ONTARIO LABOUR RELATIONS BOARD

2036-11-JD Carpenters' District Council of Ontario, Local 494, Applicant v. **1256458 Ontario Ltd. and PCR Contractors Inc.**, and Labourers' International Union of North America, Local 625, Responding Parties.

BEFORE: Caroline Rowan, Vice-Chair.

APPEARANCES: D. Wray and T. Hulkkonen for the applicant; Jeremy Schwartz and Paolo Collavino for 1256458 Ontario Ltd. and PCR Contractors Inc.; Lorne Richmond, Eli Gedalof, Rob Petroni, Bill Moreland and Mike Vieau for Labourers' International Union of North America, Local 625.

DECISION OF THE BOARD: January 16, 2014

1. This matter is a jurisdictional dispute in the construction industry filed pursuant to section 99 of the *Labour Relations Act, 1995* S.O. 1995, c.1, as amended (the "Act"). To the extent that the work in dispute was performed by members of Labourers' International Union of North America, Local 625 ("Labourers"), it is claimed by the Carpenters District Council of Ontario, Local 494 (the "Carpenters").

2. The work in dispute was performed by employees of PCR Contractors Inc. and/or 1256458 Ontario Ltd. ("PCR") and is related to the dismantling and removal of the shoring structure at the University of Windsor project site at the Engineering Building ("Windsor Project").

3. The work in dispute in this application is described in the following terms:

> The lowering down of hardware (u-heads) followed by the dismantling and lowering to the ground of the joists, beams, plywood and shoring in respect of a flat arch /cast in place, suspended concrete slab system ("Suspended Concrete Slab System").
>
> For greater clarity, the work in dispute is not in respect of shoring structure for concrete beams and is not in respect of the initial loosening of the u-heads.

There is no dispute that loosening of the u-heads, which involves relieving the pressure and only takes a few seconds, was properly done by the Carpenters. The Carpenters however contend that the entire process they refer to as "releasing" and which they say involves first loosening the u-heads and then releasing the forms and falsework by

removing the forms and dismantling them down to the ground is properly assigned to the Carpenters. The Carpenters initially accepted only that the Labourers are properly assigned to remove the material once it has been lowered to the ground (but subsequently acknowledged in their reply brief that the Labourers strip non reusable materials only). The work in dispute (also referred to herein as "Stripping" for ease of reference) involves the dismantling process after the initial loosening of the hardware up until the material has been lowered to the ground.

Events Leading up to the Assignment of the Work to the Labourers

4. The assignment of the Stripping work to members of the Labourers in or about July 2011 resulted in the lay off of five or six Carpenters. There is a factual difference between the parties concerning how much Stripping work was done by members of the Carpenters at the Windsor Project prior to July 2011 when the Stripping work was formally assigned to members of the Labourers. The formal assignment to the Labourers in July 2011 occurred shortly after the Labourers filed a grievance concerning the assignment.

5. The Labourers take the position that, prior to July 2011, twenty percent (20%) of the total amount of Stripping work done on the Windsor Project was done intermittently by members of both the Labourers and of the Carpenters. PCR agrees with that estimate, but notes that it has no knowledge as to which trade performed that work prior to July 2011.

6. The Carpenters, on the other hand, take the position that slightly more than fifty percent (50%) of the total amount of Stripping work done on the Windsor Project was done by what it refers to as a "composite crew" of Carpenters and Labourers prior to its assignment to the Labourers in July 2011. In this connection, the Carpenters take the position that, prior to July 2011, their members did the Stripping work by lowering the material to the ground and that members of the Labourers assisted only from the ground after the material had been lowered.

7. The Carpenters argue that these facts are relevant to their contentions that:

1. the onus lies on the Labourers in this case;

2. the Labourers' delay in complaining is a bar to any complaint by them and involves acquiescence or acceptance of the assignment to the Carpenters; and

3. the Labourers' delay in asserting a claim to the work is a factor to be considered in assessing the merits of the jurisdictional dispute.

