

APPENDIX "A"

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Attention: Mr. Gary Pedron
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Attention: Mr. Philip Bender

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Attention: Mr. Larry G. Culver

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Attention: Mr. Hal R. Bruckner
Vice-President Human Resources

National Steel Car Limited
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Attention: Mr. David Soldo
Project Manager

Universal Plasma Cutting Limited
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Attention: Mr. David Soldo

ONTARIO LABOUR RELATIONS BOARD

3561-06-R United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7135, Applicant v. **National Steel Car Limited** and Universal Plasma Cutting Limited, Responding Parties.

3562-06-U United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7135, Applicant v. **National Steel Car Limited**, Responding Party.

BEFORE: Patrick Kelly, Vice-Chair.

APPEARANCES: G. James Fyshe, Gary Pedron and Sergio Vassalli for the applicant; Larry G. Culver, H.R. Bruckner and David Soldo for the responding parties.

DECISION OF THE BOARD: September 17, 2008

1. Board File No. 3561-06-R is a common employer application under subsection 1(4)¹ of the *Labour Relations Act, 1995* (the "Act"). The applicant (or "the union") contends that National Steel Car Limited ("NSCL") and Universal Plasma Cutting Limited ("UPCL") are one employer for purposes of the Act. NSCL and UPCL concede that two of the elements of subsection 1(4) have been satisfied. That is, they agree that they are two corporate businesses and that they are under common control or direction. However, they do not concede that they are associated or related activities or businesses. Moreover, if the Board finds that they are associated or related activities or businesses, they say the Board ought not to exercise its discretion under subsection 1(4) to declare that they are one employer.

2. Board File No. 3562-06-U is an unfair labour practice complaint brought against NSCL pursuant to section 96 of the Act, alleging breaches of section 17², section 70³ and section

¹ 1(4). Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate. 1995, c. 1, Sched. A, s. 1 (4).

² 17. The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement. 1995, c. 1, Sched. A, s. 17.

³ 70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence. 1995, c. 1, Sched. A, s. 70.

72 of the Act⁴. The union takes the position that NSCL made a decision to create the plasma-burning operation which became UPCL during the course of collective bargaining which commenced with the exchange of proposals on February 22, 2006 and ended with a collective agreement on April 6, 2006. The union contends that NSCL was obliged to disclose that decision to the applicant during the negotiations. Alternatively, the union says that NSCL was seriously pondering the UPCL operation, and ought to have disclosed that to the union. In any event, the applicant contends that NSCL's failure to disclose the decision or the information about the new operation was a deliberate attempt by NSCL to avoid the union and to avoid hiring employees laid off from NSCL in the second half of 2006 to work at UPCL.

3. NSCL and UPCL deny that any decision was taken to begin the UPCL operation until well after the parties reached a collective agreement. NSCL admits that, at some stage in the course of the collective bargaining, it was certainly considering a plasma-burning operation to make rail car parts. But it contends that it was not obliged to inform the union of what it was considering. NSCL denies it breached the Act.

4. The union grieved the 2006 layoffs, taking the position that, in light of NSCL's continuing reliance upon third party contractors to supply fabricated parts, the layoffs constituted a breach of the newly negotiated collective agreement. The grievance was referred to arbitration, before Richard Brown. An issue arose in the course of the hearing with respect to UPCL's status as a third party contractor and its alleged "relatedness" to NSCL. The union and NSCL agreed to refer the question whether UPCL and NSCL were related employers to the Board. Further details concerning the precise nature of the grievance and Mr. Brown's award are described later in this decision.

5. These matters were listed for hearing before a three-person panel of which I was the chair. On the first day of the hearing, the applications were consolidated and the panel commenced to deal with preliminary issues. On the second day of hearing, the panel commenced to hear evidence on all matters in dispute. Some time after the second day of hearing, Board Member Rene Montague died. Accordingly, I continued to hear the matter sitting alone, pursuant to subsections 110(12) and (13) of the Act.

⁴ 72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act. 1995, c. 1, Sched. A, s. 72.

The Evidence

6. The following individuals testified on behalf of the responding parties:
- David Soldo, Project Manager, New Process Development for NSCL since January 2004; in that capacity, Mr. Soldo was instrumental in recommending the establishment of the operation that became UPCL, and is currently overseeing the management of UPCL;
 - Sean McRae, a Certified General Accountant employed by NSCL; Mr. McRae assisted in setting up UPCL's financial and accounting systems, and now works full-time there;
 - Hal Bruckner, NSCL's Vice President of Human Resources for the past fourteen years; Mr. Bruckner has participated on NSCL's negotiating committee in fifteen rounds of collective bargaining with the applicant, including the last round in 2006.

The union's witnesses were:

- Chris Winterburn, an employee of thirteen years service at NSCL in its axle shop, and currently a shop steward; Mr. Winterburn has had several roles in the union, and participated as a member of the union's negotiating committee in the 2003 and 2006 rounds of collective bargaining;
- Al Reichert, a welder/fabricator of nearly 33 years service at NSCL; he too has carried out a number of roles in the union and is currently its Chief Financial Officer;
- Gary Pedron, a welder with NSCL since 1996, and currently the union's President; Mr. Pedron has had several positions in the union, and participated on the negotiating committee in the 2006 round of collective bargaining, which was his first experience in the collective bargaining process.

The Business of NSCL

7. NSCL assembles and sells freight rail cars. The assembly of the rail cars is carried out on several rail assembly lines in a very large, multi-building facility in Hamilton. Some of the rail car parts are manufactured in the Fabrication Department in the Hamilton facility. For example, steel is cut in the Fabrication Department into various sizes on large plasma-burning tables, then pressed, bent and drilled before moving to the sub-assembly stage.

