ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 2585-14-JD
Jurisdictional Dispute (Construction)

International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736, Applicant v Matrix North American Construction Ltd., and United Brotherhood of Carpenters and Joiners of America, Millwrights Local 1916, Responding Parties

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - September 8, 2015

DATED: September 8, 2015

Catherine Gilbert
Registrar

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International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736, Applicant v **Matrix North American Construction Ltd.**, and United Brotherhood of Carpenters and Joiners of America, Millwrights Local 1916, Responding Parties

BEFORE: David A. McKee, Vice-Chair

APPEARANCES: Robert Gibson and Steve Pratt for the applicant; Daina L. Search and Ted Piva for Matric North American Construction Ltd.; Meg Atkinson and Brad Sutton for the United Brotherhood of Carpenters and Joiners of America, Millwrights Local 1916

DECISION OF THE BOARD: September 8, 2015

1. This application is a jurisdictional dispute filed pursuant to section 99 of the *Labour Relations Act, 1995*, S. O. 1995 ch 1, as amended ("the Act"). Matrix North American Construction Ltd. ("Matrix") was a contractor at the ArcelorMittal Dofasco steel mill in Hamilton Ontario in 2014. Part of its contract involved the installation of a scrap chute on the #6 Galvanizing line. The International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 736 (the "Iron Workers") assert that this work ought to have been assigned to their members, rather than to the members of the United Brotherhood of Carpenters and Joiners of America, Millwright Local 1916.

The Work in Dispute

2. There is little dispute about the specifics of the work itself. The parties agreed that the Work in Dispute is described as:

> The rigging and installation of a fixed scrap chute at the Number 6 Galvanizing Line project at the ArcelorMittal Dofasco steel mill in Hamilton, Ontario.

3. It is worth noting that there are two phases of work described in this phrase: the rigging and the installation. In fact the rigging involves only the work done during the removal and adjustment phase described below. I have dealt with the rigging separately after the dispute installation.

4. Some greater detail as to the nature of the work is required to understand the nature of the dispute. While there were slight differences among the parties, I conclude that the work is as described as follows.

5. The work in dispute involves a single scrap chute located at the welder/cutter of the No. 6 Galvanizing Line. As a roll of steel goes through the galvanizing line, it passes through a machine called a “crop/shear” where it is welded onto other incoming strips in order to make one continuous piece of steel. The roll is also trimmed as it travels the line past the crop/shear, so that it will be straight and of uniform size. The trimmings from the crop/shear are sent down the scrap chute. The trimmings fall through the chute and are thereby directed into a scrap bin below it.

6. The scrap bin sits on top of a flat car that runs of a set of rails. When the scrap bin is full, the car travels along the rails to the end point. The bin at that point is picked up by an overhead crane for emptying.

7. The chute was fabricated offsite. The chute is made of steel with a wear plate lining in order to protect the steel. The chute arrived at the No. 6 Galvanizing Line fully assembled and was initially rigged into place using a 50/50 composite crew of Iron Workers and Millwrights. The chute was power rigged using an overhead crane and then transferred to chain falls to jump it into place and lower it into position.

8. The chute was subsequently removed, as it did not fit into the void for which it was designed. It had to be removed and reworked a number of times before the work was complete. The rework involved cutting notches into the chute with a torch and then welding it. The chute was eventually bolted into place. All of the reworking and the additional power rigging were done by the Millwrights.

9. The Millwrights describe the work as follows:

> 7. Initial blue prints called for the chute to be attached to the bases of the #1 Crop Shear and the upper common Pinch Roll. The Millwrights performing the work to install it as designed discovered that this could not be achieved. The mounting points, which were welded on angle iron with pre-drilled holes in them, did not work because the chute interfered with the lower lifting table and its mechanisms between the #2 Crop Shear and lower common Pinch Roll. . . .
>
> 8. The [Millwright] crew first cut off the mounting angles and slotted the pre-drilled holes. Matt Pukarowski welded the slotted angle iron to a lower position on the chute so it would essentially raise the chute higher. The Millwrights also welded two more mounting points onto the chute that would attach to the machine bases because they had determined that the initial number of mounting points was not sufficient. Because the Millwrights had repositioned the mounting points in order to raise the chute, the Millwrights then cut off some of the top lip of the chute so the strip would not hit the top lip when passing through the crop shear.
>
> 9. When all modifications were complete, the Millwrights used chain falls and come-alongs to rig and lift the chute and install it to its initial location on the #1 Crop Shear and upper common Pinch Roll bases with success and no more interferences.

