ONTARIO LABOUR RELATIONS BOARD

OLRB Case No.: **1144-14-R**

Labourers' International Union of North America, Local 183, Applicant v. **Normac Kitchens Limited**, Responding Party v. Group of Employees

BEFORE: Harry Freedman, Vice-Chair

APPEARANCES: Ben Katz, Frank Martins, Nuno Viera and Victor Almeida for the applicant; Jeremy Schwartz, Frank Portman, Alfonso Mendez, Bianca Marcus, and Simone French for the responding party; no one appearing for the Group of Employees.

DECISION OF THE BOARD: February 13, 2015

1. The hearing in this construction industry certification application being dealt with under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") convened pursuant to the Board's September 8, 2014 decision following a Case Management Hearing to deal with whether two of the responding party's employees (JL and SS) were at work in the construction industry on the date this application was filed.

2. The Board in its prior decision dated August 29, 2014 noted that the applicant and responding party had agreed that the bargaining unit ought to encompass construction labourers, carpenters and carpenters' apprentices who were at work in Board Area 8 in all sectors of the construction industry other than the industrial, commercial and institutional sector. The Board noted the only issue between the parties relating to the bargaining unit description was whether the geographic scope of the bargaining unit should encompass Board Area 9.

3. The Board at paragraphs 7 and 8 of its August 29th decision described the nature of the issue and how it affected the bargaining unit description when it wrote:

> 7. Both parties agree that two individuals employed by the responding party (JL and SS) were doing work in Board Area 9. The applicant contends they were doing the work of a construction labourer. The responding party contends they were engaged in the delivery of materials to the construction project in Board Area 9 for installation at a later date and therefore were not working in the construction industry on that date.
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> 8. The determination of whether Messrs. JL and SS were at work in the construction industry on July 21st will allow the Board to finalize the bargaining unit description.

4. Prior to the scheduled hearing of this matter the parties filed the following agreed statement of fact:

> 1. The Applicant is a trade union within the meaning of s.126(1) of the *Labour Relations Act, 1995* and represents, *inter alia*, construction labourers in the Province of Ontario.
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> 2. The Respondent, Normac Kitchens Ltd. ("Normac"), designs, fabricates, and installs kitchen cabinetry and countertops. Normac's fabrication shops are located at 59 Glen Cameron Road, Thornhill, Ontario (the "Office Shop") and 375 John Street #5, Thornhill, Ontario (the "Counter Top Shop") (together the "Shops"). The Shops are located within the geographic boundaries of Board Area 8.
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> 3. At all times relevant to this application, Jose Lora ("JL") and Sinniah Suganthanathan ("SS") (together, the "Disputed Employees") were employed by Normac.
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> 4. The Applicant filed the relevant Application for Certification on July 21, 2014 (the "Application Date").
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> **Jose Lora**
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> 5. On or about June 8, 2009, JL was hired by Normac as a worker in the warehouse and shipping

department. JL's role included working as a Delivery Helper, responsible for sorting and loading product and materials into trailers as well as assisting delivery drivers with their scheduled deliveries and effecting deliveries at various work sites where he would offload and deliver products/materials to construction sites. This included handling and movement of materials from the delivery truck to specific units. At other times, JL was assigned to perform other work in one of the Shops, such as warehousing, wrapping materials and handling materials.

Sinniah Suganthanathan

6. On or about March 5, 2012, Normac hired SS as a Delivery Driver, the position he held on the Application Date. SS possessed a driver's licence with an "AZ" endorsement, permitting him to operate Normac's delivery trucks.

7. SS resigned his employment with Normac on or about July 31, 2014. His responsibilities during his employment consisted of sorting product/materials in factory warehouses, loading materials fabricated at the Shops onto Normac's trucks for local deliveries, and driving to effect deliveries at various work sites where he would offload and deliver products/materials to construction sites or between Normac's facilities. This included handling and movement of materials from the delivery truck to specific units.

Normac's Delivery Procedures

8. Although the Disputed Employees had worked together before the Application Date, Normac does not have set delivery "crews." The combination of Drivers and Helpers is continually adjusted on a needs basis, and is subject to change at any time. The assignment of Delivery Helpers to Drivers is scheduled weekly and confirmed on a day-by-day basis.