8. The Fabrication Department is one of five. The other four are: Construction, which easily employs the largest number of NSCL's employees; Finishing; Cranes; and Maintenance, which employs the fewest employees. Fabrication, Finishing and Cranes are roughly equivalent in terms of the number of employees they each utilize⁵. Some employees (fewer than 100 at the moment) are not assigned a specific department. It would appear from a review of tab 55 of

⁵ At the beginning of 2006, there were approximately 234 employees in the Fabrication Department, 257 in Finishing, and 194 in Cranes, compared to 1,121 in Construction.

Exhibit 2 that the union represents well in excess of a thousand employees across NSCL's entire operation in Hamilton.

9. It takes up to six months from the moment NSCL receives an order for rail cars from a customer until the rail cars are ready to be shipped. Much of that time is taken up by the engineering design phase, which can range from two to five months depending upon NSCL's previous experience with the particular type of rail car ordered. Therefore, when orders increase or decline, the effect on production (and increases or decreases in the workforce) in the Fabrication and Construction Departments is not immediately felt.

10. Whatever parts the Fabrication Department cannot, or chooses not to, produce are supplied to NSCL by third party contactors.⁶ This combination of in-house parts production and third-party parts supply has been a feature of NSCL's business for many years.

11. NSCL has in the past made parts for other businesses. For example, until 1999, NSCL made "drives" in the Fabrication Department's axle shop for the Toronto Transit Commission's subway cars. At one time, finished axles were made for Canadian Pacific Railroad and for Ronsco, a supplier of various railroad parts. NSCL also in the past did some repair work on rail cars used by Dofasco in its operation, and made water coolers for Dofasco. All of these jobs were completed at least five years ago.

12. NSCL also operates a facility in Brantford to repair and/or set up rail car jigs for use in production of rail cars in Hamilton. The bargaining unit employees from Hamilton go for periods of time to Brantford to do the jig work, and then return to Hamilton. As explained in more detail later in this decision, despite the recognition clause in the collective agreement, which limits the union's bargaining rights to a street address in Hamilton, NSCL has applied the terms of the collective agreement to employees when they are working at the Brantford facility.

13. The rail car manufacturing business is highly competitive. NSCL is Canada's only rail car manufacturer, and one of five in all of North America.

14. When orders for NSCL rail cars are at their peak, 10,000 to 11,000 per annum, the Hamilton facility will operate with as many as four shifts, and the Fabrication Department will employ around 180 active employees. Despite a relatively good year producing rail cars in 2006, there were layoffs in three of NSCL's departments (Fabrication, Construction and Finishing). The pattern was similar in all three. That is, there was a notable number of employees laid off in February 2006, around the time that collective bargaining was getting underway, but very little further job loss in the first half of the year. Then, commencing in June 2006 until the end of the year, there was a series of layoffs, beginning in the Finishing Department, in each ensuing month (with the exception of November, in Fabrication).

15. NSCL has invested as much as a quarter billion dollars in capital improvements to the Hamilton facility over the last ten years or so. Those improvements included upgrading the production lines, overhauling entirely the paint and blast sections, and expanding the facility's buildings and acquiring new ones. The Fabrication Department was the beneficiary of

⁶ The Fabrication Department's capacity to produce parts is determined largely by the number of rail cars manufactured per year. Once NSCL reaches production of 4,000 rail cars, the Fabrication Department's capacity is maximized, and NSCL is forced to contract out the remaining parts production work to third-party contractors. In 2006, NSCL produced over 9,000 rail cars. By comparison, in 2007, NSCL manufactured approximately 4,700 rail cars. However, even during slow periods such as 2007, NSCL relies upon third-party contractors for at least 25% of the parts used in the manufacturing process.

approximately \$14 million in investment over the last five years, in terms of re-designing work flow and purchasing new equipment.

NSCL's Cost Cutting Initiatives

16. Mr. Soldo's mandate as Project Manager, New Process Development was to search for and recommend to senior management ways to cut NSCL's considerable costs throughout the entire Hamilton facility. In particular, Mr. Soldo was expected to examine NSCL's costs of outsourcing parts production to the third party contractors, and find ways to bring the work "in-house" if financially feasible. In other words, Mr. Soldo's job was to search for ways and means of reducing NSCL's reliance upon the third party contractors, and to reduce their price leveraging power over NSCL. Mr. Soldo testified that the price leveraging was particularly onerous for NSCL during times when it was very busy producing rail cars, and as the value of the Canadian dollar rose. The Fabrication Department is not able to keep up when the Hamilton facility is in high production mode. NSCL is forced to rely more heavily upon the third party contractors for parts. When demand for parts rises, so do prices, and the cost burden for NSCL is exacerbated in the era of a high Canadian dollar.

17. Mr. Soldo was free to consider any and all options with respect to the "repatriation" of third party costs. For example, he had the authority to recommend adding or changing machinery in the Fabrication Department. He could also propose new ventures, such as off-site production options whereby NSCL might compete with the third party parts contractors. One idea he pursued was setting up a NSCL forging operation to make wheels, rather than outsourcing. Senior management did not agree, and that notion was abandoned. Another idea Mr. Soldo came up with early in his new role was the establishment of an off-site plasma burning operation. The Fabrication Department already had and used plasma burning tables in the cutting of steel, but according to Mr. Soldo, there simply was not room to add more tables there⁷. Mr. Soldo's supervisor at the time, Frank Jalsavec, advised Mr. Soldo that any off-site operation he proposed ought ultimately to be self-sufficient if and when rail car production at NSCL declined. That is, it had to bring in revenue even *without* NSCL as a customer.