Delay

8. The Carpenters maintain that the Labourers' delay in accepting PCR's assignment for eight or nine months prior to grieving in late June 2011 constitutes acceptance of PCR's work assignment such that it is too late for the Labourers to complain. The Carpenters argue that, in the circumstances and irrespective of any other considerations, the Board ought to declare that the change of work assignment in July 2011 was unjustified and improper. In the alternative, the Carpenters allege that the Labourers' delay ought to be a factor considered by the Board in assessing this jurisdictional dispute.

9. In support of their argument with respect to delay, the Carpenters refer to the following cases for the proposition that delay is either a bar to a work assignment complaint or a significant factor that should weigh heavily against the party who delayed in complaining about an assignment: *Walter & SCI Construction (Canada) Ltd.*, [1997] OLRB Rep. September/October 961; *Aker Kvaerner Songer Canada Ltd.*, 2010 CanLII 6667 (ON LRB); *E.S. Fox Limited*, [2010] O.L.R.D. No. 1128, *Priestly Demolition Inc.*, 2006 CanLII 9944 (ON LRB).

10. In *E.S. Fox Limited*, cited above, the Board summarized the jurisprudence with respect to its discretion to dismiss a jurisdictional application on the basis of delay, as follows, at para 8:

> 8. The Board may also dismiss a jurisdictional dispute on the basis of delay. In making this determination, the Board will consider the length of the delay (*Walter & SCI Construction (Canada) Ltd.* [1997] OLRB Rep. September/October 961); whether the failure to claim the work continued until the point where the work in question was substantially completed (*Focu Furniture supra*); and whether the performance of the disputed work was "significant, conspicuous and well-known" (*Priestly Demolition Inc.* [2007] OLRB Rep. March/April 419). Where a work assignment is not challenged in a timely manner the Board will exercise its discretion not to inquire further into the assignment: *Aker Kvaerner Songer Canada Ltd.* 2010 CanLII 6667 (February 11, 2010).

The Board considers a number of factors when deciding whether or not it is appropriate to exercise its discretion to dismiss a jurisdictional dispute for delay, including the length of the delay, the extent to which the work in question has been completed, and whether it was done in an open and conspicuous manner.

In the present case, there is a dispute concerning whether only 20 per cent of the work was already completed with a composite crew or whether it was actually in excess of 50 percent of the work that was done in the seven or eight month period prior to the filing of the grievance by the Labourers in June 2011, and the consequent assignment to the Labourers in July 2011. However, according to the uncontradicted evidence, the Labourers' business representative, Bill Moreland, first learned of an issue concerning the flat-arch formwork in the winter of 2011. Upon receipt of that information, he met

with senior management on the project regarding the Labourers' claim to the work and was advised by the project manager that the issue would be straightened out. The next time that Mr. Moreland learned of any issue concerning the stripping of the flat-arch formwork was in late June 2011 when PCR had assigned a number of Carpenters to strip forms on a rain day. The Labourers consequently filed a grievance dated June 22, 2011 with respect to that assignment. Given these uncontradicted facts concerning the earlier complaint and assurance given by PCR (which are undisputed and do not therefore need to be corroborated as was suggested in argument), it is not possible to say that there was a lengthy delay of some eight months or more prior to any complaint being raised by the Labourers, or that the Labourers can be said to have acquiesced or sat on their rights.

11. Another difficulty with the Carpenters' argument as it relates to delay is that the Carpenters are the party seeking to have the Board inquire into the assignment of the work in dispute to the Labourers. They ask the Board to exercise its discretion to inquire into the work assignment made in July 2011. Neither PCR, nor the Labourers, are asking the Board to inquire into this matter or are asking for any relief from the Board. If the Board were to exercise its discretion not to inquire into the present work assignment dispute, it is the Carpenters that would be precluded from obtaining the relief they seek – not the Labourers.

12. The situation in the present case is therefore distinguishable from that in *Walter & SCI Construction (Canada) Ltd.*, cited above, in which the Board declined to inquire into the Labourers' contention that the work in question had been improperly assigned because of the *Labourers*' delay in bringing the application. Similarly, in *Aker Kvaerner Songer Canada Ltd.*, cited above, the Board declined to inquire into the Plumbers' challenge to the employer's assignment to the Millwrights until almost a year after the *Plumbers* were aware of the assignment and therefore confirmed the assignment to the Millwrights. In *E.S. Fox Limited*, cited above, the Board declined to inquire into the Iron Workers' complaint about a work assignment made to the Millwrights because of the *Iron Workers*' delay in protesting the work assignment. Finally, in *Priestly Demolition Inc.*, cited above, the relevant delay was similarly that of the party who was claiming the right to the assignment of the work before the Board.

