



ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 0772-13-JD
Jurisdictional Dispute

International Union of Operating Engineers, Local 793, Applicant v. H.B. White Canada Corp., Mid South Contractors ULC, KT Backhoe and Trucking, Avertex Utility Solutions Inc., and International Brotherhood of Electrical Workers, Locals 773, 105 and 353, Responding Parties.

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is transmitting the attached document(s) via e-mail, facsimile, regular mail or courier:

Decision-August 8, 2014

DATED: August 11, 2014

Peter Gallus

NOTE:

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BEFORE: Harry Freedman, Vice-Chair

APPEARANCES: Robert Gibson, Melissa Atkins-Mahaney, Ken Lew, Joel Collins and Steve Homewood for the International Union of Operating Engineers, Local 793; Michael Church, Simone Ostrowski, Bill Finnerty and Bernie Graves for the International Brotherhood of Electrical Workers, Locals 773, 105 and 353; no other parties appearing.

DECISION OF THE BOARD: August 8, 2014

1. In its decision dated May 2, 2014 in this work assignment complaint filed under section 99 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended (the "Act") the Board adjourned the date for the continuation of the consultation that would have dealt with the merits of this complaint if the preliminary motion made by the International Brotherhood of Electrical Workers, Local 773, 105 and 354 ("IBEW") was dismissed. The motion by the IBEW to dismiss this complaint was fully argued by the parties at the first day of the consultation. The decision with respect to that motion had not been released by the time the consultation was to continue. This decision determines that motion.

2. The IBEW had moved for the dismissal of this work assignment complaint on the grounds that the applicant ("Local 793") had failed to proceed promptly with its work assignment complaint in relation to the work in dispute, which the IBEW characterized as the operation of the Vermeer T655 Trenching Machine (the "Belt Trencher") at the Summerhaven wind farm project in Board Area 5 (the "Project").

3. Before addressing the IBEW's argument with respect to delay it is important to recognize that it appeared, initially at least, from submissions made at the first day of consultation, the parties' briefs and the decision of the Board (differently constituted) dated July 26, 2013 following the pre-consultation conference, that the parties continue to disagree about what work was actually in dispute in this proceeding. The Board at paragraph 10 of that July 26th decision described the work in dispute as follows:

The work in dispute is the operation of equipment* to perform the directional drilling, digging of trenches and backfilling of trenches for the purpose of installing underground electrical cable on the Summerhaven Windmill Project located generally at Concession 5 and Cheapside Road in Haldimand, County, Ontario performed by Mid South Contractors ULC, KT Backhoe and Trucking and Avertex Utility Solutions Inc.

* As at the date of the pre-consultation conference, Local 793 understood the equipment used to include: rubber tire backhoes; trenchers; dozers; excavators and directional boring machines and the IBEW understood the equipment used to include: belt trenchers, mini-excavators and mini-backhoes.

Local 793 understood that the IBEW was claiming that its members were properly assigned to operate all the equipment that was used to carry out the work associated with both the excavation and backfilling of the trenches in which electrical cables were placed while the IBEW in its brief focussed only on the operation of the Belt Trencher. Indeed, at the consultation the IBEW made it clear it was not seeking to encroach on the core jurisdiction of Local 793, which Local 793 characterized as the operation of heavy equipment used in the construction industry.

4. The Board in that July 26th decision described the nature of the work that was carried out at the Project that was the focus of the dispute in this proceeding in the following way:

On the Summerhaven Windmill Project, cable had to be installed between the windmills. Equipment was used to essentially plough the cable underground *without the need to excavate and later backfill*. When the reel of cable ran out, the end of the cable would be left sticking out of the ground. A new reel of cable would be put in place and the process of ploughing the cable under the ground would carry on. I will refer to this as the "first" stage of the work. [emphasis added]

That decision indicated that it was only the "first stage" of the work at the Project that was subject matter of this dispute.

5. The Board at paragraph 3 of that July 26th decision also noted: "The IBEW has advised that it objects to this jurisdictional dispute on the basis of timeliness."