18. Mr. Soldo began scouting locations for the plasma-burning operation in mid-2004. I do not intend to set out in detail all the evidence concerning his search and preparations in this regard. Suffice it to say that his efforts in 2004 stalled and were resumed in the fall of 2005. From that point and into the period leading up to and including the period of collective bargaining between NSCL and the union, he took a number of steps in anticipation of a proposal to obtain a new plasma-burning operation. Those steps included: assessing a number of locations in different municipalities, retaining real estate agents, pricing equipment and conducting a cost-benefit analysis.

19. Ultimately, a site in Kitchener became available. It was a relatively new building, with plenty of space for two or three large plasma-burning tables. There was not much plasma-burning competition in and around Kitchener, and there was an available market for cut steel in the area. Mr. Soldo was favourably impressed.

⁷ Plasma-cutting tables in the rail car business are at least 70 feet in length. NSCL had at least two such tables in the Fabrication Department, both exceeding 70 feet in length. Although counsel for the union cross-examined Mr. Soldo concerning the capacity of the Fabrication Department in terms of total shifts, he did not challenge Mr. Soldo's assertion (or, for that matter, Mr. Bruckner's identical assertion) that there was insufficient room physically to accommodate the equipment necessary to run an additional plasma-burning operation at NSCL, and that generally Mr. Soldo supported in-house options where feasible.

20. Mr. Soldo and a co-worker, Michael Sarazin with whom Mr. Soldo collaborated, decided the time was right to present a proposal (which they dubbed "ABC Co.") to their superiors at NSCL, with a preference for the Kitchener location. Mr. Soldo testified in chief that they made their proposal at a meeting sometime in April 2006. In cross-examination, however, Mr. Soldo estimated that the ABC Co. proposal was presented sometime in March 2006. For reasons that will become apparent later in this decision, I do not find it necessary to resolve this discrepancy.

21. The ABC Co. proposal was reduced to a slide presentation created by Mr. Sarazin in consultation with Mr. Soldo, and presented to NSCL's owner, Gregory Asiz, and Dan Elliot, NSCL's Chief Operating Officer. The proposal clearly contemplated the manufacture of parts for the transportation sector by the end of the third year of operation, with NSCL as the primary customer initially. Mr. Soldo and Mr. Sarazin projected substantial cost savings through the manufacture by the new 45,000 square foot facility of a significant number of parts that were currently outsourced to third party contractors. They anticipated revenues of \$6 million in the first year of operation, and that, after three years, the new facility would be manufacturing 250 types of parts out of a total of 800 that were currently outsourced by NSCL.⁸ The ABC Co. proposal also pointed out that the new business would operate union-free, with a projected manufacturing complement of forty-four employees by the third year of operation, and that there would be no need to pay union-scale wages.

22. At the conclusion of the presentation, Mr. Asiz said "Sounds good" or words to that effect. Mr. Soldo denied that this constituted formal approval by NSCL. In any event, Mr. Soldo was not involved in the decision-making process. According to Mr. Soldo, the formal approval came on May 31, 2006. There was no evidence as to who informed Mr. Soldo of the approval, or what form it took. Again, for reasons that emerge later in this decision, I do not find it necessary to determine who made the decision, or even the most probable point in time that it was taken.⁹

23. The Kitchener location was obtained through a lease, which was signed on July 1, 2006. The first leased plasma-cutting table was delivered to UPCL in November 2006. Production began in mid-December 2006. A second plasma-cutting table came in January 2007. Two brake presses were delivered in March 2007. A bevelling machine has been added, but was not operational at the time Mr. Soldo testified in these matters.

The Collective Bargaining Context

24. NSCL and the union have a long-standing relationship. The recognition clause in the last two collective agreements (and presumably even before the 2003-2006 collective agreement) recognizes the union as the bargaining agent for designated employees of NSCL employed at its

⁸ The projections were belied by the actual results because Mr. Soldo and Mr. Sarazin assumed incorrectly that NSCL would continue to produce 10,000 or more rail cars per year. UPCL came nowhere near the \$6 million in projected revenue in the first year of its operation, which was essentially the 2007 calendar year.

⁹ For similar reasons, I have not set out the evidence concerning a conversation between Mr. Reichert, the union's Chief Financial Officer, and Mr. Soldo in the winter of 2006, concerning NSCL's possible use of certain used parts fabrication equipment purchased by Mr. Soldo at auction and stored temporarily at the Hamilton plant. There was a discrepancy between them as to whether or not Mr. Soldo claimed the equipment was headed for a facility in Cambridge in which employees would earn \$9 per hour, substantially less than the Hamilton-based employees. In my view, nothing of significance turns on that conversation.

Kenilworth Avenue North plant in Hamilton.¹⁰ However, for some time now, NSCL has treated the non-management employees at the Brantford location as if they were covered by the collective agreement.

25. The collective agreement between the parties from April 6, 2003 until April 5, 2006 contained a letter of understanding with respect to contracting out. Essentially, the letter of understanding recognizes NSCL's right to contract out bargaining unit work provided that, in non-emergency situations, the union is given advance written notice and an opportunity to recommend changes to the contracting out plan. As I indicated in the introductory portion of this decision, in August 2006, the union filed a policy grievance challenging the propriety of contracting out work to, among others, UPCL, in the face of the layoffs described above. The grievance was referred to arbitration, which resulted in an award dated March 31, 2008. The arbitrator, Mr. Brown, found that NSCL violated the collective agreement, and in particular the requirement in the letter of understanding obligating NSCL to give advance written notice of any plan to contract out bargaining unit work. The arbitrator remains seized to deal with the remedy for the breach, pending the decision of the Board in this matter.