10. The briefs and submissions of the other parties do not dispute that detail, although they do dispute the relevance of that level of detail.

Factors to consider

11. The Board has historically considered certain factors when determining jurisdictional disputes in the construction industry. Factors usually considered by the Board include:

> (a) Collective bargaining relationships and trade union constitutions
> (b) Trade agreements

(c) Employer practice
(d) Area practice
(e) Safety, skills and training
(f) Economy and efficiency.

12. See *Aluma Systems Canada Inc.,* [2007] CanLII 40746 ("*Aluma*"), at paragraph 11, and the cases cited therein. The parties to this proceeding addressed all of these factors in the briefs filed with the Board and/or their submissions at the consultation.

13. As noted by the Board at paragraph 12 of *Aluma* 2007 (relying upon *Ecodyne Limited*, [1997] OLRB Rep. March/April 197), the above-referenced factors are not to be applied in a mechanical fashion. In any given case, one or more of the factors may be of particular relevance and other factors may have no relevance. Though unusual, in some cases a single factor may determine the issue in dispute. As noted by the Board in *Total Support Services Ltd*., [2004] OLRB Rep. January/February 147 ("Total Support Services Ltd.") at paragraph 13, the Board's role is to adjudicate the competing claims of two unions, both of which have some kind of legal right to the work they seek to have their members perform. The Board considers all of the relevant factors and determines, by reference to those factors, which union ought to have had the work in dispute assigned to its members in the circumstances before it.

14. Most of these factors are not of assistance in resolving this dispute. Both unions have a collective agreement with Matrix that cover the Work in Dispute, and both have descriptions of a craft claim in their constitutions that covers this kind of work. Both trades have performed this type of work in the past, and both have the necessary skills and safety training to perform the work properly.

15. Both trades made arguments about why it was more economic and efficient to assign the work to their members. This factor will be considered along with the more significant factors of area and employer practice.

16. One issue was raised that I have not dealt with. Both the Millwrights and Matrix argued that the Iron Workers failed to claim the work at the appropriate time and delayed excessively in filing the grievance and jurisdictional dispute. The Millwrights later said they did not wish to deal with it as a preliminary matter. Matrix did not withdraw its position in any way. The matter cannot be resolved on

the basis of the briefs, and would require the calling of oral evidence. Given the outcome of this decision, it is not necessary to determine that question.

The Nature of the Dispute

17. This is one of the not uncommon sort of cases where there is a fundamental difference about how to define the extent of the dispute between the two unions. The real question is not so much the nature of the work as the context (if any) within which this work is to be seen. In some senses, this jurisdictional dispute is an argument between Gertrude Stein ("a chute is a chute is a chute"), as championed by the Iron Workers and Virginia Wolfe ("context is all") as asserted by the Millwrights. As will be seen, even the Iron Workers acknowledge that there is a context within which this work must be seen, but the parties all define that context differently.

18. The Iron Workers begin their brief by asserting that this work is core to the trade of the Iron Worker and that no one else should be doing it. This was the argument that they made throughout the consultation. However, in the brief they acknowledge that the Millwrights claim the fabrication and installation of some, but by no means all chutes, and further that there are times when such work has been assigned to Millwrights without objection by the Iron Workers. In light of that fact, the Iron Workers concede that there are some sorts of chutes that Millwrights could properly install, depending on the degree of mechanical functioning of the chute. They would define those chutes as only those that perform some sort of mechanical function The Iron Workers assertion is that:

> 14. The scrap chute is fixed in place. It is a stationary steel object. It does not move in any way and it is not part of a machine. It is simply a substantial steel structure used as a method to transfer scrap pieces of steel from the welder/cutter at the Galvanizing Line to the hopper.
>
> . . .
>
> 28. Even assuming the 1970 Tentative Understanding [a document described more fully below, which is the basis of the Millwright's claim] were a valid and subsisting trade agreement, under the agreement the Millwrights only have jurisdiction over the installation of chutes when there is a mechanical component to the

> chute or the chutes connect to machines on both ends. The installation of a fixed chute from a conveyor to a hopper, like the scrap chute currently at issue, is not the type of chute where there would typically be a dispute as to jurisdiction, as it is clearly within the jurisdiction of the Iron Workers.

