhibit "J".

⁶⁵ Schutz affidavit, para 26 and Exhibit "L".

⁶⁶ Schutz affidavit, para 27.

⁶⁷ Schutz affidavit, para 27.

⁶⁸ Schutz affidavit, para 35.

⁶⁹ Schutz affidavit, para 36.

⁷⁰ Schutz affidavit, para 36.

⁷¹ Schutz affidavit, para 37.

⁷² Schutz affidavit, para 37.

⁷³ Schutz affidavit, para 38.

⁷⁴ Schutz affidavit, para 39.

⁷⁵ Schutz affidavit, para 40.

Argument on behalf of the Union:

[29] The Union acknowledged its onus to establish that the Underlying ULP disclosed an arguable case and that the balance of convenience favoured the relief it was seeking. It also acknowledged that the presumption in s. 6-62(4) is inapplicable.⁷⁶

[30] The Union characterized the January 30th meeting as encouraging employees to spy on one another and to report to management. Union supporters were threatened with retaliation, and Schutz's evidence confirms that NSC was aware of the potential effects of its managers' statements.

[31] The Union highlighted that two terminations were carried out on February 13th - Hamm and Nelson - and that both individuals were within a class of individuals perceived as being potentially problematic, being more recent hires. Employees had told Hiebert that Hamm and Nelson were perceived as being those who got the Union involved. Employees had also told Nelson that this is how he was perceived.

[32] Nelson's termination letter provided no reason for his dismissal. The verbal explanation he was given was that it was due to a safety infraction. However, a more senior employee, Varley, was also involved and received no discipline. Beauchemin had indicated that both employees would be disciplined; only Nelson was. Further, Varley's written statement supports Nelson's version of events: that Varley was involved and providing him with direction.

[33] The Union submitted that it had established an arguable case in the Underlying ULP for the purposes of clauses 6-62(1)(g) and (a) of the Act. When viewed in context, Nelson's termination was discriminatory, with a view to discouraging participation in or supporting the Union. It was intended as intimidation and to have a chilling effect on other employees.

[34] The irreparable harm and labour relations harm, from the Union's perspective, is the chilling effect on employees exercising their rights, particularly during the period when the representation vote is underway. Citing several cases,⁷⁷ the Union submitted that the Board is sensitive to improper influences on employee choice at the organizing and vote stages. The Union pointed to employees having expressed their concerns to its organizer, Hiebert, and having

⁷⁶ *International Brotherhood of Electrical Workers, Local 2038 v Active Electric Ltd.*, 2018 CanLII 38245 (SK LRB) [Active Electric], at para 14.

⁷⁷ *Active Electric*, at para 87; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Sakundiak Equipment*, 2011 CanLII 75157 (SK LRB), at para 45; *United Steel, Paper And Forestry, Rubber, Manufacturing, Energy Allied Industrial And Service Workers Interenational Union (United Steelworkers) v Evraz Wasco Pipe Protection Corporation*, 2016 CanLII 98635 (SK LRB) [Evraz Wasco], at para 67.

signed support cards and then rescinded them, suggesting worry about potential employer retaliation.

[35] The Union submitted that NSC's stated concerns about safety if Nelson were reinstated were belied by the differing treatment that Varley and Nelson received on account of the same incident. In its view, any effect on employee morale as a result of Nelson's reinstatement could at best be a minor consideration. The Union submitted that Nelson, a Union member, should be back in the workplace to speak for himself to fellow employees. The prospect of him eventually being reinstated following resolution of the Underlying ULP would not address the potential chill on employees exercising their rights during the period of the representation vote without fear of retaliation.

[36] With respect to its request for any terminations to be prohibited until final determination of the Second Certification Application, the First ULP and the Underlying ULP, the Union suggested that this was necessary to prevent irreparable harm. Counsel admitted, however, that the Union had been unable to find a case where the Board had awarded such relief in analogous circumstances. The case that the Union relied upon involved an intended restructuring in a certified workplace that would have clear knock-on effects with respect to bumping, etc.⁷⁸

Argument on behalf of NSC:

[37] NSC argued that the Union failed to demonstrate an arguable case with respect to the Underlying ULP, or that the balance of convenience favoured granting interim relief.

[38] With respect to demonstrating an arguable case, NSC acknowledged that it is "a pretty low bar". However, it submitted that the Union had presented nothing but innuendo to suggest that Nelson was perceived as being involved in an organizing campaign, based on the statements of unidentified employees. Nelson was terminated because of the severity of his misconduct, his having received a written warning relatively recently, and him being an employee of short tenure. Varley received no discipline because he only observed Nelson's misconduct. Schutz was the decision-maker with respect to Nelson's termination. He even reconsidered the decision once he was aware that the Second Certification Application had been filed, but he determined that it remained appropriate.