26. The bargaining process for a renewal collective agreement began with a preliminary meeting initiated by Hal Bruckner in which NSCL wished to explain the financial situation it was facing as the parties entered the latest round of bargaining. The meeting took place on February 1, 2006. Mr. Bruckner and Dan Elliot, represented NSCL. The union's bargaining team plus other representatives from the union's Toronto office attended. Mr. Bruckner and Mr. Elliot tried to impress upon the union the need for the union to be reasonable in its monetary demands, given NSCL's sensitive competitive position in light of the high Canadian dollar. According to Mr. Winterburn's testimony, Mr. Bruckner and Mr. Elliot conveyed that one of NSCL's competitors was shifting production to Mexico, and that NSCL would be looking for concessions from the union in order to get through a year in which they said there were no new rail car orders to work on past the annual summer shutdown commencing at the end of July. Mr. Pedron recalled in his testimony the talk about the drop in rail car orders, but he remembered discussion about production in India. He recalled asking if NSCL was planning to open a plant in India, and was told NSCL had no such intention. Apparently the union representatives were

¹⁰ The union represents a wide range of employees, with certain specified exceptions, in all five departments described in paragraph 8 above. The recognition clause reads:

3.01 As the Union was certified by the Ontario Labour Relations Board upon January 10, 1967, the Company recognizes the Union as the sole collective bargaining representative of the Company's employees, as designated herein in Article 3.02 hereof, at its Kenilworth Avenue plant in Hamilton, Ontario.

3.02 The bargaining unit for which the Union is recognized by the Company as the bargaining agent for purposes of collective bargaining is as follows:

All employees employed by the Company at its Kenilworth Avenue North plant, Hamilton, Ontario, save and except:

1. Foremen
2. Supervisors
3. Persons above the rank of supervisor
4. Security Guards
5. Office staff
6. Sales staff
7. Time study observers
8. Timekeepers
9. First Aid Staff
10. Plant clerical personnel

skeptical about NSCL's claims of "doom and gloom", as Mr. Pedron put it, particularly as there were no financial people present at the meeting to provide the kind of detailed information the union wanted.

27. Proposals between the union and NSCL were exchanged on February 22, 2006. NSCL's negotiating team consisted of Mr. Bruckner, Mr. Elliot and NSCL's labour relations lawyer. According to Mr. Bruckner, Mr. Asiz played no role in the bargaining, but he was kept informed of progress by Mr. Elliot.

28. The union's proposals did not include any proposal to change the letter of understanding regarding contracting out, and there is no question the union was fully aware that NSCL was continuing to contract out the fabrication of parts, just as it had been doing for years. Nor did the union seek any enhancements to the language in the collective agreement concerning severance of employment. However, there was a union proposal to include Brantford within the recognition clause. Both Mr. Pedron and Mr. Winterburn, two members of the union's bargaining committee, testified that the union had heard rumours about other facilities NSCL might be operating or of the retrofitting of equipment to be used elsewhere, but the union was unable to confirm those rumours. In any event, there was very brief discussion on February 22, 2006 about Brantford - according to Mr. Winterburn, Mr. Pedron, the union's chief spokesperson, simply indicated to the other side that the union wanted the Brantford plant formally included in the collective agreement. The parties moved on to other areas. Mr. Pedron testified that at some point in the bargaining he said that Brantford should "fly under our flag", and that the collective agreement should cover any and all facilities of NSCL, although he only knew of Brantford. Mr. Winterburn could not recall anyone from the union's bargaining committee asking the NSCL committee anything specific about any other facility or plant than Brantford. For his part, Mr. Bruckner testified that there were no union comments or inquiries about possible NSCL expansion or plans to open additional facilities.

29. The Brantford proposal remained on the table for most of the remainder of the subsequent negotiation sessions between the parties, although it appears there was no further dialogue about it after February 22, 2006 until early April 2006. Mr. Winterburn testified that on or around April 3, 2006, during a bargaining session, Mr. Bruckner told the union in Mr. Elliot's presence that he did not understand the need for the Brantford proposal. He indicated that, from NSCL's perspective, the union's representation rights at Brantford were not disputed and never had been, and that NSCL was "not going anywhere, we're not hiding, why can't we get rid of this". Mr. Pedron recalled Mr. Bruckner's comments slightly differently. He testified that Mr. Bruckner referred to NSCL's long history of dealing with grievances and health and safety concerns arising out of the Brantford property. He acknowledged that the union had every right to Brantford, and that "there's no other facilities". Neither Mr. Winterburn nor Mr. Pedron recorded Mr. Bruckner's comments in writing, although they both kept detailed notes of the bargaining sessions. Nor did Mr. Pedron keep notes of an exchange he said in cross-examination he or someone on the union's bargaining committee had with Mr. Elliot or Mr. Bruckner about other facilities NSCL might be planning to open.¹¹ In any event, the union responded to Mr. Bruckner by withdrawing the Brantford proposal. Mr. Winterburn testified that he took Mr. Bruckner's comments to be an assurance that NSCL was not planning to open anywhere else.

¹¹ Mr. Pedron gave no specifics of this discussion, and as I have indicated, he did not testify to any such exchange in the course of his examination in chief, although he had ample opportunity to do so. I am left to conclude that Mr. Pedron simply erred in his recollection, and probably confused this exchange with the discussions at the preliminary meeting of February 1, 2006 meeting where Mr. Bruckner and Mr. Elliot talked about competitors setting up in Mexico and India.