13. For all these reasons, the Carpenters' objection on the ground of delay is dismissed.

Onus

14. With respect to the issue of onus, the Carpenters acknowledge that, in a typical jurisdictional dispute, the Board has held that it is the trade union which is complaining about the work assignment that bears the onus. They however argue that the present case is not a typical jurisdictional dispute given the facts noted above to the effect that the work in dispute was originally assigned to a composite crew of both Carpenters and Labourers and was not formally assigned to the Labourers until approximately eight months later. In the circumstances, the Carpenters argue that the Labourers should bear the onus of explaining why they delayed in grieving for in excess of eight months and

that PCR should bear the onus to explain why they changed the assignment. According to the Carpenters, absent a legitimate explanation from either the Labourers and/or PCR, the original assignment should stand.

15. While the unusual history of the particular assignment in this case may arguably have some bearing on such factors as the employer's preference, they do not, in my view, constitute a basis for departing from the usual rule that it is the trade union which is complaining about the work assignment that bears the onus. In this respect, I note that, even accepting as true and provable the facts asserted by the Carpenters concerning the amount of work done by a composite crew prior to the assignment of the work in dispute to the Labourers in July 2011, it is nonetheless the Carpenters (the applicant in this case) that seek relief from the Board. That is, it is the Carpenters that request a declaration that the work in dispute should have been assigned to them, rather than to the Labourers.

16. In the present case, the Carpenters are the party seeking something from the Board and are consequently the party that bears the onus to demonstrate, on a balance of probabilities, that the work should have been assigned to them rather than to the Labourers, having regard to all of the relevant factors (*K.E.W. Steel Fabricators Ltd.*, 2006 CanLII 2118 (ON L.R.B.). It is not up to the parties that do not seek any relief to persuade the Board that no relief is appropriate. Instead, and in the normal course, it is for the Carpenters to persuade the Board that the assignment of the work in dispute to the Labourers in July 2011 about which they complain ought to be changed, and that the relief they seek in the form of a declaration ought to be granted.

Applicable Criteria

17. When determining a jurisdictional dispute complaint, the Board generally considers the following six factors:

> Collective bargaining relationships and trade union constitutions;
> Trade agreements;
> Area practice;
> Employer practice and preference;
> Safety, skill and training; and
> Economy and efficiency.

See *Kel-Gor Limited,* [1998] OLRB Rep. March April 231.

The parties agreed that that there are no relevant trade agreements, and that the criterion of economy and efficiency is neutral.

Collective Bargaining Relationships and Trade Union Constitutions

18. PCR is bound to the Carpenters' and the Labourers' ICI Provincial Collective Agreements. While both Provincial Collective Agreements purport to claim the work in

dispute, both the Carpenters and the Labourers argue that this criterion favours the assignment of the work to them. PCR, on the other hand, argues that this criterion is either neutral or slightly favours assignment to the Labourers.

19. In support of the Carpenters' position that they have a superior claim to the work in dispute, the Carpenters rely on Articles 19.01, 19.02 and 19.03 of the Carpenters' Provincial Agreement as well as a decision of the committee contemplated under Article 19.02 thereof (the "Committee"). Those articles read, in part, as follows:

> 19.01 The assignment of all work claimed in Schedule "A" and which is in accordance with established local area work practice shall be to members of the United Brotherhood of Carpenters and shall take precedence over any assignment awarded by any method of jurisdictional disputes settlement.
>
> 19.02 The determination of established local area work practice under 19.01 will be placed before a committee for decision.
> …
> A decision of the committee in favour of the CDC shall secure that Local Area Work Practice for the exclusive assignment to members of the United Brotherhood of Carpenters. The employer shall immediately implement the decision.
>
> A subsequent assignment in violation of a committee's decision shall be considered a violation of this Agreement and subject to grievance and arbitration.
>
> 19.03 Any assignment of work that is awarded to members of the United Brotherhood of Carpenters under the provisions of this Agreement shall be acknowledged and supported by the EBA in all proceedings.

