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Reasons for decision

Grain Services Union (ILWU - Canada),

applicant,

and

Viterra Inc.,

employer.

Board File: 26380-C

Grain Services Union (ILWU - Canada),

applicant,

and

United Grain Growers Limited operating as Viterra,
Viterra Inc.,

employers,

United Food and Commercial Workers Union, Local
832,

interested party.

Board File: 26473-C

United Grain Growers Limited operating as Viterra,
Viterra Inc.,

applicants,

and

Grain Services Union (ILWU - Canada), United Food
and Commercial Workers Union, Local 832

bargaining agents,

and

AgPro Grain Inc.,

employer,

and

United Food and Commercial Workers International
Union, Local 1118

interested party.

Board File: 26532-C
CIRB/CCRI Decision no. **442**
March 10, 2009

The Board was composed of Mr. Graham J. Clarke, Vice-Chairperson, Messrs. Patrick J. Heinke and John Bowman, Members. Hearings were held in Regina, Saskatchewan, on March 17, 18, 19 and 20, 2008, September 29 and 30, 2008, October 1, 2008, and in Toronto, Ontario, on November 24, 2008.

Appearances

Ms. Ronni A. Nordal, L.L.B. for Grain Services Union (ILWU - Canada);

Mr. Craig W. Neuman for Viterra.

These Reasons for Decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I - Nature of the Applications

[1] The Canada Industrial Relations Board (the Board) has three applications before it, all of which are related to the Saskatchewan Wheat Pool's (SWP) acquisition of all the shares of Agricore United (AU).

[2] SWP later changed its name to Viterra Inc. (Viterra), following a change to its Letters of Incorporation. This decision will describe the ongoing corporate entity using the Viterra name, but will refer to SWP and AU, where appropriate, to explain the background.

[3] The Grain Services Union (ILWU - Canada) (GSU) filed two applications (files 26830-C and 26473-C) pursuant to section 18 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*) and requested essentially three things:

- i) a change to the scope of an office bargaining unit it represented;
- ii) an amalgamation of its country operations bargaining unit and maintenance bargaining unit; and
- iii) a declaration that former AU employees working in Saskatchewan fell within the GSU's existing bargaining units.

[4] Viterra's application (file 26532-C), filed pursuant to sections 18.1, 35, 44 and 45 of the *Code*, asked the Board to consolidate Viterra's existing bargaining units, represented by the GSU, into a single bargaining unit. Viterra further asked for a representation vote to determine whether employees wished to be represented by a bargaining agent or not.

[5] Viterra's application also impacted two bargaining units represented by the United Food and Commercial Workers (UFCW). UFCW Local 832 represented a three-person bargaining unit in Winnipeg, Manitoba. UFCW Local 832 filed written submissions but declined to participate any further in the oral hearing. UFCW Local 832 took no position with regard to the GSU's two applications but opposed Viterra's request for a bargaining unit review. It argued against the Board holding a vote to determine whether or not Viterra's employees wanted to be unionized.

[6] On the eve of the first day of hearing, counsel for the UFCW Local 1118, representing a bargaining unit at the Edmonton Oat and Forage facility, advised that it had never received notice of the hearing and requested an adjournment. The AU had owned the Edmonton Oat and Forage facility at the time of the corporate transaction.

[7] In order not to delay the hearing, Viterra advised the UFCW Local 1118 and the other parties that it was withdrawing its request to include this particular facility in the proposed single bargaining unit. Viterra also advised that this particular facility had been slated to close.

[8] The parties advised the Board at the start of the hearing on March 17, 2008 that counsel for UFCW Local 1118 had withdrawn the request for an adjournment.

[9] During final argument on November 24, 2008, the parties advised the Board that they had differing views about the scope of their arguments. In Viterra's view, they were prepared to argue not only that the Board should conduct a bargaining unit review, but that the Board should find that a single bargaining unit was appropriate and that a vote of all of the employees in that unit should be ordered.