6. The IBEW timeliness objection rests on its contention that the work it characterizes as being in dispute in this proceeding—that is only the operation of the Belt Trencher—was carried out by its members at the project for several months without objection or formal challenge by Local 793. It appears that the IBEW accepts that members of Local 793 have a better jurisdictional claim to the operation of any other equipment that was used to do backfilling or any of the other work described by the Board's July 26th decision as being in dispute, that is "directional drilling, trenching and backfilling" with equipment other than the Belt Trencher.

7. Although the IBEW suggests that it is only claiming the operation of the Belt Trencher, the work in dispute in this proceeding as defined by the Board in its July 26th decision was much broader and was defined as the operation of equipment to perform the directional drilling, digging of trenches and backfilling of trenches for the purpose of installing underground electrical cable. Nevertheless the Board in that decision also pointed out that work in dispute related to the first phase of the project where the "equipment was used to essentially plough the cable underground without the need to excavate and later backfill."

8. H.B. White Canada Corp. ("H.B. White"), the general contractor at the Project conducted a markup meeting in connection with the Project on October 11, 2012. At that markup meeting, H.B. White indicated that the operation of the equipment used to carry out trenching for the installation of underground electrical cables (and a good deal of other work) including the operation of the Belt Trencher was being subcontracted to Mid-South Contractors ULC ("Mid-South") and would be assigned to members of the IBEW. H.B. White subcontracted the work in dispute that the IBEW at the consultation maintained was properly assigned to its members, that is the operation of the Belt Trencher, in order to plough the cable underground without the need to excavate and later backfill.

9. It is clear from the material filed by the parties that H.B. White had subcontracted excavating, directional drilling, grading, backfilling and all the other work associated with the placement of electrical cable underground to Mid-South.

10. Mid-South is bound to a collective agreement with the IBEW. It was not bound by a collective agreement with Local 793. Mid-South performed some of the work in dispute (as broadly defined by the Board's July 26th decision) it had secured from H.B. White with its own employees who were members of the IBEW and subcontracted the balance of the work in dispute and the other excavating, drilling, earth moving, trenching, backfilling and compacting work to four other contractors. Two of those four subcontractors were bound by collective agreements with Local 793 and assigned their work to members of Local 793. Two other subcontractors (Avertex Utility Solutions Inc. and KT Backhoe and Trucking) carrying out the work in dispute as more broadly defined in the Board's July 26th decision were not bound by collective agreements with Local 793.

11. Local 793 challenged the proposed assignment of the work in dispute (and the other work Mid-South had been awarded) to members of the IBEW at the mark-up meeting and after the mark-up meeting submitted the reasons for its claim to that work. Nevertheless, the work in dispute was performed by members of the IBEW starting at the end of October and continued afterwards.

12. It is clear from the parties' materials that members of the IBEW operated the Belt Trencher and also operated some of the other equipment claimed by Local 793 when work at the Project commenced. The IBEW asserts and it is not disputed by Local 793

that although Local 793 had initiated a grievance against H.B. White shortly after work started at the Project, Local 793 neither advanced that initial grievance further nor did it file this work assignment complaint until June, 2013.

13. Local 793 in its reply brief stated at paragraph 14:

In its brief, the IBEW has only advanced a claim over the T655 Vermeer trenchers. These trenchers represented a small fraction of the heavy equipment used to perform the work in dispute. The IBEW has put in no evidence at all with respect to the operation of any other heavy equipment – the directional drills, rubber tire backhoes, excavators, dozers, and excavators with hoe ram attachments.... Indeed, the IBEW has not addressed any of these pieces of heavy equipment or advanced any claim over them.

That description of the material filed by the IBEW Local 793 had set out in its reply brief is accurate and I adopt it.

14. Regardless of the apparent differences between the parties over the breadth of the work that is in dispute, it seems to me that based on the materials filed by the parties and the representations made at the consultation, that although the IBEW was not explicitly conceding the impropriety of the assignment of certain work to its members, the IBEW has accepted that the operation of the heavy equipment at the Project, other than the Belt Trencher, that was assigned to members of the IBEW was improperly assigned and ought to have been assigned to members of Local 793.