9. The Disputed Employees were not instructed, trained or authorized to perform any installation or deficiency service work for Normac, and have never performed such work for Normac.

10. The Disputed Employees were not instructed, trained or authorized to operate any site equipment, including but not limited to lifting equipment such as scissor lifts, skid steers and forklifts, while working for Normac. They did not operate such equipment while working for Normac.

The Activities of the Disputed Employees on the Application Date

Prior to Arrival at the Whitby Site

11. The only delivery scheduled for the Disputed Employees on the Application date was a load of kitchen products/materials fabricated by Normac (the "Cargo") to the BGS—Whitby site at 310 Mary Street East, Whitby, Ontario in Board Area 9 (the "Whitby Site").

12. The Cargo was destined for five units at the Whitby Site. These units were situated on the ground, third, fourth, fifth and sixth floors. The materials that comprised the Cargo was [sic] installed by other Normac employees at a later date. The work of installing the Cargo, which was performed by those other Normac employees at a later date, is work falling within the scope of the proposed bargaining unit.

13. The Whitby Site is a six-storey residential building intended for rental by seniors.

14. The Disputed Employees were informed about the delivery of the Cargo by schedule posted in the shipping office at the Office Shop prior to the Application Date. The schedule included the details of the Cargo.

The Application Date

15. SS arrived at the Counter Top Shop at or about 6:00 a.m. on the Application Date, at which time he inspected the truck and completed the mandated Vehicle Inspection Report. JL arrived at the Counter Top Shop at approximately the same time.

16. SS then drove the truck to the Whitby Site with JL riding as passenger. They departed at or about 6:15 a.m.

17. Normac was not scheduled to perform any installation, deficiency service, or repair work at the Whitby Site on the Application Date. No other Normac employees attended at the Whitby Site on the Application Date.

The Activities at the Whitby Site

18. The Disputed Employees arrived at the Whitby Site at approximately 7:15/7:30 a.m., and parked their truck at the north side of the building.

19. The Truck contained the Cargo, as well as dollies to assist with the movement of the Cargo into the specific units.

20. The rear of the Truck was opened to a red and black scissor lift (the "scissor lift"). The scissor lift was lowered to approximately the height of the rear flat bed of the Truck.

21. The Disputed Employees proceeded to unload a portion of the Cargo from the truck. SS manually lifted kitchen countertops and vanities from the flat bed of the Truck and placed them on to the scissor lift. JL then picked up the kitchen countertops and vanities and manually repositioned them on the scissor lift.

22. The Disputed Employees continued this practice until the scissor lift was fully loaded with the kitchen materials. Once all the materials were loaded on to the scissor lift the Disputed Employees entered the building and climbed the stairs to the sixth floor. The scissor lift was operated up to the sixth floor.

23. At the sixth floor, the Disputed Employees physically lifted the kitchen materials from the scissor lift and hauled the numerous kitchen materials down the hallway and placed them into the appropriate unit on the sixth floor. The Disputed Employees used a dolly contained in the Truck to move some of the kitchen materials.

24. This process was then repeated. The scissor lift was lowered to the ground level. JL and SS walked down the stairs of the building. The Disputed Employees returned to the truck and loaded additional kitchen materials from the Truck by manually lifting them onto the scissor lift and physically repositioning them on the scissor lift.

25. The scissor lift was then raised to the fifth floor. The Disputed Employees walked up the stairs of the building to the fifth floor, manually lifted the kitchen materials from the scissor lift and then hauled them down the hall and into the appropriate unit on the fifth floor.

26. This process was repeated for the fourth floor and the third floor. For each floor, the Disputed Employees manually lifted the kitchen countertops from the Truck onto the scissor lift and then hauled the kitchen materials from the scissor lift into the appropriate unit.

27. At the conclusion of placing the materials in the third floor units, the scissor lift was lowered to the ground level. The Disputed Employees returned any dollies used to the Truck.

28. The scissor lift was operated at all times by a non-Normac employee.

29. SS then drove the truck around to the opposite side of the building, where the Disputed Employees unloaded the final portion of the Cargo by hand into a unit on the ground floor of the building.

30. At approximately 9:50 am., the Disputed Employees left the Whitby Site in the truck and returned to the Office Shop at approximately 11 a.m. Upon their arrival, they turned in the delivery paperwork in respect of the Cargo to the Shipping Supervisor.