The Carpenters also rely on a decision of the Committee dated April 26, 1999 ("Committee Decision"), which confirmed, pursuant to Article 19.03 that the following work set out in Schedule "A" to the Carpenters' Provincial Agreement, is established local area work practice which shall be assigned to their members:

> …
> 2. The releasing of concrete forms that are to be re-used.
>
> …
>
> 31. The building, erecting and dismantling of steel or wood shoring and steel jacks used to support concrete forms, including all lagging.

The Carpenters contend that the Committee Decision is still recognized and respected by employers bound to the Carpenters' Provincial Collective Agreement in the Windsor area and, in that regard, refer to Minutes of Settlement between the applicant and Loaring Construction 1603878 Ontario Limited dated April 30, 2009 in which that Company agreed that the fabrication, erection and releasing of concrete forms that are to be re-used

will be assigned exclusively to members of the Carpenters Union, as set out in the area work practice agreement between the applicant and the Windsor Construction Association, dated April 26, 1999. It should be noted that the Minutes of Settlement refer to "fabrication, erection and releasing of concrete forms" as set out in the Committee Decision but do not refer specifically to the "dismantling of steel or wood shoring and steel jacks used to support concrete forms, including all lagging", which is also referred to at para 31 of the Committee Decision and which more clearly describes the Stripping work in dispute in this case.

20. While the Carpenters acknowledge that the Labourers' Provincial Collective Agreement also purports to claim the work in dispute, they argue that the collective agreement factor favours their claim to the work since, under the Carpenters' Provincial Collective Agreement, that work is not only claimed by them but also recognized by the employer as being work of the Carpenters. They note that, even though both unions purport to claim the work under their respective collective agreements, the Carpenters' Provincial Collective Agreement sets out a process to determine which work is the exclusive work of their members in a particular area and that process has established that Stripping work is their work in Windsor. The Carpenters argue that, by contrast, the Labourers' Provincial Collective Agreement merely indicates that the Labourers claim that work.

21. A review of the relevant provisions of the Labourers' Provincial Collective Agreement however indicates that the Labourers not only claim the work in dispute, but that the Employer party to that agreement also agrees to assign that work to the Union, subject only to a work assignment complaint filed with the Board. Under Article 2 of the Labourers' Provincial Collective Agreement, the Employer agreed that work covered by the agreement is work within the exclusive jurisdiction of the Labourers and that it shall assign this work to members of the Labourers notwithstanding the claims of any other Union. Those provisions read as follows:

> 2.03 The Employer acknowledges and agrees that the work covered by this Agreement is within the exclusive jurisdiction of the Union and its affiliated bargaining agents, notwithstanding the claims of any other Trade Union.
>
> 2.04 The Employer agrees that notwithstanding the claims of any other Trade Union, it shall assign exclusively to members of the Union and its affiliated bargaining agents, all work covered by this Agreement.
>
> …
>
> 2.06 (a) Schedule 'E' to this Collective Agreement constitutes a list of work that is claimed by the Union.
>
> (b) Where work within Schedule 'E' is claimed by the Union and is within the I.C.I. sector and there is no work claim dispute within the meaning of Article 8.01, the work will be assigned to employees represented by the Union.

Schedule "E" of the Labourers' Provincial Collective Agreement refers to work claimed by the Labourers under the Agreement and includes the Stripping work at issue in this case, described as follows:

> Form removal: Once the reusable form panels have been released by loosening of the hardware, the removing, cleaning, oiling application or releasing agents and carrying to the next point of erection of all materials and panels, including flying forms, as well as the stripping of forms which are not to be reused and of forms on all flat arch work.

Article 8.01 of the agreement, generally speaking, provides that jurisdictional disputes will be processed as a complaint under section 99 of the Act and that work will continue to be assigned to the Labourers by the Employer unless otherwise directed by the Board. The Carpenters' Provincial Collective Agreement claim to the work in dispute would similarly be subject to a work assignment complaint filed with the Board, even if not expressly stated in the Carpenters' Provincial Collective Agreement.