15. It is important to note in that regard that some of the subcontractors engaged by Mid-South to perform the work at the Project it had secured from H.B. White were either non-union contractors or were bound by collective agreements with Local 793. It is also apparent that in the result members of Local 793 did a good deal of the work Mid-South had secured without complaint from the IBEW.

16. The narrow issue for resolution in this preliminary motion therefore is whether this application ought to be dismissed because Local 793 chose not to pursue its jurisdictional claim over the operation of the Belt Trencher by members of the IBEW until June, 2013 when members of the IBEW had started doing that work (and

the other work claimed by Local 793) shortly after the mark-up meeting at the end of October 2012. The IBEW claims that Local 793 waited some nine months before pursuing its claim and that a nine month delay in claiming jurisdiction over a work assignment, particularly when that work has been ongoing during that nine month period, is simply far too long a time to deal with a situation where the assignment could be overturned.

17. The explanation by Local 793 for why it waited is relatively straight forward. It maintains that there was no nine month delay. It submits that it had filed a grievance against H.B. White in November, 2012 over the work that was being done by Mid-South with members the IBEW. Local 793 argues that it was not sitting back and doing nothing to assert its jurisdiction over that work. More importantly, Local 793 points out that H.B. White issued its final assignments following the October 2012 mark-up meeting in March, 2013. It contends that it moved promptly after those final work assignments were made by H.B. White to claim jurisdiction over the work in dispute. It filed a second grievance and when that could not be resolved, Local 793 and H.B. White agreed that rather than having its grievances referred to arbitration it would proceed directly to have the issues determined in a work assignment complaint.

18. The IBEW contends that shortly after the mark up meeting in October 2012 the work was actually assigned as contemplated by H.B. White in its proposed assignments. The IBEW submits that it was never put on notice that there was a problem with the work its members were assigned until this work assignment complaint was delivered. The IBEW was not given notice of the grievances that Local 793 had filed against H.B. White. Members of the IBEW were working on the Project without complaint where members of Local 793 were also working.

19. The IBEW argues that the failure of H.B. White to formalize the work assignments that had been made in early November by way of an explicit final work assignment document did not relieve Local 793 from acting promptly to secure the work it only claimed from the IBEW nine months later.

20. In my view, once the time expired for challenging the assignments proposed at the mark-up meeting, which was at the end of October 2012, and the work was actually assigned, the work assignments that were being made at the Project were clear to all the

trades. I accept the argument made by the IBEW that when the work at the Project started with members of the IBEW carrying out the work that Local 793 claimed at the mark-up meeting, Local 793 was aware that the work it was claiming had been assigned despite H.B. White not having issued its formal "final" assignment until March 2013. It is significant that Local 793 filed a grievance against H.B. White over that work in November but took no steps to advance it any further. It asserts it was in discussions with H.B. White in an attempt to resolve the issue but nothing was done to affect the work that was actually being done by members of the IBEW at the Project until it filed this work assignment complaint.

21. The work being done by members of the IBEW that it continues to claim was properly assigned to its members, that is, the operation of the Belt Trencher, had been ongoing for many months before the IBEW learned that Local 793 was taking steps to have that assignment of work taken away from its members.

22. Thus, in assessing whether this work assignment complaint should be dismissed on the grounds of delay, the period of time between when the assignment was made and when the IBEW was put on notice that Local 793 was moving to challenge the propriety of the assignment was nine months and not three months as claimed by Local 793.

23. It is not enough, in my opinion, that Local 793 filed a grievance against H.B. White over the propriety of the work assignment in November 2012. While the IBEW was not entitled to notice of that grievance, once it was clear that the grievance filed by Local 793 sought to have the assignment made to members of the IBEW reversed, then it seems to me that Local 793 could have either pursued its grievance with H.B. White and triggered the work assignment complaint or, at the very least, notified the IBEW that it was initiating a jurisdictional claim over the work that had been assigned to its members.

