

ONTARIO LABOUR RELATIONS BOARD

1458-10-M Avery Construction Limited Transportation Services, Applicant v. International Union of Operating Engineers, Local 793, Labourers' International Union of North America, Local 1036, Labourers' International Union of North America, Ontario Provincial District Council, Responding Parties v. IBEW Construction Council of Ontario, Intervenor.

BEFORE: Jack J. Slaughter, Vice-Chair.

APPEARANCES: Walter Thornton, Jim McKeown and Jeff Avery for Avery Construction Limited Transportation Services; Stephen Wahl, Ken Lew and R. Catling for International Union of Operating Engineers, Local 793; Lorne Richmond and Harold Bartlett for Labourers' International Union of North America, Local 1036, and Labourers' International Union of North America, Ontario Provincial District Council; Ron Lebi for IBEW Construction Council of Ontario.

DECISION OF THE BOARD: January 30, 2012

1. This is an application filed by Avery Construction Limited Transportation Services ("Avery") pursuant to section 166 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act"), for a determination of what sector of the construction industry certain work performed by Avery's employees falls into. The responding parties are Labourers International Union of North America, Ontario Provincial District and its Local 1036 ("the Labourers"); and International Union of Operating Engineers, Local 793 ("the OEs"). The IBEW Construction Council of Ontario ("the IBEW") also filed an intervention herein.

2. The Board held a consultation in this matter on October 27, 2011. At the outset of the consultation, the Board initially dealt with and dismissed a preliminary motion by the Operating Engineers that the Board not inquire into this sector dispute. The Board's oral reasons were as follows:

The Board will exercise its discretion to inquire into this sector dispute. Despite the able argument of counsel for the Operating Engineers, the Board finds that this is a case involving grievances by more than one trade union where various parties are asserting that various portions of the work in dispute could fall into as many as four different sectors of the construction industry. Where multiple trade unions and multiple sectors are involved, it is appropriate and efficient to utilize the sector dispute mechanism to resolve the sector issue in one proceeding. Therefore, the Operating Engineers' preliminary motion is dismissed, and this case shall be allowed to proceed.

3. The parties then made full submissions on what sector or sectors of the construction industry they are asserting the work in question falls into. No party asserted that the Board needed to hear any *viva voce* evidence in order to decide this matter and the Board does not find it necessary to do so. All participants provided detailed written materials, supplemented by oral

representations. Together they provide a full factual record which enables the Board to finally determine this matter at this time.

The Work in Dispute

4. The work in dispute was performed in the course of the construction of a Landfill Gas Management System (“the LGMS”) located in the City of Sault Ste. Marie (“the City”) at the City’s Municipal Landfill site (“the Landfill”).

5. The contract specifications for the work were as follows:

The work generally consists of supplying all materials, labour and equipment for the installation of landfill gas extraction wells, installation of gas headers and laterals, installation of condensate drains and condensate forcemains, construction of a blower/flare station, construction of electrical services for the landfill gas management system, start up operation of the landfill gas management system and preparation of record drawings.

6. The work performed by the OEs at the Landfill included the following:

- (a) site and trench excavation using 350 or 550 John Deere excavators in preparation for the installation of the Landfill Gas Header and Lateral piping for the purpose of processing solid waste garbage by extracting and directing the methane gas to the Flaring Station;
- (b) drilling and installing methane gas extraction wells in the landfill site;
- (c) transporting granular bedding which is to be compacted in the base of the trenches for proper bedding of the piping prior to the installation of piping;
- (d) site distribution and piling and passing down Landfill Gas Header and Lateral piping into the trenches;
- (e) backfilling dirt on top of the piping and compacting the dirt with a “ride-on” compactor; and
- (f) the construction of the gravel access roads.

7. The Labourers assisted the OEs with this work, cleaned up garbage, and performed other routine duties commonly considered to be construction labourers’ work.