30. All the witnesses agreed that throughout the bargaining the company made no reference to any plans by NSCL to open a new facility of any kind whatsoever. Mr. Bruckner testified that he had no knowledge of any such plans. He told the Board he learned of UPCL well after the bargaining had concluded in a new collective agreement, and he also later learned of NSCL's plans to open a plant in Alabama, U.S.A. On the other hand, it is clear that Mr. Elliot, one of the management bargaining committee members who did not testify in these proceedings, had some knowledge during the course of the bargaining of Mr. Soldo's activities pursuing a plasma burning operation. Furthermore, Mr. Elliot was present when Mr. Soldo and Mr. Sarazin made their pitch to Mr. Asiz to approve such an operation. Again, however, I do not consider that it matters whether or not the decision to proceed with UPCL was made in the course of the bargaining, or if Mr. Eliot participated in or knew of such a decision, for reasons articulated later in this decision.

31. Mr. Pedron testified that, had the union been aware during the last round of bargaining of developments involving UPCL, it would have attempted to negotiate various types of provisions to protect the interests of the bargaining unit employees, including an expanded recognition clause to cover UPCL's operation and an enhanced severance package.

The Business of UPCL

32. UPCL makes parts from steel plate, and in some cases, blasts, bends and bevels them. Initially, all of UPCL's production, which commenced in December 2006, was for one customer: NSCL. In March 2007, that changed with the acquisition of a second customer, Advantage Trailer. UPCL has continued to add customers. None of them, other than NSCL, is in the rail car manufacturing business.

33. UPCL relies less on NSCL for revenue than it once did. NSCL is no longer UPCL's primary customer. As of March 2008 it comprised seventeen per cent of UPCL's business. In fact, at the point Mr. Soldo testified on May 2, 2008, UPCL had no outstanding purchase orders from NSCL. Mr. Soldo explained that as demand for NSCL's rail cars declined, NSCL relied less heavily on third party contractors such as UPCL, and repatriated the third-party fabrication work it was capable of producing in its Fabrication Department.

34. UPCL runs two production shifts daily, and currently employs about 12 individuals in total. Among the UPCL classifications with counterparts in the NSCL bargaining unit are lead hand, plasma machine operator, milling machine operator, brake press operator, shipper/receiver/scheduler and general labourer. The wages payable to UPCL production employees range from \$14 to \$18 per hour. Generally, NSCL bargaining unit employees in comparable positions enjoy substantially higher wages.

35. In mid-May 2006, Mr. Jalsavec assigned Mr. Soldo to oversee and manage UPCL's operation. Since then, he has worked out of an office at the Kitchener site, and all of his time is dedicated to UPCL. He is the chief management representative for UPCL. He continues to be paid, however, by NSCL. Mr. Soldo reports to NSCL's Chief Operating Officer, Lorraine Johnson.

36. NSCL has helped out UPCL in other ways. Mr. Soldo estimated that NSCL invested between \$3 million and \$4 million in getting UPCL up and running.¹² NSCL pays UPCL's costs, and UPCL reimburses NSCL for all such payments at month end. Very recently, NSCL sent one of its Fabrication Department foremen to UPCL to deal with a production problem affecting one of UPCL's major customers. That foreman continues to be paid by NSCL while at UPCL.

37. Although the vast majority of UPCL's equipment and machinery is leased from third parties, UPCL is currently using a NSCL de-burring machine in its production. UPCL is also the storage site for some other de-commissioned NSCL equipment. Of that stored equipment, one piece of machinery, "the Rumbler", could be of use to UPCL, but it currently sits idle.

38. UPCL has a set of human resource policies and procedures. Mr. Soldo testified that he believed the policies were created by NSCL. (Given his somewhat surprising lack of knowledge of some aspects of the policies, I would surmise that NSCL not only created the policies but also established the infrastructure to support them.) Mr. Soldo indicated further that to the extent any changes were required at UPCL in terms of labour standards, wages or working conditions, he would make recommendations to his current supervisor, Ms. Johnson, at NSCL.

39. UPCL's employees are covered by the same group insurance policy underwritten by the same insurance company as NSCL. Their wages are processed and paid through the same payroll agency as well.

Arguments of the Parties

Subsection 1(4)

40. Subsection 1(4) is reproduced in footnote 1 at the outset of this decision.

41. As I have indicated the responding parties acknowledged that more than one corporation was carrying on business under common control and direction. They do not agree, however, that NSCL and UPCL were associated or related activities or businesses, and in any event, even if they were, the responding parties submitted that the Board ought not to exercise its discretion to make a declaration that they are one employer.

42. To put it in its simplest terms, the responding parties submit that NSCL is in the business of manufacturing rail cars, and UPCL is in the business of fabricating parts for use by third parties involved in various activities. NSCL's business requires, and always has required, the contracting out of fabricated parts to one degree or another because NSCL's Fabrication Department cannot produce all the parts necessary in the manufacture of rail cars. NSCL takes the position that the Brown award, though it found a violation of the collective agreement in NSCL's failure to give the union written notice of contracting out, nevertheless confirmed that NSCL's contracting out of parts fabrication was an accepted and integral process in its operation. Moreover, according to NSCL, Mr. Brown found no evidence of any prior practice by NSCL of not contracting out parts fabrication in the face of layoffs.