19. The Millwrights say:

> 11. The Millwrights submit that the work in dispute is a critical element of the crop shear and welding machinery. As such, it is properly Millwright work. Further, as will be described below, the practice in Board Area 26 is to assign chutes which are situated between the machine or conveyer and a machine or conveyor to the Millwrights. For either or both of these reasons, the Millwrights submit that they were properly assigned the work in dispute.

20. As will be seen, the Millwrights rely on a "tentative agreement" made December 1, 1970, but likely suspended by the two Internationals in 1971. As will be seen it is not a Trade Agreement, as that term is used by the Board. The Millwrights rely particularly on the division of work in that tentative agreement that provides:

> 2. The installation of chutes from conveyor to conveyor, conveyor to machine, machine to machine, machine to conveyor shall be the work of the Millwrights.
>
> 3. Any fabrication or refabrication of chutes shall be performed by the trade installing the chute.

21. The Iron Workers point out that, while they do not accept the tentative agreement as a document of any significance at all, paragraph 1 of the same agreement provides:

> 1. The installation of chutes from bin to bin, bin to conveyor, conveyor to bin, holding hopper to holding hopper, holding hopper to conveyor, hopper to machine, conveyor to holding hopper shall be the work of the Iron Workers.

22. It all depends on how one describes as a hopper.

23. Matrix asserts:

> 5. The scrap chute in dispute is integral to the proper functioning of the scrap removal system of the Number 6 Galvanizing Line. . . .
>
> 7. The scrap chute therefore serves as a necessary connecting element between two components of the scrap removal system (i.e. the crop shear machine and the railing system that removes the steel trimmings from the Galvanizing Line). The Iron Workers do not challenge the Millwrights' jurisdiction over the work related to the crop shear machine or the scrap removal railing system.
>
> 18. Matrix states that the assignment of the work in dispute to the Millwrights is consistent with its past practice. Where work is integral to the operation of automated machinery, Matrix typically assigns the work to the Millwrights.
>
> 19. In fact, Matrix has assigned work associated with similarly designed chutes to the Iron Workers where, unlike the instant chute in dispute, the chutes are not affixed, or otherwise integral, to the proper functioning of machines. The relation to machinery (over which the Millwrights have jurisdiction) is a significant factor considered by Matrix when assigning work associated with a chute to either trade union.

24. That is, all three parties acknowledge to some degree or other both trades will perform the installation of chutes, and further that this is not simply a case where both trades do the work and it is simply a matter of counting up who does more. All three parties appear to concede with greater or lesser degrees of enthusiasm that both trades do the Work from time to time, but that there are occasions when it is appropriate to assign the work to Millwrights and other occasions when it is appropriate to assign the work to Iron Workers. They do not agree on what that dividing line is, or how it is to be defined, but both unions acknowledge it exists.

The "tentative agreement"

25. This was an agreement between the International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers ("Iron Workers International Union ") and the United Brotherhood of

Carpenters and Joiners of America ("Millwrights International Union"). It represents a first step towards a full-fledged Trade Agreement, but never went further. The documents itself is described as a "tentative agreement" and there is no reason to treat it as having been anything else. The Iron Workers assert that it was rethought after it was executed and that the Iron Workers International Union, at least, found that it created more disputes than it solved. According to letters from the Iron Workers International Union to various local unions and district councils of the Iron Workers, the two International Unions decided to "hold the agreement in abeyance" and "we agree that all chutes shall be erected in accordance with the past practice in the area in which the work was performed". As the Millwrights pointed out, there is no letter from the Iron Workers International Union to the Millwrights International Union saying that. Nor, I add, was there any evidence from the Millwrights International Union disputing this version of events. The matter has come up once before in litigation before this Board (*E. S. Fox Limited* 2010 CanLII 15374) so that no one ought to have been caught by surprise.

26. Hence I conclude that the agreement, which was at best "tentative" has been "put in abeyance" (which is different from being abrogated) but it cannot be held up as an agreement as to the proper manner of determining what distinguishes a "mechanical" chute from a "structural" or simply "non-mechanical" chute. There is a limited acknowledgment among the three parties that there is some distinction to be drawn, but no sense of what that distinction should be.