[10] The GSU took the position that they were only prepared to argue on the merits of their two applications and, for Viterra's application, on the sole issue of whether a bargaining unit review was warranted. If the Board found in favour of a review, then the GSU wanted an opportunity, pursuant to section 18.1(2) of the *Code*, to try to come to an agreement with Viterra with regard to the appropriate bargaining unit(s).

[11] Given the distinct stages set out in section 18.1(1) and (2) of the *Code*, the Board accepted the GSU's position that they were entitled to an opportunity to come to an agreement about the appropriate bargaining unit(s) prior to the Board determining, if necessary, the issue.

[12] As stated earlier, the Edmonton Oat and Forage facility is not at issue in these proceedings. Similarly, Viterra has other certified bargaining units as part of its export terminal operations involving different bargaining agents. Those port-based units are also not in issue.

II - The Existing Bargaining Units

[13] At the time the applications were filed, seven affected bargaining units existed at Viterra, not including the Edmonton Oat and Forage facility. In the intervening period, the Board certified two other bargaining units, one of which, due to a recent reconsideration decision, has been returned to the original panel for review.

[14] For ease of reference, the bargaining unit descriptions are as follows:

i) The Saskatchewan Country Operations Unit Order No.: 8259-U (Country Operations Unit):

all employees of the Saskatchewan Wheat Pool employed in its Country Services Division, commonly referred to as the Country Services (Operations) unit and specifically, but not so as to limit the generality of the foregoing, including employees in the classification of truck driver/truck operator employed in the operation of tractor-trailer units hauling grain for Saskatchewan Wheat Pool and AgPro Grain, excluding Manager Asset Utilization, Manager Agronomic Services, Market Development Manager, Manager Agricultural Research & Development Farm, Plant Processing Manager, and Head of Agronomy.

ii) The Saskatchewan Maintenance Unit Order No.: 7763-U (Maintenance Unit):

all employees of the Saskatchewan Wheat Pool employed in its Country Services Division, commonly referred to as the Maintenance unit, excluding District Maintenance Manager, Manager Maintenance Services, Superintendent Electrical Services, Supervisor Warehouse & Distribution, Technical Maintenance Support Services.

iii) The Office Unit Order No.: 7754-U (Office Unit):

all employees of the Saskatchewan Wheat Pool employed in its Regina, Saskatoon, Winnipeg, Thunder Bay, and Vancouver offices; in Computer Maintenance Services; Member Relations Division, commonly referred to as the Offices unit, excluding Research and Development Analyst, Chief Executive Officer, Treasurer, Executive Director, Director, Chief Financial Officer, Executive Assistant to the President, Assistant to the President, Executive Assistant to the Chief Executive Officer, Assistant to the Chief Executive Officer, Assistant to the Executive Director, Assistant to the Chief Financial Officer, Controller Terminal Elevator Division, Controller Country Services Division, Corporate Controller, Controller Corporate Accounting, Accountant, Manager Employee Relations, Manager Industrial Relations, Manager Compensation & Benefits, General Manager, Manager Grain Accounting, Manager Agronomic Services, Manager Grain Inspection & Services, Manager Member Development, Commodity Manager, Manager Accounting, Program Manager, Manager Shipment & Allocation, Manager Farm Supply Services, Manager Community Relations & Member Information, Manager Property Administration, Manager Corporate Business Development, Manager Corporate Planning Services, Manager Business Systems Development, Manager Purchasing, Manager International Business, Senior Project Manager, Project Manager, Manager Service Planning & Development, Manager Fertilizer Marketing, Territory Manager, Manager Asset Protection Services, Manager Office Services, Manager Commercial & Customer Relations, Manager Member Relations, Manager Engineering, Manager Financial Systems, Manager Financial Services, Manager Financial Analysis, Manager Finance, Manager Customer Support, Client Services Manager, Manager Grain Transactions, Manager Grain Marketing, Manager Traffic Logistics, Manager Market Analysis & Development, Market Development Manager, Manager Project Evaluation & Analysis, Manager Market Research & Promotion, Manager Crop Protection Marketing, Marketing Manager Terminal Elevator Division, Manager Communication Services, Claims Manager, Manager Safety, Manager Open Market Grains, Manager Special Crops Inventory, Manager Systems Operations, Manager Consulting Services, Manager Seed Marketing, Manager Environmental Policy & Planning, Manager Audit Services, Manager Selection & Quality Control, Manager Terminal Operations, Manager Democratic Process, Manager Research & Development, Manager Agricultural Research & Development, Manager Data Processing, Manager Facilities Planning, Position Manager Special Crops, Manager Quality Assurance, Manager Economic Analysis + Policy Development, Manager Transportation, Retail Sales Manager Western Canada, Manager Taxation, Manager Public Affairs, Manager Equipment & Special Services Marketing, Management Analyst, Head Central Development, Head Oil seed Development, Supervisor Compensation & Classification, Supervisor Employee Benefits, Supervisor Technical Support, Supervisor Employee Health Services, Supervisor Payroll Accounting, Supervisor Public Relations, Technical Maintenance Support Supervisor, Human Resources Superintendent, Human Resource Coordinator, Human Resources Consultant, Human Resources Development Coordinator, Human Resources Development Consultant, Human Resources Systems Analyst, Employee Relations Consultant, Employee Relations Coordinator, Employee Information Coordinator, Employee Family Assistance Program Coordinator, Employment Services Coordinator, Territory Coordinator, Employment Equity Coordinator, Quality Performance Coordinator, Administrative Coordinator, Business Systems Coordinator, Administration & Finance Coordinator, Development Coordinator, Grain Operations Coordinator, Salary Administration Coordinator, Coordinator Terminal Marketing, Investor Relations