43. In support of its position that NSCL and UPCL ought not to be found to be one employer, counsel for the responding parties pointed out that fabrication of parts is only one of

¹² By way of comparison, NSCL invested approximately \$14 million in its Fabrication Department in the period 2003 to 2007.

several functions undertaken by NSCL, and that construction and finishing constitute far greater components of NSCL's total enterprise. In contrast, UPCL began as, and remains, a very small operation, employing only about six individuals initially, and by the time Mr. Soldo finished his testimony, UPCL had no orders from NSCL: its business was supplying parts only to third parties not in the rail-car business. The existence of UPCL did not lead to any layoffs at NSCL. Those layoffs – which cut across all NSCL departments, not just the Fabrication Department – were in the works because NSCL did not have sufficient customer orders for rail cars. It cannot be said, therefore, that there was any erosion of bargaining rights by the creation of UPCL. In addition, the evidence of NSCL's considerable capital investments in the Hamilton plant, and in the Fabrication Department itself, is inconsistent with any notion that NSCL is trying to dismantle or undermine the union or the bargaining unit. Moreover, there is no obvious impediment to an attempt by the union to seek to represent the employees of UPCL through the Act's certification process. Finally, counsel pointed out that the current collective agreement will expire on April 5, 2009, and that bargaining will begin well before then. I am not certain what significance this entails, but presumably what counsel meant to suggest was that the union will have the opportunity to bargain the issue of contracting out and to thereby protect its interests in preserving bargaining unit work.

44. Counsel for the responding parties relied upon the following authorities in support of its position:

- *Enka Contracting Limited* 2003 Can LII 18109 (ON L.R.B.), for the principle that where two or more enterprises exist for bona fide business reasons, and there has been no attempt by a unionized employer to siphon work away from the trade union, the Board will not exercise its discretion to make a common employer declaration; and
- *Deer Park Villa*, [1994] OLRB Rep. September 1196 for the principle that where “there are no work opportunities being shifted between bargaining units, artificial legal entities undermining bargaining rights, dysfunctional bargaining structures requiring consolidation, or other circumstances warranting relief”, the Board will not exercise its discretion to make a declaration under subsection 1(4).

45. Counsel for the union, on the other hand, argued that, on the evidence, NSCL and UPCL are associated or related activities or businesses within the meaning of subsection 1(4). They both fabricate parts for use in the manufacture of rail cars. NSCL simply does it in a larger business context. And NSCL has in the past fabricated parts for third parties, as UPCL does now, and appears quite capable of doing so again if it wishes. As the Board observed at paragraph 20 in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720:

Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature (“associated” or “related”, “activities” or “businesses”) it is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else.

(emphasis in original)

46. Moreover, subsection 1(4) applies no less in situations where the businesses in question engage in other activities beyond the associated or related activities, although that may

be a factor the Board takes into account in the exercise of its discretion to make a declaration: see *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. January 9 at paragraph 105.

47. Having established that NSCL and UPCL are related businesses and under common control or direction, counsel for the union argued that the Board should exercise its discretion to declare that the responding parties are one employer. The fact that NSCL is in a position to fabricate parts in Hamilton or at the UPCL site in Kitchener, depending upon considerations of convenience, is, counsel argued, the kind of mischief that subsection 1(4) was intended to prevent. Counsel submitted that the creation of UPCL was more than a simple contracting out of fabrication – it constituted a transfer of bargaining unit work to an entity clearly integrated with NSCL and whose labour relations are closely controlled by NSCL. Moreover, the establishment of UPCL had an economic impact upon the Hamilton bargaining unit, in that some Hamilton equipment was transferred and stored at UPCL and could potentially be utilized in that facility; and in that there are laid off Hamilton employees who are qualified and able to perform the UPCL work, but who are not being recalled by NSCL. In other words, the Hamilton bargaining unit is being underutilized in circumstances where there is other available work to be done, but that work has been assigned beyond the scope of the bargaining unit precisely because of the perceived advantages in operating in a non-union environment. Finally, counsel submitted that a further factor in the exercise of the Board's discretion is its importance to the resolution of the union's grievance before Arbitrator Brown.

The Unfair Labour Practice Complaint

48. As I indicated at the outset of this decision, the union contends that NSCL breached the duty to bargain in good faith as set out in section 17, and committed unfair labour practices in violation of sections 70 and 72 of the Act. These sections are reproduced in footnotes 2, 3 and 4 respectively at the outset of this decision.

49. Counsel for the responding parties submitted that the evidence disclosed that, by the time the collective bargaining concluded in early April 2006, NSCL was merely contemplating the possibility of a new laser-cutting operation, but had made no firm decision at that point. There was no obligation upon NSCL to disclose its thinking on the subject in the absence of a final decision, and in any event, the union made no inquiries about any plans by NSCL to expand its operations beyond Hamilton. The union's only interest in the course of bargaining the issue of representation rights, as far as NSCL could determine, was to bring the Brantford facility within the collective agreement's scope clause. Moreover, having been warned in February 2006 that NSCL's customer orders would provide work for only a further six months, and having admitted during the hearing that it was aware of rumours of expansion, the union made no other effort at the bargaining table to restrict NSCL's right to contract out bargaining unit work, or even to enhance the severance arrangements applicable under the expiring collective agreement. Finally, counsel for the responding parties pointed out that Mr. Bruckner's testimony that he knew nothing of a new plasma-burning operation until the latter part of May 2006 was uncontradicted. Accordingly, Mr. Bruckner's assurances to the union's bargaining committee that the Brantford employees were covered by the Hamilton collective agreement and that the company was not hiding or intending to go anywhere cannot reasonably be interpreted as a declaration that NSCL had no plans generally to expand. In any event, Mr. Bruckner testified that, even if had known of the plans regarding a new plasma-burning operation, he would not have disclosed it to the union because, in his opinion, it had no detrimental impact upon the bargaining unit, and in fact, such an operation would ensure a continuous supply of parts, thus ensuring continuous production and work opportunity at NSCL. In all those circumstances, NSCL contends, it was not obliged to

reveal anything to the union during negotiations about the mere possibility of a new operation coming into existence.