8. The purpose of the LGMS is to enable the Landfill to collect and burn off methane gas generated by the operation of the Landfill.

9. The sequencing of the work was fairly straightforward. The construction of the LGMS started with the drilling of landfill gas extraction wells into the Landfill. Next headers and lateral piping were connected to the wells. Condensate drains and manholes were built and located within the network of pipes. The lateral piping was then connected to a forcemain which was

joined to a flaring station (“the Station”). Once in operation, the Station ignites and burns off the methane gas. Any effluent collected in the network of pipes is pumped back into the Landfill.

10. Avery took the position that the Board should divide the work up into the construction of access roads, the installation of piping and all other work, including the Station. The other parties did not agree, but did concede that all employees working on the access roads received appropriate compensation and working conditions.

11. The Board will not subdivide the work in dispute herein. All the work took place at a landfill site under one contract. That contract was for a landfill gas management system. When assessing such a package of work, it is appropriate to look at how the entirety of the work process is carried out on the project, rather than to focus on the detailed elements of each work function in dispute: *Premier Pipelines Ltd.*, [1988] OLRB Rep. October 1068; *Spruce Falls Power & Paper Co.*, [1988] OLRB Rep. July 708. This approach is appropriate where the project as a whole constitutes one fully integrated structure and system: *Lockerbie & Hole Eastern Inc.* (2008) 153 CLRBR (2d) 1 (Ont.). Whether a different type of project might have components that fall into more than one sector of the construction industry is an issue that does not need to be decided in this case. That issue can be left for another day.

12. However, in this case, the LGMS was a unique project. It was bid as such. As its name suggests, it is a complete system to deal with landfill gas management. It would not serve the important labour relations interests of fairness and certainty to subdivide it after the fact. The Board will therefore consider the overall nature of the work in dispute at the LGMS and determine into which sector of the construction industry it falls.

Summary of the Positions of the Parties

13. Avery takes the position that the work in dispute falls within the sewers and watermains sector. The OEs’ primary position is that the work in dispute falls within the industrial, commercial and institutional (“ICI”) sector. The OEs’ alternative position is that the work in dispute falls within the pipeline sector. The Labourers adopt the OEs’ submissions. During the course of argument, the Labourers withdrew their further alternative position that the work in dispute falls with the electrical power systems sector. The IBEW’s position is that the work in dispute falls within the ICI sector.

14. No party took the position that the work in dispute falls within the heavy engineering sector.

Summary of the Arguments of the Parties

15. Avery suggested that it was open to the Board to find that certain work falls within one sector of the construction industry while other work falls within another sector, although Avery was not explicitly asking the Board to so find. Avery emphasized that over two thirds of the value of Avery’s contract with the City involved the installation of below grade piping. Avery conceded that it did apply the terms of the participating trade unions’ ICI collective agreements to work performed on the Station, but submitted that the Station was a pre-engineered structure that formed a very small portion of the overall contract. However, Avery did not agree that the application of the ICI collective agreements to the Station work constituted an admission that the Station work fell within the ICI sector.

16. Avery says that the collection and distribution of gas through the piping installed at the Landfill is similar in nature to the function performed by sewers and watermains. Avery argues that the process of installing the piping at the Landfill is similar to the process of installing sewers and watermains piping. The piping used was high density polyethylene (“HDPE”) piping. The work in dispute was performed pursuant to the Ontario Provincial Standards for Roads and Public Works (“the Standards”).

17. Avery referred the Board to the following decisions: *Corporation of the City of Sault Ste. Marie*, [2002] OLRB Rep. September/October 870 (the “Sault decision”); *Leo Alarie and Sons Limited*, [2006] OLRB Rep. September/October 721; *Barclay Construction Group Inc.*, [2008] OLRB Rep. March/April 136; and *V.K. Mason Construction Co.*, [2009] OLRB Rep. November/December 985.