31. The Disputed Employees spent the remainder of the Application Date preparing for their following day's delivery to the Medallion Site in Brampton (the "Brampton Order"). These preparations consisted of:

a. sorting and stacking materials for the Brampton Order,

b. preparing the truck for the Brampton Order,

c. travelling to the Counter Top Shop from the Office Shop where they loaded counter tops for the Brampton Order, and

d. parking the truck.

32. The Disputed Employees finished working and left the Counter Top Shop at or about 3:15 p.m.

33. The Disputed Employees took one lunch break which lasted approximately 30 minutes, and one morning and one afternoon break, each of which lasted approximately ten minutes. The times at which they took these breaks are not precisely known.

34. The Disputed Employees were paid piecework for their work on the Application Date according to their usual rates.

5. The essence of the position taken by the applicant is that although Messrs. JL and SS were not doing work in the construction industry when they were working in the responding party's shop and driving to the Whitby worksite (a six storey residential building under construction that on completion is intended for rental by seniors), once they arrived on site at the Whitby construction project, which is in Board Area 9, they were engaged in the work of a construction labourer by reason of their work moving kitchen products and materials manufactured by the responding party (the "Cargo") from their truck to the point of installation in the building under construction. The applicant maintains that once those two employees of the responding party, an employer within the construction industry, began moving construction materials on a construction site they were doing the work of construction labourers on the application date. The applicant correctly points out that it does not matter that they had also been engaged in non-construction work (warehouse and delivery) for a majority of the day. See *Jamwood Developments Inc.*, [2011] OLRB Rep. March/April 224; *Country Green Homes Inc.*, [2012] OLRB Rep. Nov./Dec. 979 at 1005.

6. The responding party's position is that Messrs. JL and SS were engaged in warehouse and delivery work for their entire day. It submits that the movement of the Cargo from the truck to the various units on different floors of the building under construction at the Whitby site was a seamless continuation of the delivery function they had been assigned and as such was not work in the construction industry. The responding party contends that its employees who carry out warehouse work and the subsequent delivery of its products to construction projects are not engaged in work in the construction industry and therefore are not employees in the construction industry.

7. The applicant maintains that the two employees in issue were engaged in two discrete functions on the application date. One was taking the Cargo by truck to the Whitby site and the other was the off-loading and movement of the Cargo from the truck to the units in the building under construction on the site where they were to be installed. It submits that the movement of construction materials on a construction site by the employees of the employer that is responsible for the installation of those materials at that site and is therefore an employer in the construction industry is clearly and unequivocally the work of a construction labourer. In this case, according to the applicant, Messrs. JL and SS were working in the construction industry as construction labourers at the very least from the time they were moving the Cargo from the scissor lift and hauling that Cargo down the hallways and into the units where that Cargo was to be installed at a later date.

8. The applicant argued that the work they were doing was clearly integrally related to the construction work that is to be carried out by the responding party at the Whitby site. The movement of the Cargo on the construction site was a necessary element of the construction work to be performed by the responding party.

9. The applicant recognizes and accepts that the Board has held that the simple act of delivering materials to a construction site by an employer that is not in the construction industry is not work in the construction industry.

10. The Board has succinctly set out that principle in *Graham Bros. Construction Limited*, 2005 CanLII 18256 (ON LRB); [2005] OLRD No. 2145 when it wrote at paragraph 92

> It is established case law that the delivery of materials to construction sites by truck drivers does not

> constitute work falling within the construction industry. …See, for example, *Four Seasons Drywall*, [1990] OLRB Rep. May 525, *Custom Concrete Northern Ltd.*, [1993] OLRB Rep. Feb. 103; *Ethier Sand & Gravel Ltd.*, [1979] OLRB Rep. Oct. 962; *Canadian Road Asphalts Ltd.*, [1980] OLRB Rep. March 299 and *Matthews Group Limited*, [1969] OLRB Rep. May 211.

See also *Graham Bros. Construction Limited*, 2010 CanLII 30944 (ON LRB); 2010 OLRD No. 2215 in which the Board reaffirmed that principle when it wrote at paragraph 27:

> It is my determination that, no matter how essential Mr. McKinnon's functions are to the work of the on-site construction employees, this fact is not sufficient to cause the Board to alter its longstanding jurisprudence establishing that individuals engaged in the delivery of materials or equipment to a construction site are not engaged in construction industry work. The tasks performed by Mr. McKinnon appear to be on all fours with the work of delivery truck drivers which the Board has consistently found not to be construction industry work.