22. It therefore appears that both the Carpenters and the Labourers claim the work in dispute and that both of their respective claims have been recognized by the Employer under the terms of the applicable I.C.I. Provincial Collective Agreements. Further, in both cases, these contractual obligations would be subject to a work assignment complaint filed with the Board. In all the circumstances, I am not persuaded that either trade union has a superior claim to the work under the collective agreement factor.

23. While the Labourers suggest that this factor favours the assignment to them because the area practice evidence suggests that the Committee Decision on which the Carpenters rely has not been given any effect in the area, that alleged fact may be relevant to an assessment of the area practice criterion, but does not alter my determination that the collective agreement factor is neutral in this case.

Safety, Skill and Training

24. The Labourers and PCR take the position that this criterion is neutral and that both trades have the requisite skill and training to perform the work safely. The Carpenters, on the other hand, assert that their claim to the work under this criterion is superior and, in this regard, rely on the Apprenticeship Training Standards for General Carpenter at page 25, which refers to stripping of concrete forms as being part of the training of all members of the Carpenters. The Carpenters point out that the stripping of forms referred to in the Apprenticeship Training Standards for Construction Craft Worker relied on by the Labourers refers to stripping and handling of material, and "strip[ping] and remove[ing] formwork, using rigging and hosting equipment and tools…" and that the work in dispute in the present case did not involve rigging and hoisting equipment.

25. While the Carpenters have identified a technical difference in the description of the Stripping work described in the Labourers' training manual, I am not persuaded that this is a material difference which suggests that the Labourers do not have the requisite skill and training to perform the work safely. In this regard, I note that the

Labourers also rely on a letter from the Training & Apprenticeship Coordinator for the Construction CraftWorker Regional Training Centre (CCWRTC) in London, in which the author confirms that apprentices receive theory and practical lessons in trade school in matters involving stripping work in all aspects of concrete formwork, including in the type flat arch applications at issue in this case.

26. In all the circumstances, I find that this criterion is also neutral.

Employer Practice and Preference

27. The parties identified a number of factual disputes as it relates to employer practice, which they agree involves only four projects. The Carpenters take no issue with the claim of the Labourers and of PCR set out in their respective briefs to the effect that members of the Labourers performed Stripping work at the Dufferin Street Parking Garage. The Carpenters however claim that their members, rather than the Labourers, did Stripping work on the following remaining three projects and rely in this connection on the declarations and/or other evidence contained at tab 17 of their Book of Documents at the page numbers noted-below:

1. WFCU Project – tab17 pp.65, 109 and 110;
2. TD Trust Office building – tab 17 pp. 27, 117, 161 and 165;
3. University of Windsor Kinetics Building – tab 17 pp. 110, 135 and 139.

28. Both trades filed declarations alleging that their members performed the work in dispute on each of these projects. As noted in *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 759 v. Lockerbie & Hole Inc.*, 2008 CanLII 14073 (ON LRB) at para 26, "[i]n the normal course these statements will not be tested by cross-examination, and will therefore be subject to close scrutiny. They are not the statements of disinterested bystanders, but of persons who have a real stake in the outcome of the proceeding. Thus both reliability and credibility are issues in the Board's mind in assessing them."

29. In the present case, the declarations filed by the Labourers are, in each case, signed statements made by their members who claim to have actually performed the work in dispute themselves. These declarations also indicate in an attached page any instance in which members of the Carpenters' Union performed any of the work in dispute in conjunction with members of the Labourers. By contrast, the declarations filed by the Carpenters are unsigned and purport to have been filed by one of their members who either performed the work or simply witnessed the work being done by others and do not distinguish which applies or provide any opportunity for the author to identify any relevant work done by the Labourers on the project(s) in question.