18. Avery argued that the *Sault* decision marked an “enlightened and thoughtful” departure from the Board’s previous jurisprudence that over-emphasized the criterion of end use in making sector determinations. In Avery’s view, the *Sault* decision and the cases decided after it equally treat the three criteria of end use, work characteristics, and bargaining patterns. In this case, Avery asserts: that bargaining patterns is a neutral factor; that there is no end use basis to find that the work in dispute is ICI work; and that accordingly the result turns on the work characteristics criterion which favours the sewers and watermains sector.

19. The OEs urged the Board not to “overintellectualize” the matter and to “look through the right end of the telescope”. The OEs note that a building is not a prerequisite to work being ICI work, and support this argument by reference to work at mines and sewage treatment plants. The OEs argue that the work, work techniques, and equipment used by Operating Engineers on both sewers and watermains and ICI projects are very similar. For example, HDPE piping is often used in ICI work, as are the types of excavators and compactors used to perform the work in dispute. In contrast, the fine grading work that members of the OEs regularly perform on sewers and watermain projects is conspicuously absent here. Building, trenching, and excavation are equally parts of the ICI and sewers and watermains sectors. Forcemains are found in ICI work such as the pumping of slurry through plastic pipe in the mining and petrochemical industries.

20. Therefore, the OEs say that the work characteristics criterion is not helpful.

21. Instead, the OEs ask the Board to look at the end use criterion. The OEs state that it is manifestly obvious that no sewers or watermains have been constructed. Instead, Avery has built a methane gas collection system. The OEs assert that the processing and treatment of garbage at a landfill, and the consequent production, collection and burning off of methane gas, is an industrial process that both reduces explosion risk and reduces greenhouse gas emissions. Furthermore, because the process is done to comply with environmental laws and regulations and on behalf of a municipality, it is also an institutional process.

22. With respect to bargaining patterns, the OEs say that criterion favours a finding the work in dispute is ICI, because Avery is bound to a provincial ICI collective agreement with the OEs, but only to a local sewers and watermains agreement with them.

23. In the alternative, the OEs propose that the Board find that the work in dispute falls within the pipeline sector. The OEs state that the pipeline agreements are provincial in scope, and that its Distribution Pipeline Collective Agreement expressly includes “oil and gas gathering

lines”. Accordingly, if the work in dispute is not ICI, the OEs say that the pipeline sector is a better fit than the sewers and watermains sector.

24. The Labourers adopted the OEs’ positions except for the argument about bargaining patterns. The Labourers request that the Board look at the “simple facts”. They say it is simple to rebut Avery’s position: there are no sewers, no watermains and no processing of water, potable or otherwise. Instead, the Board is confronted with a process of transporting gas to a flaring station, where it is burnt up. This is a simple industrial process that occurs as part of an enclosed system within the Landfill. As it is work performed for a municipality, and municipalities have a legal obligation to deal with their garbage, it is also an institutional use. Even the *Sault* decision relied on by Avery was decided on the basis of the end use criterion. The Labourers, like the OEs, say that is the only useful criterion here.

25. Alternatively, the Labourers assert that the Board can find the work in dispute falls within the pipeline sector as it is all about the movement of gas from the wellhead to the customer, who then burns it up. What a pipeline does is move gas and oil, and the work in dispute can be construed to be a very small pipeline.

26. The Labourers submitted the following cases for the Board’s consideration: *Marine Pipeline Construction of Canada Limited*, [1995] O.L.R.D. No. 4227 (October 26, 1995); *Toronto Construction Association, General Contractors Section*, [2004] OLRB Rep. November/December 1216; and *Matthews Contracting Inc.*, [1993] OLRB Rep. December 1332.

27. The IBEW queries whether the approach taken in the *Sault* decision was the correct one, and opines that it might lead to greater uncertainty. Instead, the IBEW urged the Board to take a “holistic view of the project”. All the work performed by IBEW members on the project, including electrical heat tracing and insulation, as well as instrumentation and control panels, was done under the IBEW’s ICI collective agreement. The IBEW submits the work in dispute falls within the ICI sector.