Coordinator, Transportation Coordinator, District Representative, Purchasing Agent (Thunder Bay), Maintenance Superintendent (Thunder Bay), Market & Trade Analyst, Financial Analyst III, Financial Analyst, Pension & Benefits Analyst, Administrative Assistant, Auditor III, Information Systems Auditor, Technology Architect, Compensation Consultant, Research Agronomist, Senior Merchandiser, Merchandiser, Wheat Breeder, Design Engineer, Occupational Health Nurse/Claims Management Compensation, Employee Health Nurse, Secretary to the Board, Secretary.

iv) The AgPro Alberta Manitoba Unit Order No.: 7938-U (AgPro Alberta - Manitoba):

all employees of AgPro Grain Management Services Ltd. employed at or in connection with its inland terminal grain elevators and farm supply facilities located at Killam, Lavoy, Trochu, Crossfield, Lethbridge, and Vulcan, Alberta, and Boissevain and Brandon, Manitoba, excluding Regional Managers, Administrative Assistant to Regional Managers, Terminal Operations Managers, and those above.

v) The AgPro Saskatoon Unit Order No.: 7750-U (AgPro Saskatoon):

all employees of AgPro Grain Inc. at its Saskatoon terminal elevator, excluding Terminal Manager, Marketing Coordinator, Senior Marketing Coordinator, Network Manager, Operations Manager, Shed Foreman, Terminal Administration and Office Manager.

vi) The AgPro Moose Jaw Unit Order No.: 7755-U (AgPro Moosejaw):

all employees of AgPro Grain Inc. at its Moose Jaw terminal elevator, excluding Terminal Manager, Marketing Coordinator, Senior Marketing Coordinator, Network Manager, Operations Manager, Shed Foreman and Executive Assistant.

vii) The Winnipeg Coulter Unit Order No.: 7555-U (Coulter Unit):

all employees of AgPro Grain Management Services Ltd. at 1051 Coulter Avenue, Winnipeg, Manitoba, excluding clerical and office staff, supervisors, and those above the rank of supervisor.