30. The Carpenters' declarations also refer to the work in dispute as described at the pre-consultation conference without the subsequently added clarification that the work in dispute is not in respect of shoring structure for concrete beams and is not in respect of the initial loosening of the u-heads. On the other hand, the declarations filed

by the Labourers are signed and make clear that the work referred to concerns the removal of shoring structure related to flat-arch form work at issue in this case and, where applicable, identifies the work performed by the Carpenters that was associated with this work. In all the circumstances, I find the signed declarations filed by the Labourers to be more detailed, specific and reliable than the unsigned declarations filed by the Carpenters to which I attach little or no weight. As such, I prefer the declarations filed by the Labourers over those filed by the Carpenters whenever they appear to conflict.

31. With respect to the WFCU Project, PCR acknowledged that there was a small amount of suspended concrete slab/arch frame forming on this project, which was done in a mechanical room. Both the Labourers and the Carpenters claim to have performed the work in dispute on this project and have filed declarations from their respective members in support of their claims. While, as noted, I give significantly more weight to those declarations filed by the Labourers, in the case of the WFCU Project there appears to be no dispute that at least some of the Stripping work was also performed by the Carpenters, albeit to a lesser extent. In that regard, I note that the Labourers' declaration filed by Morris Ifill indicates that he observed Carpenters "pulling material down on a few occasions on rain days" (in addition to loosening the u-heads, which is not, in any event, the work in dispute in this case). It therefore appears that the Carpenters performed at least some of the work in dispute on this project, but that the majority of it was performed by the Labourers.

32. With respect to the work performed at the TD Trust Office Building, I again prefer the more detailed and signed declarations filed by the Labourers in support of their claim that their members performed the work to the less specific and unsigned statements completed by members of the Carpenters who may or may not have actually performed any of the work themselves. Only the second unsigned statement of Tomi Hulkkonen, Local Coordinator for the Carpenters who was a Union representative for the Carpenters' Union in Windsor for four years, refers to this job site. His signed declaration simply describes the process he claims is *generally* used for releasing of forms and falsework (in which he describes members of the Carpenters being involved in lowering of the u-heads and beams and the lowering of joists and plywood, and refers to the fact that the dismantling and lowering of the shoring components is performed by Carpenters and Labourers working together). In the absence of more reliable signed declarations filed by members of the Carpenters, the documentary evidence filed with respect to this project weighs more heavily in support of the Labourers' claim.

33. In the circumstances, and regardless of any finding with respect to the remaining project at the University of Windsor Human Kinetics building that I might make or the determination of the factual differences between the parties concerning the amount of Stripping work done in this case by the Carpenters at the University of Windsor project prior to its assignment to the Labourers in July 2011, I find that the criterion of employer practice is neutral. The small amount of projects involved is, in any event, insufficient to establish a pattern of employer practice.

Area Practice

34. The relevant area practice in this case relates to stripping of flat arch formwork in the ICI sector of the construction industry in Board Area 1; that is, in the Counties of Essex and Kent.

35. The Carpenters began with a listing of some 208 jobs they contended represent relevant area practice evidence which supports their claim to be entitled to do the work in dispute in this case. They however ultimately accepted the Labourers' contention that certain jobs should be struck from the list as not relevant (either because the work involved was not ICI work, was outside the relevant Board Area, was single trade practice or was a duplicate of a project previously listed in the chart). This resulted in a reduction from a total of 208 jobs to 97 jobs alleged by the Carpenters to be relevant practice evidence performed by their members.

36. There is however conflicting evidence as to whether the work in question on those 97 jobs was performed by members of the Labourers or by members of the Carpenters. Both trade unions purported to file evidence indicating that their members performed the work in dispute on those jobs. According to the Carpenters' counsel, when they say they did the work in dispute, they are referring either to the fact that they did the work, or alternatively that there was a composite crew that did the work. By composite crew, the Carpenters' counsel notes that they mean a crew of employees comprised of both Carpenters and Labourers, in which the Carpenters do all of the work in dispute except that the Labourers receive and handle the material on the ground.

37. As previously indicated, the Carpenters' declarations do not distinguish between those who did the Stripping work themselves personally and those who claim to have simply witnessed that work being done. Unlike the Labourers' declarations, they are also all unsigned. In the circumstances, and as previously indicated, I give little or no weight to the unsigned declarations filed by the Carpenters to the extent that they conflict with the sworn and specific statements filed by members of the Labourers who claim to have actually done the work themselves.