28. The Board drew the parties’ attention to the decisions in *Plumbtech Plumbing Inc.*, [2009] OLRB Rep. September/October 733, reconsideration denied by decision dated November 16, 2009. The Labourers asserted that these decisions are not helpful as they deal with the difference between residential and ICI construction, which is completely different than the situation in this case.

29. In reply, Avery says that *Plumbtech* is useful as it endorses the reasoning in the *Sault* decision, and applies the work characteristics criterion at paragraph 38 of the first decision in stating that the project in question was one where “every major work characteristic was typical of a residential home”. Avery sought to factually distinguish the cases relied upon by the Labourers. Avery finished by reiterating its position that the only relevant criterion is work characteristics, and that factor favours a conclusion that the work in dispute falls within the sewers and watermains sector.

Analysis and Decision

30. The starting point for the Board’s analysis must be the *Sault* decision. In this panel’s view, it is not necessary to determine whether this decision contemplates a break from the Board’s past practice or not. In the *Sault* decision and the sector dispute determinations following it, the Board has examined three basic criteria: work characteristics, bargaining patterns and end

use. In the interests of clarity, consistency, certainty and fairness to the participants in this process, the Board should not arbitrarily deviate from applying those criteria without notice to the construction labour relations community. In any event, in this case, the Board finds that both the *Sault* decision analysis and a more simplistic end use analysis lead to the same conclusion. Whether the Board should depart from the *Sault* decision approach in the future is an issue that need not be determined in this case.

31. However, the Board reasoned as follows in the second *Plumbtech* decision:

. . .when making a sector determination, the Board is to have regard to work characteristics, bargaining patterns and end use. The Board is not to base its decision exclusively on end use. The reason for this, as stated in *Heavy Construction Association, supra* is that . . . “the enumerated sectors are divisions of the construction industry determined by work characteristics”.

32. In applying these criteria, it is important to bear in mind the Board’s observations at paragraph 39 of the *Sault* decision:

In the end, what this means is that there is no single test which can be applied to determine sector, nor is there a descending order of factors which directs the Board to look at the “end-use” first and only later at work characteristics or bargaining patterns as a means of resolving doubtful cases. It is necessary to examine all the relevant factors. In most cases all of them will be present to some extent (or one will and the others will be neutral). It is where they do not point in the same direction that the Board must determine which sector the work falls in, having regard to both of the statutory definition of sector and the statutory purpose of sectoral divisions.

33. The Board notes that this approach is similar to the one it takes when deciding jurisdictional disputes in the construction industry. Generally, the Board assesses the application of five or six standard criteria in determining those kinds of disputes. However, such assessment is not done on a mechanical basis; some factors may have little or no relevance; and in some cases one factor might prove determinative: see *Groff and Associates* [1994] OLRB Rep. July 846; *Ecodyne Ltd.*, [1997] OLRB Rep. March/April 197; *Aecon Construction Group Inc.* 2008 CanLII 7449 (February 14, 2008); *Lockerbie & Hole Eastern Inc.*, *supra*. The context is all important. The Board should strive to arrive at decisions that are clear, transparent, and in accord with common sense and the reasonable expectations of the participants in the construction process.

34. The Board now turns to an examination of bargaining patterns, work characteristics and end use with regard to the particular fact situation of this case.

Bargaining Patterns

35. The OEs argue that bargaining patterns are relevant and favour the ICI and pipeline sectors because those collective agreements are bargained on a province-wide basis while Avery’s sewers and watermains collective agreement is bargained on a local area basis. The other parties ask the Board to treat bargaining patterns as a neutral factor.

36. There is no evidence before the Board that any collective agreement relied on by any party has ever been applied to a project similar to the one in issue. Nor is there any evidence that

any party to those collective agreements had ever turned its mind to this type of project in collective bargaining or included language governing this specific type of project in any of those collective agreements. This is a matter of first instance.