Analysis and Conclusions

50. I turn first to the question whether or not the Board ought to declare that NSCL and UPCL are one employer for the purposes of the Act.

51. The purpose of subsection 1(4) is to preserve bargaining rights. Where a unionized employer spins off or purchases a related business which results in the erosion or potential erosion of the trade union's bargaining rights, the Board may make a declaration if the other elements of the subsection are satisfied, i.e. the entities are related or associated businesses and are under common control or direction.

52. With respect to the exercise of discretion under subsection 1(4), I agree with the approach articulated at paragraph 57 in *KNK Limited*, [1991] OLRB Rep. February 209 and followed more recently in *Humphrey Plumbing & Electrical Service Ltd.*, [2006] OLRB Rep. July/August 519 (see paragraphs 121 to 125). That is, where the trade union has made out the elements for a declaration and established the existence of the "mischief" which such a declaration was designed to prevent, the declaration should normally issue in the absence of significant prejudice or a compelling policy reason not to do so. I also agree with the Board's observation at paragraph 114 of the *Brantwood Manor* decision, that "[c]ritical to the exercise of discretion under subsection 1(4) is the presence or absence of mischief of a sort to which the enactment of subsection 1(4) was directed."

53. While the parties agree that NSCL and UPCL are under common control and direction, they do not agree that the entities are related or associated businesses or activities. Assuming without finding that they are indeed related or associated businesses or activities, that still leaves the issue of the Board's discretion to make the declaration. I am not persuaded that the facts in this case give rise to the kind of mischief subsection 1(4) was designed to prevent. I see no evidence that the establishment of UPCL resulted in any erosion of the union's bargaining rights or created any impediment to the bargaining structure at NSCL. The union's bargaining rights are limited to a street address in Hamilton. The establishment of a new business in Kitchener did nothing to erode the union's right to represent employees working at Kenilworth Avenue North in Hamilton. At its highest, the establishment of UPCL in Kitchener, rather than the expansion of the existing plasma burning operation in Hamilton, had the effect of denying the union an accretion to its bargaining unit. However, the uncontradicted evidence of the responding parties was that there was no room for further expansion in Hamilton's Fabrication Department. That is why Mr. Soldo considered only off-site locations. Moreover, the layoffs that affected the Hamilton bargaining unit in 2006 were, in all probability, not caused or even exacerbated in any way by UPCL, which only began operating at the very end of 2006. They were due to NSCL's decline in rail car orders, an event foretold by NSCL officials in a pre-bargaining meeting with the union in early 2006. In my view, the union did not establish the existence of any mischief that would cause the Board to exercise its discretion to make a common employer declaration.

54. The facts in this matter stand in stark contrast to those in the *Brantwood Manor* decision. There the trade union had bargaining rights for a unit of employees of a nursing home. The collective agreement between the employer and the trade union contemplated the right of the employer to contract out.

55. The nursing home expanded its operation and incurred formidable debts to finance the expansion. The cost of servicing the debts rose, and the difficult financial situation was exacerbated by an interest arbitration award that provided the bargaining unit employees with substantial increases in wages and created a significant liability on the part of the employer for retroactive wages. The nursing home's owners attempted to secure further financing, and when that failed, appealed to the bargaining unit employees and the trade union to forego their wage increases. The employees and the union rejected that request. The owners then arranged for the performance by outside agencies of housekeeping, laundry, maintenance and health care services that had been performed by a substantial number of the bargaining unit employees, and laid off those employees. The trade union filed several applications before the Board, including a common employer/sale of business application and an unfair labour practice complaint.

56. The majority of the Board in *Brantwood Manor* declared, among other things, that the nursing home and the two agencies were one employer for the purpose of the Act and directed the reinstatement of the laid off employees. In so doing, the majority noted that the nursing home's sole and acknowledged purpose in contracting out the work was to avoid its wage obligations pursuant to the collective agreement. The effect of the majority's declaration was to preserve "the labour relations *status quo*". The union's bargaining rights had originally attached to a nursing home enterprise, and despite the arrangements between the employer and the agencies, it continued to be operated as just such an enterprise, albeit by different corporate entities. Without the benefit of subsection 1(4), the bargaining unit would otherwise have been decimated by the contractual scheme between the owners of the nursing home and the agencies.

57. Clearly, the situation in the matter before me is quite different. The evidence does not disclose that NSCL's creation of UPCL was an attempt to avoid its obligations under the collective agreement covering the employees at Hamilton. It is true that Mr. Soldo and Mr. Sarazin endeavoured to sell the idea of UPCL to NSCL's senior management on a number of bases including the fact that the new operation could operate as a non-union enterprise. Nevertheless, the evidence failed to establish that the creation of UPCL diminished, intentionally or otherwise, the union's bargaining rights. Nor was there any compelling evidence before the Board that the start-up of UPCL had any discernible adverse economic impact upon the Hamilton bargaining unit. In all probability, the layoffs at Hamilton were solely attributable to the drop off in rail car orders. In any event, even had I come to a different conclusion, I am not satisfied that there would be any utility in making a declaration the effect of which would be to bind the Kitchener-based UPCL to a collective agreement whose bargaining unit is confined to a street address in Hamilton.