24. There is no doubt that members of Local 793 were assigned to carry out much of the same kind of work that was being done by members of the IBEW at the Project. Mid-South had subcontracted some of the work it had secured from H.B. White to employers bound by collective agreements with Local 793. Local 793 was content to have its members continue to perform work that had been obtained by Local 793 contractors through subcontracts they had secured from

Mid-South. The IBEW did not file grievances against Mid-South over its subcontracting of work to contractors not bound by a collective agreement with the IBEW. Nevertheless, it is also clear from the material filed that members of the IBEW had been doing the work claimed by Local 793 for some nine months before formal steps were taken by Local 793 to have that assignment changed.

25. Local 793 maintains that the delay was minimal and that it moved promptly after it had received the final work assignment decision made by H.B. White in March 2013. For the reasons expressed earlier, I am satisfied that Local 793 was aware that for all practical purposes the actual assignment had been made in November, 2012, some five months earlier when work started on the Project and when it filed its first grievance against H.B. White over the subcontracting of work to Mid-South.

26. The approach the Board has taken when a party to a work assignment complaint moves for dismissal on the basis of delay has been set out in a number of cases that were referred to by the parties in their arguments. In my view, the principles discussed in *Exhibition Place*, 2013 CanLII 29730; [2013] OLRD No. 1978 are applicable in the circumstances of this case. The Board in that decision exercised its discretion to refuse to entertain a work assignment complaint when about a year had elapsed between the date the assignment was made and the date the application challenging the assignment was initiated. The Board in that case wrote at paragraph 51, after referring to and relying on the following passage from *Walter & SCI Construction (Canada) Ltd.*, [1997] OLRB Rep. September/October 961:

7. Jurisdictional disputes are a process designed to move relatively quickly at the Board, at least with respect to the state of the initial filing of the dispute. The system of dealing with such disputes at the Board is itself undermined if jurisdictional disputes could be filed after long delays, without reasonable explanation, and if they should be allowed to proceed. Unions would then file jurisdictional disputes with respect to disputes long over.

...

9. But apart from the actual prejudice here, it is a question of promoting the right system for dealing with jurisdictional disputes at the Board. Countenancing a 7 month delay, without good explanation, in our view undercuts this system.

I agree with these views. To proceed to determine this work assignment dispute on the merits would countenance a 13 month delay without any legitimate explanation, and would undermine the work assignment dispute system established by the Board.

27. That same approach had been applied by the Board earlier *E.S. Fox Limited*, 2010 CanLII 15374 (ON LRB) and *Aker Kvaerner Singer Canada Ltd.*, 2010 CanLII 6667 (ON LRB). Simply put, in this case, despite the final assignment having been formally made in March 2013, I am satisfied that the work assignment in issue in this case was made and acted upon in November 2012. Although Local 793 claimed that work at the pre-job mark-up meeting and filed a grievance shortly after the work started, it did not pursue that grievance and, more importantly, did not take steps to put the IBEW on notice that it was claiming the work IBEW members had been assigned until some nine months had elapsed. The members of the IBEW were operating the Belt Trencher at the Project throughout that nine month period. The explanation provided by Local 793 for waiting until June 2013 before initiating this work assignment complaint, although understandable, does not provide adequate justification for the period of inaction in relation to the IBEW.

28. In reaching this conclusion the Board emphasizes that even though members of the IBEW appear to have been assigned a good deal of work operating equipment other than the Belt Trencher at the Project, the IBEW was not defending the assignment of the work in dispute to its members except for the operation of the Belt Trencher. Indeed, as the Board noted at paragraph 14 above, the IBEW had accepted, at least implicitly, that work in dispute, as described in the Board's July 26th decision, but for the operation of the Belt Trencher, ought to have been assigned to members of Local 793.

29. The preliminary motion made by the IBEW is granted. The Board exercises its discretion under section 99 of the Act and dismisses this work assignment complaint.

"Harry Freedman"
for the Board

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APPENDIX A

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