⁷⁸ *Unifor Canada Local 594 v Consumers' Co-operative Refineries Limited*, 2021 CanLII 123017 (SK LRB), at para 73.

[39] NSC submitted that s. 6-62 of the Act does not prevent employees from being terminated when there are legitimate reasons for doing so. The Union's draft order would tie management's hands with respect to workplace safety and discipline, based on scant evidence.

[40] NSC noted that it took steps to remedy any potential harm caused by the January 30th meeting, especially through Schutz making remarks to employees on February 6th. It characterized its remedial efforts as analogous to those in *Aaron's Furniture*,⁷⁹ which were instrumental in the Board determining that interim relief was not required in that case.

[41] Regarding irreparable harm and the balance of convenience, NSC noted that Nelson could be reinstated with back pay and benefits if the Union ultimately succeeds on the Underlying ULP. NSC submitted that the Union filed no evidence to suggest that it was losing Nelson's vote or his leadership if he weren't reinstated, or that his termination had had any effect on the certification drive. NSC also suggested that the decision to terminate Nelson was made at a time when it appeared that the Union was abandoning its organizing efforts, because the First Certification Application had been withdrawn, and Schutz did not become aware of the Second Certification Application until after meeting with management during the morning of February 13th.

[42] NSC submitted that reinstating Nelson would be reinstating "an accident waiting to happen" and would have a negative effect on workforce morale. This is labour relations harm that it is able to be taken into account based on *Verdient*.⁸⁰ The balance of convenience did not favour Nelson's reinstatement.

Relevant Statutory Provisions:

[43] The following provisions of the Act are relevant:

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:*

(a) *subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*

...

(g) *to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with*

⁷⁹ *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Aaron's Furniture*, 2016 CanLII 1307 (SK LRB), at para 29.

⁸⁰ *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*, 2019 CanLII 57377 (SK LRB), at para 44.

a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part;

...

(2) *Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.*

...

6-103(1) *Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

(2) *Without limiting the generality of subsection (1), the board may do all or any of the following:*

...

(d) *make an interim order or decision pending the making of a final order or decision.*

[44] Section 15 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* describes the procedure for interim applications:

15(1) *An employer, union or other person that intends to apply to the board for an interim order or decision pursuant to clause 6-103(2)(d) of the Act shall file:*

(a) *an application in Form 12 (Application for Interim Relief);*

(b) *an affidavit of the applicant or other witness in which the applicant or witness identifies with reasonable particularity:*

(i) *the facts on which the alleged contravention of Part VI of the Act, the regulations made pursuant to Part VI of the Act or an order or decision of the board is based, including referring to any provision of the Act or regulations that is alleged to have been contravened;*

(ii) *the party against whom the interim relief is claimed; and*

(iii) *any exigent circumstances associated with the application or the granting of the interim relief;*

(c) *a draft of the order sought by the applicant in Form 13 (Draft Interim Order); and*

(d) *any other material that the applicant considers necessary for the purposes of the application.*

(2) *Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or witness's own knowledge to prove.*

(3) *If the board is satisfied that it is appropriate to do so because of special circumstances, the board may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.*

(4) *If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.*

(5) *Before filing an application pursuant to this section, the applicant shall contact the registrar and, on being contacted, the registrar shall set a date, time and place for the hearing.*

(6) *On being notified pursuant to subsection (5) of the date, time and place of the hearing, the applicant shall serve a copy of the application and all other material mentioned in subsection (1) on the party against whom the interim relief is claimed at least 3 business days before the date set for the hearing.*

(7) *Before the hearing, the applicant shall file with the board proof of service of the application and the material mentioned in subsection (1) in accordance with subsection (6).*

Analysis and Decision:

[45] The Board employs a two-part test in determining whether to grant interim relief.⁸¹ The onus is on the applicant to satisfy both parts of the test.

[46] First, the applicant must establish that the underlying application discloses an arguable case that a violation of the Act has occurred. This is not a rigorous standard.⁸² An applicant is not required to demonstrate a probable violation of the Act through its evidence, only that a violation is more than a remote or tenuous possibility.⁸³ The Board does not pay close attention to the relative strengths or weaknesses of the applicant's case at this stage.⁸⁴

[47] Second, the applicant must establish that the balance of convenience favours granting interim relief pending a decision on the merits in the underlying application. For this stage, the applicant is required to demonstrate a meaningful risk of irreparable harm that may ensue if interim relief is not granted. Generally, irreparable harm is harm that cannot be remedied through an award of damages, or otherwise remedied, if it occurs.