[15] The two new units certified during these proceedings were:

viii) The Carman Bean Plant Unit Order No.: 9419-U (Carman Bean Unit):

all employees of Saskatchewan Wheat Pool Inc., operating as Viterra, in the town of Carman in the Province of Manitoba who are employed in the Bean and Special Crops plant, excluding the Janitor, Senior Facility Manager, Senior Field Representative, Senior Merchandiser, Merchandiser Trainee / Office Manager, Country Operations Manager and those employed above that rank.

ix) The Manitoba Country Operations/Maintenance Unit Order No.: 9488-U (under review):

all employees of Viterra Inc. in the Province of Manitoba who are engaged in agri-sales, grain handling, maintenance and related ancillary operations of the employer, excluding employees employed at the Coulter Street Facility, casual and seasonal employees, market centre managers, regional maintenance managers, manager terminal operations, administrative coordinator, administrative assistant to the regional manager, administrative assistant to the market centre manager, and those above.

[16] A reconsideration panel of the Board has asked the original panel to review this last unit on the basis that it inadvertently covered employees already subject to a collective agreement. Viterra has also filed a judicial review application related to that certification.

III - Facts

a) History of the bargaining units

[17] The technology in the grain industry has changed significantly in recent years. The traditional wood crib elevators have given way to large concrete high-throughput elevators.

[18] The GSU has a long history representing grain workers on the prairies. In February 1947, the GSU was certified at SWP to represent the Country Operations Unit. Members of this bargaining unit generally perform grain handling work, including the procurement of grain, the sale of inputs and the operation of Ag-Retail outlets.

[19] Also in February 1947, the GSU was certified at SWP to represent the Office Unit. The main office location is in Regina, Saskatchewan. The SWP had offices in other cities but, over the last decade, closed branches in Thunder Bay, Vancouver, Winnipeg and Saskatoon.

[20] In July 1956, the GSU was certified at SWP to represent the Maintenance Unit.

[21] In 1980, the GSU was certified for two different grain facilities in Saskatoon and Moose Jaw which were owned by two separate private companies. The certifications are site specific. SWP purchased these terminals from the private companies and continued to operate them as distinct sites under the AgPro name.

[22] The SWP operated AgPro mainly in Alberta and in Manitoba. The name AgPro was used outside Saskatchewan primarily for marketing reasons.

[23] In 1988, the UFCW Local 832 was certified for a unit of Winnipeg employees at Elders Grain Limited (Elders). In 1999, AgPro acquired Elders. This resulted in an amended certification order (7555-U) for the UFCW Local 832 for AgPro Grain Management Services Limited at 1051 Coulter Avenue. There are currently three members in the Coulter Unit.

[24] In 2000, the GSU was certified for the AgPro Alberta - Manitoba Unit.

[25] In 2003, the GSU and the SWP agreed to negotiate one collective agreement covering both the Country Operations Unit and the Maintenance Unit.

[26] In June 2007, the SWP acquired all of the shares of United Grain Growers Limited, which was operating as Agricore United. AU had a bargaining unit at the Edmonton Oat and Forage facility, which was represented by the UFCW Local 1118. As mentioned, that facility is not in issue in these proceedings.

[27] Following the SWP's acquisition of all of the AU shares, the Boards of Directors were combined almost immediately. The combined Board of Directors selected a single CEO, COO and senior management team to run the businesses.

[28] Most of the SWP's assets had been in the Province of Saskatchewan. The only exception was the separate AgPro Grain, which operated mostly in Manitoba and Alberta.

[29] AU's assets were found mainly in Alberta (including Northeastern B.C.) and in Manitoba.

b) The first application (file 26380-C)

[30] On June 28, 2007, the GSU filed an application under section 18 of the *Code* with regard to the Office Unit (file 26380-C). The GSU asked the Board to modify the description of its bargaining unit in order to limit its geographic scope to Regina, Saskatchewan. Not only had SWP closed offices in other cities, but the GSU submitted that office employees in Winnipeg did not do work of the bargaining unit and that employees in the Calgary office were mainly managers. The GSU wanted the description to be updated to reflect the current reality as it saw it.