38. With respect to the five projects performed by Calvino Incorporated ("Calvino"), the Carpenters rely only on unsigned declarations which refer to the work in dispute but do not include the clarity note that such work is not in respect of the initial loosening of the u-heads. By contrast, the signed letters filed by PCR from representatives of management at Calvino indicate that the Carpenters released the forms or falsework by turning down the hardware (u-heads) and that the Labourers dismantled and lowered the joists, beams, plywood and shoring to the ground. I similarly discount an additional 51 projects put forward by the Carpenters as reflecting area practice evidence given that the only support for their claims in respect of those projects is in the form of unsigned declarations (including those of Mr. Hulkkonen with respect to six of those projects) from members who may or may not have personally performed the work in question. In one instance, there was in fact no declaration.

39. Of the remaining projects on which the Carpenters rely, a review of the material filed suggests that there was, in fact, no flat-arch formwork on five of the projects; namely at project no. 28 (Wheatley Water Treatment Plant), project no. 103 (Old Age Home/Lea.), project no. 123 (ADM Truck Scale & Tarping Building), project no. 147 (Zehr Super Store), and project no. 155 (Bar on Ouellette) where the contention that there was no flat arch formwork at this project appears to be undisputed.

40. I also, in any event, note the employer's letter setting out Loaring Construction's general practice of having the Carpenters loosen the hardware only and the more specific letter written by Mr. Anthony Pupatello of Pupatello & Sons Ltd. dated January 16, 2012, which makes clear that the latter company's practice in relation to flat-arch form work on all I.C.I. projects in the Essex and Kent area is also to have members of the Carpenters loosen all u-heads and hardware to release the pressure and to have members of the Labourers perform the balance of the Stripping work. (I am not further persuaded that there is any basis to discount the signed employer letters which I note are similar in form to those filed by the Carpenters.) In the circumstances, I give little or no weight to the unsigned declarations filed by the Carpenters in relation to Loaring Construction's projects nos. 49, 75, 84 and 88 or to the unsigned declarations filed by the Carpenters in relation to Pupatello & Sons Ltd.'s projects nos. 67 and 91.

41. In addition, and in view of the apparently conflicting letters written by representatives of Elmara Group and those formerly employed by Elmara Construction as it relates to projects nos. 40, 53, 76, and 140, I give significantly more weight to the signed declarations filed by the Labourers from members who actually performed the work as opposed to the information set out in either these letters or in the unsigned declarations filed by the Carpenters from members who may not have actually done the work.

42. A review of the apparently conflicting employer letters written by A.M. Razak of Oscar Construction Company Limited relied upon in respect of project nos. 102, 113, 114, 115, 116, 117 and 137 performed by that Company suggests that its practice is to employ Carpenters to release the u-heads and "pull the forms from the face of the concrete", but that "[o]nce the formwork is released then the labourers are utilized to strip down and move/remove the formwork and to dismantle the shoring". In addition, some of the declarations filed by the Labourers in respect of work performed by Oscar Construction Company Limited confirm that members of the Carpenters assisted with Stripping work on rain days. It therefore appears that both trades have, to some extent, been involved in performing the work in dispute on these projects and that the majority of the Stripping work (as opposed to the initial releasing work involving turning down the u-heads) was performed by the Labourers.

43. The evidence with respect to Ellis Don's projects nos. 41, 77, 89, and 108 also, at best, suggests that the work in dispute was performed by both the Labourers and the Carpenters working as a composite crew. The signed statements filed by the Carpenters from individuals with knowledge of the projects in question do not however indicate that the individuals performed any of the work in dispute themselves. In addition, apart from

the signed declaration filed by Mr. Hulkkonen, which does not refer to any of the Ellis Don projects specifically, the two signed statements filed by the Carpenters in respect of these projects do not make clear that the "stripping/releasing" referred to as having been done by Carpenters assisted by the Labourers involved more than the initial loosening of the u-heads by the Carpenters.