[48] In assessing the balance of convenience, the Board will typically consider a variety of factors, including (but not necessarily limited to): (1) Whether there is a sufficient sense of urgency to justify the interim relief sought; (2) the potential burden imposed upon the respondent, including whether there is a meaningful risk of irreparable harm to the respondent if the interim relief is granted; (3) whether the interim relief, in effect, grants all of the relief sought in the underlying

⁸¹ *Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB) [SGEU], at para 30.

⁸² *Kone Inc. v International Union of Elevator Constructors*, 2020 CanLII 41808 (SK LRB) [*Kone*], at para 24.

⁸³ *SGEU*, at para 31.

⁸⁴ *Kone*, at para 24.

application; and, (4) whether there is a clear labour relations purpose for granting the interim relief sought.

[49] With respect to evidence on interim applications, in general there should be legitimate and persuasive reasons why an individual possessing personal knowledge is unavailable to provide an affidavit.⁸⁵ This is recognized by ss. 15(2) and (3) of the Regulations. That said, the Board has acknowledged, in *Evrz Wasco*, that in the course of a certification drive “there may often exist a certain level of trepidation among employees about how management might perceive the future prospect of unionization in its workplace and their attitude towards employees who are actively working towards that end”, and that “These fears can be exacerbated by unusual events taking place at the workplace during such a time”.⁸⁶ In *Evrz Wasco*, the Board accepted an organizer’s evidence about communications he had with unidentified employees for the purposes of establishing a chill on organizing efforts.⁸⁷ Here, the parties did not object to the admissibility of hearsay tendered by each other. Rather, their arguments focused on the weight that could be given to it.

[50] Based on the evidence before it and the submissions made to it, the Board concluded that the Underlying ULP discloses an arguable case for potential violations of clauses 6-62(1)(g) and 6-62(1)(a) of the Act. These were the provisions relied upon by the Union during its submissions, and the Board did not consider it necessary to examine any others noted in the Underlying Application.

[51] The evidence before the Board was that management made statements at the January 30th meeting that NSC admitted could be perceived as threatening, and suggesting retaliation for participating in organizing. The Board refers to the prepared remarks of Schutz quoted at paragraph 13 of these reasons.

[52] Management’s statements at the January 30th meeting suggest that it may have been interested in knowing which employees were participating in organizing, and its awareness that newer employees, in particular, might be dissatisfied with working conditions. Management encouraged employees to report information regarding organizing to it.

⁸⁵ *Evrz Wasco*, at para 20.

⁸⁶ *Evrz Wasco*, at para 21.

⁸⁷ *Evrz Wasco*, at para 22.

[53] Hiebert, the Union's organizer, was made aware of the January 30th meeting. According to his evidence, employees who spoke to him indicated that Hamm and Nelson were perceived as those "bringing in the union." According to Nelson's evidence, he had been told by employees that he was perceived this way as well. Nelson believed himself to be the most recent hire at the January 30th meeting, and he was attuned to certain comments at the meeting directed to the recent hires.

[54] The Board was faced with a conflict in the evidence regarding the conveyor incident. Nelson's evidence was first-hand, while Schutz's relied on hearsay. Nelson's evidence is that he was being instructed by Varley. Schutz's evidence is that NSC management considered Varley to have been a passive observer. It is arguable that Varley's statement, appended to Schutz's affidavit, suggests otherwise. The statement from Beauchemin, appended to Schutz's affidavit, suggests that he told Varley and Nelson that they would both be subject to disciplinary action. Only Nelson was. The respective involvement of Varley and Nelson in any safety violations that occurred in the course of the conveyor incident will need to be resolved in a full hearing with respect to the Underlying ULP.

[55] In spite of the conflict with respect to what occurred at the conveyor, Nelson's evidence is that he was permitted to finish his shift that day, and that he worked two hours of overtime at NSC's request.

[56] The evidence before the Board suggested that Varley and Nelson were subject to different processes following the conveyor incident. According to Nelson, he was not given the opportunity to explain what occurred, while Varley was.

[57] Both Hamm and Nelson were omitted from the employee list provided to the Board on the morning of February 13th, but both were not terminated until later that day.

[58] Schutz's evidence suggests that he had some awareness of the potential effect of terminating Nelson shortly after the Second Certification Application was filed. Its filing caused him to reflect on whether the decision remained appropriate. Notably, Hamm, who was apparently laid off on February 13th, was reinstated by February 16th. The reasons for this have not been explained to the Board, yet.