[31] In August 2007, the changes at SWP continued. SWP adopted the trade name of "Viterra". The business consisting of the SWP's and AU's assets would be operated as a single new entity. Viterra established a transition plan to create one overall business and to promote synergies "without regard to existing artificial provincial and bargaining unit boundaries".

c) The second application (file 26473-C)

[32] On August 31, 2007, the GSU filed its second application seeking to combine its Country Operations Unit and Maintenance Unit. In that application, the GSU raised sections 18 and 44 of the *Code*. During final argument on November 24, 2008, the GSU advised that it was proceeding only under section 18 of the *Code*, since, in its view, no sale of business had taken place.

[33] The GSU argued that the Country Operations Unit and the Maintenance Unit were not inappropriate for collective bargaining, which explained why they were not filing their application under section 18.1 of the *Code*. Rather, the GSU argued the Board could merge the two bargaining

units, pursuant to its powers under section 18 of the *Code*, in order to reflect the bargaining reality that had existed since 2003.

[34] The GSU also asked the Board to confirm that the existing bargaining unit descriptions for Country Operations and Maintenance covered any former AU employees in Saskatchewan who fell within scope.

d) The third application (file 26532-C)

[35] On October 9, 2007, Viterra filed its application under sections 18.1, 35, 44 and 45 of the *Code*.

[36] Viterra requested that the Board review all of the bargaining units represented by the GSU and the UFCW. In Viterra's view, the Board should create one single bargaining unit for the new business which now operated across the prairie provinces. Because union and non-union employees would be covered by the description of that unit, Viterra argued that a vote of the employees was required, in order to determine whether they wanted to be represented by a bargaining agent.

[37] Viterra estimated that as of September 30, 2007 there were approximately 890 SWP employees in the seven existing bargaining units and 1033 former AU employees in non-union "bargaining unit equivalent" positions.

[38] Generally, there were far more AU employees in the Provinces of Alberta and Manitoba than in Saskatchewan.

[39] Viterra's goal was for its bargaining units to reflect its new integrated western Canada wide operation.

[40] On November 1, 2007, AU was wound up as a wholly owned subsidiary of SWP (Viterra).

[41] On December 20, 2007, the Board dismissed the GSU's request for an interim order (file 26574-C). The GSU had asked the Board for:

- i) an order that the existing bargaining unit descriptions in Saskatchewan covered any AU employees in that province;
- ii) alternatively, an order prohibiting Viterra from intermingling employees until the Board had completed its deliberations.

[42] The Board was not convinced that it should issue an interim order, given the diverging views on the material facts.

[43] Viterra advised at the November 24, 2008 hearing that SWP amended its Articles of Incorporation in March 2008, *inter alia*, to formally change its name to Viterra.

[44] On March 14, 2008, the Board certified the GSU to represent a bargaining unit at the Carman Bean Plant (Order 9419-U). The Carman Bean Plant handles beans and other specialty crops.

[45] On July 31, 2008, the Board certified the GSU to represent the Manitoba Country Operations Bargaining Unit (9488-U). This unit applied to Viterra's employees in agri-sales, grain handling, maintenance and related ancillary operations. The original panel, following a reconsideration decision, is currently reexamining the description of this bargaining unit.

[46] Viterra and the GSU collectively bargained in the latter part of 2007 and during 2008. Collective bargaining commenced in November 2007 for the AgPro Alberta - Manitoba unit. On May 27, 2008, Viterra presented its final offer to the GSU. From June 2 to 13, the GSU held a ratification vote. The GSU advised Viterra on June 13 that its membership had ratified the agreement. Viterra's Board of Directors ratified the agreement on July 4, 2008 and the collective agreement was made retroactive to July 1, 2008.

[47] For the Office Unit, Viterra and the GSU started bargaining in December 2007. Viterra gave the GSU a final offer on May 27, 2008 during conciliation. The members of the bargaining unit rejected the final offer by a margin of 83%.

[48] After the GSU and Viterra exchanged lockout and strike notices, a legal strike by members of the Office Unit commenced in July 2008. Viterra presented the GSU with a revised final offer on September 12, 2008, which was ultimately accepted by members of the bargaining unit and ratified by Viterra.