44. Similarly, with respect to Matassa Incorporated's projects nos. 30, 85, 100, 107, 111, and 112, the preponderance of the evidence filed in respect of these projects suggests that Matassa Inc.'s general practice is for Carpenters to turn down the u-heads and for the Labourers to strip formwork from the face of the concrete, remove the plywood and joists and dismantle the shoring system. The signed employer statement filed by the Labourers from the President of Matassa Incorporated is much more specific as to what portion of the actual Stripping work (as opposed to the initial turning down of the u-heads which involves the releasing of the pressure of the formwork and which, as noted, is not the work in dispute) is done by which trade than is the statement from that same individual filed by the Carpenters. The signed employer statement filed by the Labourers supports the position taken by the Labourers with respect to these projects (and is supported by signed declarations from their members who actually performed the work). By contrast, there is little to support the Carpenters' claim, other than the unsigned declarations of members of the Carpenters (to which I attach little to no weight) and a few signed statements that do not make clear what is meant by a composite crew of Carpenters and Labourers or, in the case of Mr. Hulkonen's signed declaration, does not refer specifically to these projects.

45. In all the circumstances, I find that the area practice evidence relied upon by the Carpenters, for the most part, supports the Labourers' claim to the work even though there is some evidence that the Carpenters have, on occasion, participated in some of the Stripping work in issue such as pulling or prying of the forms from the face of the concrete either on rain days or otherwise after they had performed the initial loosening of the u-heads.

46. Not surprisingly, some of these same projects are referred to by the Labourers in support of their position that the work was properly assigned to them. In the circumstances, and even discounting the projects alleged by the Carpenters to be too old to be of relevance, the weight of the area practice evidence referred to supports the assignment of the work in dispute to the Labourers. In this respect, I note that the Carpenters were unable to provide any substantive dispute to many of the projects upon which the Labourers rely as they apparently had no knowledge of the project in question.

47. It also bears noting that the evidence filed with respect to a dispute which arose on two relatively recent job sites referred to in the Labourers' area practice evidence, namely the Aecon East Windsor Cogeneration Plant (2008/2009) and the Bondfield Construction's Windsor Regional Hospital Western Campus in 2010, suggests that the work in dispute was ultimately assigned to the Labourers following a meeting between the trades and the employers concerned and that no grievance was ever filed by the Carpenters. The declaration filed by Mr. Hulkkonen in the Carpenters' reply brief

clarifies the position he took at those meetings but does not clearly dispute the evidence filed by the Labourers in the form of declarations filed by their representatives, Mr. Petroni and Mr. Moreland, to the effect that the Carpenters were ultimately assigned only to loosen the u-heads or hardware on these projects and that all other aspects of stripping the formwork was assigned to members of the Labourers. He also did not clearly dispute the consistent employer statements to the same effect that the Carpenters were assigned only the work of turning down the u-heads, which is known as releasing the pressure on the formwork, and that the Labourers were assigned to remove thereafter the joists and plywood and to dismantle the shoring equipment and associated paraphernalia. The document referred to setting out the final assignment for the Aecon East Windsor Cogeneration Plant project on which the Carpenters rely further refers simply to the Carpenters having been assigned "Form Release". The employer letter provided by the President of Aecon Buildings further makes clear his understanding that turning down the u-heads is what is known as "releasing the pressure on the formwork". The declarations filed in reply by the Carpenters, in any event, acknowledge that the Labourers do Stripping work, albeit only in respect of formwork that is not reusable. With respect to these two projects, I reiterate that I give little or no weight to the unsigned statements filed by members of the Carpenters, who may not have actually performed the work, as compared to the more detailed and specific statements signed by members of the Labourers who actually performed the work in dispute.

48. In all the circumstances, and particularly in view of the fact that the bulk of the area practice evidence relied upon by the Carpenters, in fact, supports the assignment of the work to the Labourers, I am satisfied that the criterion of area practice favours the assignment of the work to the Labourers.

Disposition

49. In summary, I find that all of the Board's usual criteria, other than area practice, are neutral as between the two trades and that the area practice evidence supports the assignment of the work to the Labourers. In all the circumstances, I find that the Carpenters have not met their onus of persuading the Board that the assignment made by PCR was wrong. The Board therefore confirms the assignment made by PCR to the Labourers.

"Caroline Rowan"
for the Board