37. In these circumstances, the Board cannot find that there are any relevant bargaining patterns applicable to the work in dispute.

38. Therefore, the Board finds that this factor is neutral.

Work Characteristics

39. Avery bases its argument on this criterion. Essentially it says that because two-thirds of the value of its contract pertains to the laying of pipe that the Board should find that the work in dispute is sewers and watermains work. Avery also relies on the presence of forcemains and the application of the Standards to reinforce its argument.

40. In the Board's view, Avery's argument oversimplifies the analysis that is necessary to assess the criterion of work characteristics.

41. The most detailed examination of the meaning of the term "work characteristics" for the purposes of the Act may be found in the Board's decision in *Heavy Construction Association of Ontario*, [1973] OLRB Rep. May 245 ("the HCAO decision"), which is referred to in the *Sault* decision. In the HCAO decision, the Board made the following trenchant observations:

13. . . . the enumerated sectors are divisions of the construction industry determined by work characteristics. Thus, the enumerated sectors give us a key to interpreting the expression "work characteristics" and in turn once the expression work characteristics is clarified this will provide assistance in the correct interpretation of each of the enumerated sectors.

14. An examination of the enumerated sectors in clause (e) of section 106 [now 126] leads to the conclusion that for all but one of the sectors listed the names given to these divisions of the construction industry relate to the use which is ultimately made of the construction. At first this may appear to be somewhat of a puzzle in that the connection between the use of the construction and the work characteristics may not be obvious. Upon examination, however, it becomes clear that the use that is ultimately made of the construction will to a large extent determine the task or the work to be performed at the construction site. The task in turn will have certain characteristics which make that project distinguishable from other types of construction. Thus, each of the sectors enumerated, by focusing on the different end uses of the construction, distinguishes one type of construction from other types of construction on the basis of peculiar tasks which are common to that type of project. The work characteristics which distinguish one sector from the other sectors of the construction industry may be shown in terms of the type of problems to be dealt with at the job site, the types of solutions resorted to at certain job sites, the material used, the relative importance of various specifications, the variety of skills and trades, and certain characteristic relations with employees. This list of characteristics is not to be thought of as exhaustive, but as examples of particular characteristics which differ between the various sectors enumerated in the Act.

42. Accordingly, the Board must consider the problems encountered at and solutions resorted to at the job site; the materials used; the relative importance of specifications; the variety of skills and trades; and “characteristic” employee relations.

43. With respect to the problems encountered at and resorted to at the job site, the first element to be noted is that all the work in dispute is performed within the property of the Landfill. Thus, the site problems are typical of the problems encountered in ICI construction. None of the problems encountered on typical sewers and watermains or pipeline projects involving public roads, highways and rights of way are in play here.

44. Secondly, there is the problem of collecting and burning off methane gas generated by the Landfill. The solution resorted to in order to deal with this problem is the use of underground piping with its associated trenching, backfilling, and forcemains, which eventually transport the gas to the Station where it is burnt off. The underground piping and associated work, including the use of manholes and forcemains, certainly is consistent with the type of work commonly associated with the sewers and watermains and pipeline sectors. However, underground piping and associated work in connection with the transportation of effluent may also be found on various types of ICI projects, including sewage treatment plants, mines, and petrochemical plants.

45. The presence of the Station as the ultimate solution to burn off the methane gas is important not only to an assessment of the problems and solutions portion of the Board’s analysis, but also to the issue of the variety of skills and trades, and the issue of “characteristic” employee relations. Avery applied the participating trade unions’ ICI collective agreements to the work performed at the Station. There was electrical work performed there, including work on control panels, instrumentation, the enclosed ground flare, condensate sumps and pumps, and electric heat tracing and insulation. All of this work was performed by members of the IBEW under the IBEW’s ICI Agreement, often referred to as the “Principal Agreement”. Therefore, there is work performed at the Station by a trade that does not work in the sewers and watermains or pipeline sectors, namely the IBEW. In *Marine Pipeline supra* there was work performed on the tie-in station in dispute by a trade that did not work in the pipeline sector – again the IBEW performing work covered by the Principal Agreement. This was a key factor to the Board’s finding in that case that the work in dispute fell in the ICI rather than the pipeline sector. In this case, the Board similarly finds that the presence of a trade not found in the sewers and watermains or pipeline sectors performing work under its ICI Agreement is a significant factor.