[49] For the Country Operations Unit and Maintenance Unit, joint bargaining commenced in December of 2007. Viterra presented a final offer on May 27, 2008 which was rejected by GSU members by a margin of 57%. GSU members worked to rule until the beginning of September 2008 when limited strike action took place. On September 12, 2008, Viterra presented a revised final offer to the GSU which was accepted by members of the bargaining unit on September 17, 2008. Viterra subsequently ratified the same agreement.

[50] As the Board heard during testimony, Viterra had sought to negotiate almost identical terms and conditions of employment for all three collective agreements. Viterra achieved most of its goals during collective bargaining and attained a significant amount of uniformity in the collective agreements covering the different bargaining units.

IV - Issues

[51] The issues raised by the parties in the order in which the applications were filed with the Board are:

- i) should the Board modify the description of the Office Unit to limit it geographically to Regina, Saskatchewan? (file 26380-C);
- ii) can the Board combine the Country Operations Unit and Maintenance Unit into a single bargaining unit pursuant to section 18 of the *Code*? (file 26473-C);

iii) does the scope of the Country Operations Unit and Maintenance Unit encompass Saskatchewan-based former AU employees?

iv) can the Board issue a single employer declaration? (file 26532-C);

v) did the SWP's transaction with AU constitute a sale of business? If yes, should the Board conduct a bargaining unit review? (file 26532-C);

vi) are the existing bargaining units inappropriate for collective bargaining thereby warranting a bargaining unit review? (file 26532-C)

V - Analysis and Decision

[52] The Board has decided to conduct a bargaining unit review. Because there are different possible routes leading to a bargaining unit review, the Board does not need to decide all of the above issues.

i) Should the Board modify the description of the Office Bargaining unit to limit it to Regina, Saskatchewan? (file 26380-C)

[53] The GSU argued that the Office Unit description should apply to the location where the office employees work. Due to changes over the last decade, offices have closed and the bargaining unit is generally restricted to employees in Regina, Saskatchewan.

[54] The Board heard evidence about office employees working in Winnipeg as well as in Calgary. The Winnipeg employees performed IT functions which had not previously been part of the GSU's office unit. The Calgary office housed Viterro executives.

[55] Due to the fact the Board will conduct a bargaining unit review, the issue of the Office Unit will be dealt with at that time.

ii) Can the Board combine the Country Operations and Maintenance bargaining units into a single bargaining unit pursuant solely to section 18 of the *Code*? (file 26473-C)

[56] The GSU asked the Board to merge two bargaining units pursuant to section 18 of the *Code*. It expressly did not raise section 18.1 of the *Code*. The GSU denied that the individual units were inappropriate, which is a condition precedent for a bargaining unit review under section 18.1. However, the GSU argued that the Board retained the power to merge bargaining units pursuant to section 18.

[57] The GSU also explained during final argument that while it had originally relied on section 44 of the *Code* (sale of business), the GSU did not have a full understanding of the facts at that particular time. The GSU's position during final argument was that no sale of business took place when the SWP acquired all the AU shares.

[58] Sections 18 and 18.1(1) and (2) of the *Code* read as follows:

Review or amendment of orders

18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

Review of structure of bargaining units

18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.

Agreement of parties

(2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board

(a) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and

(b) may make any orders it considers appropriate to implement any agreement.

[59] The Board is of the view that the introduction of section 18.1 into the *Code* in 1999 codified the procedure for bargaining unit reviews.

[60] Previously, the Board could order a review under section 18 at the request of the parties or on its own motion. It is now clear in section 18.1 that the review process can be initiated only by an employer or a certified bargaining agent.

[61] The *Code* in section 18.1 has also set out three routes by which a party can obtain a bargaining unit review. Section 18.1(1) allows the Board to conduct a review if, in its opinion, it believes that the bargaining units are no longer appropriate for collective bargaining. Under section 18.1(2) the Board can also conduct a review following the issuing of a single employer declaration under section 35 of the *Code* or a sale of business declaration under section 44 of the *Code*.