[59] Based on the foregoing, the Board was satisfied that the Union had raised an arguable case that Nelson's termination may have been motivated by anti-union animus, to dissuade Nelson and others from supporting and/or assisting the Union. A hearing on the merits will be

required to determine this. As both parties acknowledged during their submissions, at this stage the “arguable case” hurdle is relatively low.

[60] In considering irreparable harm and the balance of convenience, the Board is cognizant that the period during which a representation vote is open is an important one.⁸⁸ Employees’ choices with respect to communicating with each other about the benefits of unionization, and about which way to vote, should not be affected by fear of retaliation. If a vote is adversely impacted by this fear, the only remedy (absent another certification application at some future date, with fresh support evidence)⁸⁹ is to proceed to a hearing to attempt to establish that a new vote is required. The ability to do so may be inhibited by employees being fearful of participating in such a hearing, again, on the basis of potential retaliation.

[61] The Board was satisfied that failing to reinstate Nelson could give rise to a meaningful risk of irreparable harm to the Union. Employees might fear termination if communicating positively about the Union or voting in favour of it. At the January 30th meeting, NSC’s management expressed interest in receiving information about unionization efforts – what the Union characterizes as management encouraging “spying”. While the Board acknowledges Schutz’s remarks at the February 6th meeting, it remains the case that both Hamm and Nelson were terminated after February 6th. According to the Union’s evidence, both were perceived as supportive of the Union.

[62] The Board determined that an interim order reinstating Nelson could serve to abate the risk of the irreparable harm identified above. That is, adverse impacts on employees sharing information and views regarding unionization, and exercising their freedom of conscience in a vote. Reinstating Nelson could provide some assurance that employees can communicate freely about their intentions, and vote their conscience, because relief from the Board may be available to prevent or cure harm (including termination).

[63] That said, the Board acknowledged that NSC has legitimate concerns with respect to safety in its workplace, and that there is apparently no dispute that the proper LOTO procedure was not carried out with respect to the conveyor. The Board accepts that some employees may think that Nelson should not be returned to the workplace because of the safety issues involved

⁸⁸ See, generally, the following: *Evrax Wasco*, at paras 67-68; *Seiu West v Revera Retirement Genpar Inc*, 2011 CanLII 75835 (SK LRB), at para 31; *International Brotherhood of Electrical Workers, Local 2038 v AECOM Production Services Ltd.*, 2017 CanLII 72970 (SK LRB), at para 47.

⁸⁹ In such a circumstance, if sufficient support were obtained, s. 6-12(3) might apply: “the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.”

with the conveyor incident. However, NSC is not powerless to mitigate its concerns with respect to workplace safety or employee morale. The Board's interim order does not prevent NSC from requiring Nelson to undergo training, or prevent it from imposing a lesser form of discipline than termination with respect to the conveyor incident, should it choose to do so. Further, the interim order does not insulate Nelson from termination, prospectively, in the lawful exercise of NSC's rights, including for new safety violations.

[64] The Board declined to make the Union's requested order that Nelson, or any employee within the proposed bargaining unit, be unable to be terminated until final determination of the Second Certification Application, the First ULP and the Underlying ULP. In the Board's view, this would unduly inhibit NSC's ability to lawfully manage its workforce (including through terminations), and to prioritize safety, which is a worthy aim. As a practical matter, and indicative of its inappropriateness,⁹⁰ this expansive requested relief would go further than the particularized relief requested in the Underlying ULP if it were conceded today:

- a. *Reinstatement of Hamm and Nelson to their positions with NSC Minerals, and back pay and other benefits owing for the time during which their employment was terminated contrary to the SEA;*
- b. *A declaration that the Respondent NSC Minerals has breached the SEA and committed unfair labour practices pursuant to sections 6-62(1)(a), (g), (h), (i) and (j) of the SEA;*
- c. *An order that such unfair labour practices cease and desist; ...⁹¹*

[65] The Board also declined to order that Nelson be awarded back pay and benefits for the period between his termination and his reinstatement. Whether that remedy is available and appropriate will depend on the outcome of the hearing with respect to the Underlying ULP.

[66] These reasons are unanimous on behalf of the Board.

DATED at Regina, Saskatchewan, this **28th** day of **February, 2024**.

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

⁹⁰ See, generally, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 568 v Signal Industries (1998) Ltd.*, 2018 CanLII 127661 (SK LRB), at paras 25 and 44.

⁹¹ Application in Underlying ULP, paras 13(a)-(c).