46. The materials used on the job include piping, but also numerous types of equipment and materials used by operating engineers and labourers on many kinds of excavation projects found throughout every sector of the construction industry. This factor is neutral in the Board’s opinion.

47. Likewise, the Board finds that the specifications criterion is neutral. The construction contract applicable to the work in dispute provides that it is to be performed under the Ontario Provincial Standards for Roads and Public Works (“the Standards”). Avery relies upon the references in the Standards to roads, sewers and utility work to support its argument that the specifications favour the sewers and watermains sector. However, other references in the Standards refer to work on structures and general construction. When read as a whole, it cannot be said that the specifications set out in the Standards favour one sector of the construction industry over another.

48. Therefore, an overall assessment of the factors the Board examines in the context of work characteristics leads to the conclusion that the problems and solutions, variety of skills and trades, and “characteristic” employee relations factors favour the ICI sector, while the materials and specifications factors are neutral.

49. Accordingly, the Board finds that the work characteristics criterion favours the ICI sector.

End Use

50. Avery argues that this factor is neutral as there is no overall end use, but that the LGMS is simply an accumulation of roads, sewers and watermains and other assorted work. Avery says the installed pipes are not part of any industrial process that occurs within the Station. The other parties disagree and state that the end use is either industrial or institutional. Alternatively, the Labourers and OEs argue that the end use is a pipeline, but as counsel for the Labourers put it “a very small pipeline”.

51. The Board finds that the end use is in fact an industrial use. The purpose of the LGMS is to burn off methane gas both to limit pollution and to ensure the safety of the landfill. As such it is part of an industrial process of safety and pollution control. The work in dispute is analogous to the underground concrete storage tank in *Matthews supra*. In that case, the Board found the tank to be in the ICI sector because it formed part of an industrial process of sewage and water pollution control. Likewise, the tie-in station in *Marine Pipeline supra* involved an industrial process of heating, odorizing and changing the direction in the flow of gas, work that ultimately was found to be in the ICI sector.

52. Work on industrial processes is properly characterized as falling within the ICI sector. The Board’s sector determinations should be easily intelligible. As much as possible, the Board should attempt to provide practical guidance to participants in the construction process. The average Canadian would think that work on a landfill is industrial work. The logic of the work processes in question supports that conclusion. The Board is not prepared to find otherwise.

53. The Board does not rely on the argument of the trade unions that the fact this project is highly regulated means that the work in dispute is an institutional use. All construction work is regulated, and perhaps no work is more regulated than work in the electrical power systems sector. The mere fact of government regulation does not place a project in the ICI sector as institutional work.

54. The LGMS does not operate outside the property line of the Landfill. Simply put, it does not deliver or transport oil or gas across country, so it is not a pipeline end use. Similarly, it does not deliver or transport or process potable water or storm water, and there are no watermains. Accordingly, there is no sewers and watermains end use. The only plausible end use is industrial.

55. Therefore, the Board finds that the end use factor favours the ICI sector.

Conclusion and Disposition

56. The Board has considered the LGMS as a whole. When viewed as a whole, the work characteristics and end use of the LGMS favour a finding that the work in dispute falls within the

ICI sector of the construction industry while the bargaining patterns are neutral. Therefore on either a *Sault* decision analysis or an end use analysis, the work in dispute is properly characterized as ICI work.

57. Accordingly, the Board determines that the work in dispute falls within the ICI sector of the construction industry.

“Jack J. Slaughter”
for the Board