[62] Given the amendments to the *Code* in 1999, which established clear criteria for the review of bargaining units, it is the Board's view that it can no longer combine bargaining units using its general review power under section 18 of the *Code*. If a party requests a merger of bargaining units, then it must file an application under section 18.1 and satisfy the criteria for one of the three routes that allows the Board to intervene.

iii) Do the existing Saskatchewan Country Operations and Maintenance Bargaining units encompass Saskatchewan-based former AU employees performing in scope functions?

[63] The GSU took the position that the Country Operations Unit and the Maintenance Unit were geographically limited to the Province of Saskatchewan. Viterra in its November 26, 2007 written submission pointed out that the actual certificates do not contain any such explicit restriction.

[64] Viterra also argued that the GSU had taken a different position on the scope of its bargaining units in other Board proceedings.

[65] The Board is satisfied that the scope of each unit is intended to apply within the Province of Saskatchewan, given the context surrounding the original certifications at SWP. While consolidation

in the grain industry has overtaken the original province-based wheat pools, the original scope of the Country Operations and Maintenance Units remains focussed on the Province of Saskatchewan.

[66] In the Board's view, any former AU employee working in Saskatchewan, who performs work falling within the description of the two bargaining units, will be a member of one of those bargaining units. The number of in scope employees significantly outnumbered the number of AU employees in Saskatchewan who could be added to either unit. There is no change in the scope of the existing units which might otherwise have required evidence of double majority support: see *Teleglobe Canada* (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198).

iv) Can the Board issue a single employer declaration? (file 26532-C)

[67] Section 35 of the *Code* reads as follows:

Board may declare single employer

35. (1) Where, on application by an affected trade union or employer, associated or related federal works, undertakings or businesses are, in the opinion of the Board, operated by two or more **employers** having common control or direction, the Board may, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business. Before making such a declaration, the Board must give the affected **employers** and trade unions the opportunity to make representations.
(emphasis added)

Review of bargaining units

(2) The Board may, in making a declaration under subsection (1), determine whether the employees affected constitute one or more units appropriate for collective bargaining.

[68] Viterra argued that at the time of its application in October 2007, the separate corporate entities of AU and the SWP both existed. Viterra was forthright during argument that in November 2007 an amalgamation took place such that there were no longer two separate corporate entities. However, in Viterra's view, the key time frame for the Board to consider was as of the date of its application.

[69] The Board cannot agree.

[70] Section 35 is quite clear, through the multiple use of the term “employers” in section 35(1), that the Board must have two distinct employers in existence at the time it decides whether to issue a single employer declaration.

[71] While there may be two employers at the time of the application, there must still be two employers at the time of the issuing of the declaration. Given that AU had been wound up on November 1, 2007 as a wholly owned subsidiary of Viterra, the Board had only one employer before it when it had to consider the merits of Viterra’s request. The Board dismisses this part of Viterra’s application.

v) Did the SWP’s transaction with AU constitute a sale of business? If yes, should the Board conduct a bargaining unit review? (file 26532-C)

[72] Section 44 of the *Code* reads as follows:

44. (1) In this section and sections 45 to 47.1,

"business"

«entreprise »

"business" means any federal work, undertaking or business and any part thereof;

"provincial business"

«entreprise provinciale »

"provincial business" means a work, undertaking or business, or any part of a work, undertaking or business, the labour relations of which are subject to the laws of a province;

"sell"

«vente »

"sell" , in relation to a business, includes the transfer or other disposition of the business and, for the purposes of this definition, leasing a business is deemed to be selling it.

Sale of business

(2) Where an employer sells a business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

[73] It was not clear initially from the written submissions in this case whether AU had any certified bargaining units. This may explain how the parties overlooked the UFCW Local 1118 and its bargaining unit at the Edmonton Oat and Forage facility. Section 44 of the *Code* contemplates the entity being purchased has one or more certified bargaining units or pending labour relations matters which pass over the purchaser.