11. The applicant contends that the situation before the Board in this case is different. It argues moreover that the Board's statements of principle in the two *Graham Bros. Construction Limited* decisions were too broad and contends that a careful reading of the cases cited and relied on for that principle indicates that in some circumstances delivery to a construction site is work in the construction industry when that delivery is carried out by the construction industry employer.

12. The applicant submits that the critical difference between the authorities relied on by the responding party and this case is that the movement of the material on the construction site that was being delivered was carried out by the employees of the responding party, that is clearly an employer in the construction industry, that was also undertaking the installation of the materials being delivered. The applicant referred and relied on the analysis undertaken by the Board in *Aramark Canada Limited*, 2007 CanLII 39345 (ON LRB); [2007] OLRD No. 3913 and in particular the following sentence in paragraph 18 of that decision:

> It seems if the work done by the drivers in the *Ellis Don Limited* and *Four Seasons Drywall* cases had been performed by employees of an employer who was otherwise in the construction industry, such work and the employees doing that work would come within the construction industry.

13. The applicant submits that the work done by Messrs. SS and JL at the construction site on the application date was the movement of construction materials that were to be installed at a later date. It says that is precisely the kind of work that is done by a construction labourer. It also contends since those two employees were working on a construction site and employed by a construction industry employer, they were at work in the construction industry.

14. In my view, this issue in this case is clear and falls to be determined based on the work functions in which Messrs. SS and JL were engaged on the application date. There can be no doubt, and the applicant concedes, as it must, that if a third party cartage contractor had been engaged by the responding party to deliver the Cargo to the Whitby site and that third party cartage contractor's employees had done the work that was done by Messrs. SS and JL, those two employees of the cartage contractor would not be considered employees in the construction industry in accordance with the Board's well established principles set out in *Four Seasons Drywall*, [1990] OLRB Rep. May 525 and *Marel Contractors*, 2001 CanLII 18279 (ON LRB); [2001] OLRD No. 4154.

15. Does the fact that Messrs. SS and JL were employed by the responding party and that the responding party is an employer in the construction industry change that result as contended by the applicant? In my view, it does not.

16. Messrs. SS and JL were employed by the responding party to carry out warehouse and delivery work. They delivered the responding party's Cargo to the Whitby project. The nature and purpose of their work did not change when they began loading the scissor lift at the work site and moved that Cargo to the assigned locations. Messrs. SS and JL were not involved in either the installation of the materials, which is work in the construction industry, they had delivered nor were they involved in the movement of the Cargo at the construction site after the delivery function had been completed.

17. It seems to me that when the Board made the comment in *Aramark Canada Limited* relied on by the applicant it was focussed on the specific tasks being carried out in respect of a construction industry employer that was engaged in construction work at the time the employees were performing the tasks to which the Board was referring. That becomes apparent when one reads paragraph 18 of that decision in its entirety:

> It is also important to note that merely because work takes place at a construction site does not necessarily mean that such work is work within the construction industry. The delivery of material to a construction site is not work in the construction industry. See *Ethier Sand and Gravel Limited,* [1979] OLRB Rep. May 692; *Four Seasons Drywall*, [1990] OLRB Rep. May 525; *Marel Contractors*, unreported, Board File No. 2172-00-G, decision dated October 18, 2001, Q.L. cite [2001] OLRD No. 4154 and *Ellis Don Limited.*, [2004] OLRB Rep. January/February 56. That is the case despite some of the work performed by the persons doing the delivery of the material being similar, if not identical, to work done by employees in the construction industry. In *Ellis Don Limited, supra*, the Board noted the ready mix drivers were required to mix ingredients, pour concrete into forms and wash chutes, but held that such work was integral to the delivery of the material. The Board wrote at page 67:
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> > …the definition of construction industry focuses on the activity of the operations engaged in rather than that of the employees. In determining whether the drivers in question are engaged in construction work consideration must be given to whether their activities are an integral and necessary part of a construction business.
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> Similarly, in *Four Seasons Drywall, supra* the Board found that the delivery of drywall to a construction site by employees of a drywall supplier was not work in the construction industry notwithstanding that the employees in question performed a significant amount of activity on the construction site. Those activities include the use of a boom truck to load the drywall to the fifth floor of the building where they stockpiled the drywall. It seems if the work done by the drivers in the *Ellis Don Limited* and *Four Seasons Drywall* cases had been performed by employees of an employer who

> was otherwise in the construction industry, such work and the employees doing that work would come within the construction industry. As the Board noted in *A-1 Hydrant Services Limited, supra* at page 355:
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> > …the appropriate approach is to focus on both the work being done and the context in which that work is done.