58. For these reasons, I decline to exercise my discretion in favour of making a declaration.

59. I turn next to the unfair labour practice complaint.

60. The union has the onus to prove the violation of the duty to bargain in good faith under section 17, whereas NSCL has the onus to demonstrate that its decision to set up UPCL was not born out of any anti-union animus: see *Amoco Fabrics Ltd.*, [1982] OLRB Rep. March 314.

61. The Board in *The Crown in Right of Ontario as represented by Management Board of Cabinet*, [1998] OLRB Rep. November/December 923 succinctly described the extent of the section 17 obligation of employers to disclose information to trade unions in the course of collective bargaining. Citing the leading cases of *Westinghouse Canada Limited* [1980] OLRB

Rep. April 577, which was referred to extensively by the parties in this matter, and *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. September 1411, the Board stated at paragraph 23:

- a) on its own initiative, an employer must reveal to a trade union any actual (including de facto) decision which is likely to have a significant impact on the bargaining unit;
- b) when asked by the union in bargaining whether it is seriously contemplating initiatives which are likely to have a significant impact on the bargaining unit, an employer must answer honestly.

62. Did the union ask NSCL if it was seriously contemplating initiatives which were likely to have significant impact on the bargaining unit? In my view, that question must be answered in the negative. The evidence did not disclose on a balance of probabilities that the union raised the issue of the employer's intentions to expand its operations beyond the reach of the Hamilton bargaining unit. There is no question that the union tabled a demand that the Brantford operation formally be included within the bargaining unit's scope clause. However, Mr. Pedron's testimony concerning the circumstances in which he says he made inquiries of NSCL's expansion plans was vague and lacked any particulars as to when and with whom he directed those questions or comments. Furthermore, Mr. Winterburn failed to corroborate Mr. Pedron's claims. Apart from the discussion regarding the Brantford facility, he could not recall a single instance when the union made any comment in the presence of NSCL's bargaining committee about anything related to the scope of the union's bargaining rights. In light of the inconsistency in the testimony of the union's witnesses, I am compelled to accept Mr. Bruckner's flat denial that the union asked anything in general terms about NSCL's plans to locate a business elsewhere. In addition, I find that Mr. Bruckner's comments about the Brantford facility, in which he assured the union that NSCL was not going anywhere, could not reasonably have been interpreted by the union as an assertion that NSCL had no other plans to start up new operations.

63. Was NSCL required on its own initiative to disclose the UPCL decision, assuming without deciding that the decision was taken in the course of collective bargaining? In answering that question, I find useful the *Amoco Fabrics* decision. In that matter, the employer began a search for a new manufacturing plant during the course of collective bargaining with its trade union for a new collective agreement covering employees in Hawkesbury, and purchased such a facility in Cornwall during the last month of a lengthy and bitter strike. The decision to make the purchase was made before the strike commenced, and in the middle of the collective bargaining. The establishment of the Cornwall plant, together with the previous purchase of a unionized facility in Brantford, resulted in a loss of several product lines in the Hawkesbury facility, and led to production specialization in all three locations. The employer initiated a substantial transfer of Hawkesbury-based equipment to the new plants. A series of layoffs of the Hawkesbury employees ensued, despite significant capital investments in the Hawkesbury plant (including new equipment which the employer anticipated - wrongly, as it turned out - would add fifty jobs) both before and after the strike. The union complained to the Board that the employer had breached its duty to bargain in good faith by failing to disclose to the union its decision to purchase the Cornwall facility; and that the loss of Hawkesbury's product lines and the layoffs were at least in part motivated by the employer's wish to punish the employees and the union for the strike.

64. The Board found no breach of the duty to bargain in good faith because, even though the decision to purchase the Cornwall plant was finalized during the course of collective bargaining, the evidence established that the employer had a reasonable and bona fide belief that

there would be no negative impact upon the Hawkesbury employees as a result. Furthermore, the Board found that the layoffs of the Hawkesbury employees were the result of unforeseen market conditions, and not due to the establishment of operations in Cornwall. Accordingly, the Board found that the layoffs were not motivated by anti-union animus.

65. I come to similar conclusions in this matter. Assuming without deciding that NSCL formulated the decision to proceed with a new off-site plasma burning operation in the course of the collective bargaining, I do not think that NSCL was under any obligation to reveal it to the union. As I have indicated before, it is not apparent that the creation of UPCL had any detrimental impact upon the Hamilton bargaining unit, or even that it potentially could have had such an impact. In those circumstances, an employer is not required by section 17 of the Act to disclose such information to its trade union. Indeed such disclosure can, as the Board explained in the *Westinghouse* decision, cause unnecessary distortion in the negotiating process.

66. Furthermore, in my opinion, NSCL was not motivated to any degree by anti-union considerations in reaching the decision to start up UPCL. Rather, the evidence establishes that the motivation was purely financial, and had no connection to avoidance of the employer's collective agreement obligations. NSCL did not create UPCL for any reason other than to relieve price pressures brought to bear by third party parts fabricators. The layoffs that ensued after the decision regarding UPCL, and that took place largely before UPCL was even up and running, were the result of market forces, namely a decline in demand for rail cars. Finally, I note the considerable investments NSCL has made in connection with capital improvements to the Hamilton facility, including the Fabrication Department. Such action is not consistent with a desire to escape the union or to avoid collective bargaining obligations.

67. For these reasons, I find no violation of sections 17, 70 or 72 of the Act.

68. In the result, both applications are dismissed.

"Patrick Kelly"
for the Board