[74] It became apparent during these proceedings that the AU had certified bargaining units, such as the one at the Edmonton Oat and Forage facility, represented by UFCW Local 1118.

[75] The GSU argued that no sale of business could take place given that none of the AU's bargaining units were directly at issue in this particular proceeding. The Board, with respect, cannot agree. The SWP clearly became responsible for any AU bargaining units, whether they were involved directly in these applications or not.

[76] In the Board's view, a sale of business took place when the SWP purchased all of the shares of AU. On November 1, 2007, AU was wound up as a wholly owned subsidiary of Viterra. In March 2008, the SWP's Articles of Incorporation were amended to change, *inter alia*, the SWP's name to Viterra.

[77] Given that there has been a sale of business, section 45 of the *Code* allows the Board to review bargaining units, using the review process found at section s.18.1 of the *Code*:

Review of bargaining units

45. In the case of a sale or change of activity referred to in section 44, the Board may, on application by the employer or any trade union affected, determine whether the employees affected constitute one or more units appropriate for collective bargaining.

[78] The GSU argued that the expression “employees affected” would have to be AU unionized employees. In the GSU’s submission, given that no AU bargaining unit is directly in issue in these proceedings, there are no “employees affected”.

[79] There is a significant discretion given to the Board under section 45 where a sale of business has taken place and that sale of business impacts on employees. The Board heard significant evidence about the impact on both employees, where unionized or not, and on the employer as a result of the corporate transaction. The intermingling of union and non-union employees was one of the issues to which the GSU referred in support of its application for interim relief. Section 45 is designed to allow the Board to deal with labour relations issues following a sale of business of the magnitude which occurred in this case.

[80] Viterra has asked for a bargaining unit review. The Board, without suggesting that the *status quo* must necessarily be changed, has decided that a review would be appropriate given the finding of a sale. The purpose of this review will be for the Board to review any supplementary evidence and submissions relevant to the issue of how the bargaining units should be changed, if at all.

vi) Are the existing bargaining units inappropriate for collective bargaining thereby warranting a review? (file 26532-C)

[81] Viterra argued that even if the Board found it could not grant a single employer declaration or a sale of business declaration, that the current bargaining units in issue, which numbered nine on the day of final argument, were inappropriate for collective bargaining, thus obliging the Board to conduct a bargaining unit review.

[82] Viterra argued that the GSU was limiting its view of Viterra to Saskatchewan whereas Viterra now operates as a western-based company without regard to geographic or provincial boundary limitations. In Viterra’s view, the Board should establish a single bargaining unit and order a representation vote regarding whether the employees want a union to represent them.

[83] The Board does not need to conclude whether the existing units are inappropriate for collective bargaining, given its earlier decision to conduct a review under section 18.1(2) of the *Code* because there has been a sale of business.

VI - Next Steps

[84] As mentioned at the beginning of this decision, the GSU was not prepared to argue about the appropriate bargaining unit(s) until the Board decided whether or not it would conduct a bargaining unit review. That decision has now been made.

[85] In accordance with section 18.1(2) of the *Code*, the parties are entitled to a reasonable period of time during which they can attempt to come to an agreement about the appropriate bargaining unit(s).

[86] The Board will give the parties 30 days from the date of this decision in order to meet and attempt to come to an agreement.

[87] The Board, upon joint request, will be prepared to grant a limited extension of that time.

[88] If the parties are unable to come to an agreement, then the Board will require further submissions from the parties. We note that Viterra has already filed submissions about a single bargaining unit as well as the need for a representation vote.

[89] The GSU will have an opportunity to file its submissions. Viterra will also have time to expand upon its existing submissions, should it so desire.

[90] This is a unanimous decision of the Board. This is an interim decision of the Board pursuant to section 20 of the *Code*.

Graham J. Clarke
Vice-Chairperson

Patrick J. Heinke
Member

John Bowman
Member