If one focusses on both the work being done and the context in which that work is done, as the Board in *A-1 Hydrant Services Limited*, [2005] OLRB Rep. May/June 350 indicated was the appropriate method of assessing the issue, it is in my opinion clear that the movement of the Cargo on the construction site by Messrs. JL and SS was the final element necessary to complete the delivery of the Cargo, a process that had started and continued uninterrupted until the different pieces of that Cargo had been placed in their final locations for installation.

18. In this case, the responding party was not engaged in installation work on the date that the Messrs. JL and SS delivered the Cargo to the Whitby site. It is clear from the facts that the responding party had no other employees working at the Whitby site doing any sort of installation work or any other kind of construction work on the date this application was filed.

19. The responding party designs, fabricates and installs kitchen cabinetry and countertops. It also distributes the product it fabricates. The installation function is a discrete element of the responding party's business that is in the construction industry.

20. There can be no doubt that the fabrication and distribution elements of the responding party's business that take place off-site are not in the construction industry and the employees engaged in those off-site elements of its business are not employees in the construction industry unless they are commonly associated in their work or bargaining with on-site employees. See the definition of "employee" in section 126(1) of the Act which was added to the Act and came into effect on February 15, 1971. See *The Labour Relations Amendment Act (No.2)*, S.O. 1970, c. 85.

21. In *Cedarhurst Paving Company Limited*, [1964] OLRB Rep. Dec. 442 the Board determined that drivers who were not always working on-site were nevertheless employed in the construction

industry "if the operations or services performed by these drivers are regarded as an integral and necessary part of the business". At the time of that decision, the Act did not contain a definition of "employee" applicable to the construction industry and only defined "employer" for purposes of the construction industry as "a person who operates a business in the construction industry."

22. While the Cargo installed by the responding party is an integral element of its business just as ready-mix concrete is an integral element of a concrete forming construction business, the delivery of ready-mix concrete is a discrete function that is not work in the construction industry. See *Ellis-Don Limited*, [2004] OLRB Rep. Jan./Feb. 56 at 64-65. Similarly, and for the reasons expressed by the Board in that *Ellis-Don Limited* decision, the delivery of the Cargo by employees of the responding party is not work in the construction industry. In this case Messrs. JL and SS were only engaged in the delivery of the Cargo when they arrived at the Whitby construction site, moved the Cargo from the truck to the scissor lift, moved the Cargo from the scissor lift into the hallway, and then carried the Cargo to each of the units where the various pieces of cabinetry were going to be installed.

23. In the result, the Board finds that Messrs. JL and SS were not employees in the construction industry on the date this application for certification was filed. Therefore there were no employees of the responding party at work in the construction industry in Board Area 9 on the application date.

24. In accordance with the Board's August 29th decision, the Board finds that all construction labourers, carpenters and carpenters' apprentices in the employ of the responding party in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

25. There are a number of status disputes in three broad categories (whether certain of the individuals challenged by the applicant were at work in the bargaining unit on the application date; whether certain persons were not employees under the Act by reason of section 1(3)(b) because they exercise managerial functions; and whether certain persons were independent contractors (or employees of an independent contractor) rather than dependent contractors or employees of the responding party) that remain unresolved.

26. If the parties cannot agree by Tuesday, February 17, 2015 which category of status disputes will proceed at the continuation of hearing of this application on March 4, 2015, the Board directs the responding party to be prepared to proceed with its evidence in relation to the individuals the applicant had challenged on the basis that they were not dependent contractors or employees of the responding party.

27. The hearing of this matter will continue as previously scheduled on March 4 and 9, 2015.

28. The Board directs the responding party to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 45 business days.

"Harry Freedman"
for the Board