27. In 2012 John Quiggin published a book called humorously entitled "*Zombie Economics*" to express his frustration with old and, he thought, discredited economic ideas that continued to find expression among the political classes of America. The Iron Workers no doubt feel the same way. As the Board pointed out in *E.S. Fox,* above, the "tentative agreement" had been applied explicitly a number of times in Northwestern Ontario. As will be seen, it has been applied explicitly in Board Area 26 as well. Because of the history, it cannot be described as a Trade Agreement that has some binding effect as between Iron Workers and Millwrights. We will not find that answer by attempting to apply the "tentative agreement", or opining on the existential nature of a hopper versus a bin. There is simply no basis for looking at any document for the answer.

28. The Board almost always relies heavily on the employer and area practice in the Board Area to find meanings or definitions that arise from what the parties themselves do. To the extent that there are a significant number of occasions on which one trade performs the Work in Dispute without protest from the other, the Board will conclude that there is an understanding or at least an expectation of when the work should be assigned to each one. When one finds that employers have assigned work explicitly in accordance with their understanding of the "tentative agreement" or at least in a manner that is consistent with it, that distinction is more likely to be a description of the dividing line as it has developed in the industry, despite the fact that it is not a matter of explicit agreement between two unions.

29. There is one question that arises from the tentative agreement, and is reflected in the practice that will be examined. The Millwrights claim to the installation of the chute applies only, on their theory, when the chute is used to move material from conveyor to conveyor or machine to machine. If the bin into which the scrap steel is deposited is not a conveyor, then on the Millwright's theory, they have no claim to the work. The Iron Workers of course assert that this bin, or in their word, "hopper", is not a conveyor or machine at all. If the Iron Workers are right, there would be no need to examine the employer and area practice at all.

30. However, I conclude that the bin is part of a conveyor consisting of the bin, the flat car on which it sits, the rails on which it travels and whatever it is that supplies the power to move or activate the rail car constitutes a conveyor. It is a system that moves material from one place to another. There is no reason to isolate the bin from the rest of the system of which it is a part. No party attempted to provide any definition of "conveyor" that is common to the industry (or even to file the Millwright / Iron Workers "Conveyor Agreement") to provide any aide to interpreting the word in this context. In its ordinary meaning this is a conveyor, and hence, for what it is worth, the chute conveys material for conveyor to conveyor.

31. The Iron Workers asserted for the first time in their reply brief that it was their members who had installed the bin. If it was significant it ought to have been set out in the original brief. It is supported by three fiercely partisan declarations but not a reference to a mark-up. However, even if the Iron Workers did place the bin on the flat car, that does not change the fact that the system is a conveyor.

General matters

32. In assessing the area practice, I have had reference only to projects that took place in the 15 years before the application was filed, i.e. any work done after January 1, 2000. Although the parties filed practice evidence going back into the early 1970's, the Board has generally not found that sort of evidence to be of any assistance. This is not an arbitrary rule designed to make the Board's task easier. The assignment decision is one that is made by the employer. In a jurisdictional dispute the Board is being asked to put itself in the shoes of the employer and to determine whether it made the right, or at least a rational and reasonable, choice. If an employer is to give the same weight to both employer and area past practices that the Board does, that knowledge must be reasonably accessible. Few people at work in the industry will remember an assignment of work in the 1970's, although the 1990's might be a little more accessible.

33. Further, if one trade had done the work almost exclusively for many years in the past, but another trade has done it exclusively for the past 15 years, the earlier evidence is obviously not of any significance. It only demonstrates that the practice has changed. If in fact both trades have done the work in the same sort of proportions for 30 years, why is it necessary to look at the first 15 years of that period? Hence I have restricted the examination of practice evidence to the period of 15 years before the application was filed.

34. Second, the employer in this case is the successor of a number of corporate entities with the name including Kvaerner, Aker Kvaerner, Kvaerner Songer, (but not Songer Canada), Jaddco, Jaddco Anderson and variations on these names. Both Unions treated the practice of all of these entities as "employer practice". It makes little difference here but this is not necessarily correct. As Matrix argued, it is in fact a company that is, essentially Kvaerner that acquired the businesses of other competitors in the field. Leaving aside the difficulties of knowing what the management team of a former competitor and purchased business may actually have done, if there is no continuity in the business, it is difficult to see why the practice of predecessors of that sort are anything more than area practice. However, this does not significantly affect the analysis of the evidence in this case.

Conflicting Theories

35. The Iron Workers argued that they need not be "stuck with" the Millwrights' theory, but were entitled to ask the Board to consider the claim on the terms that the Iron Workers have used to define the work. That goes without saying. However, the reality is that there are two different theories (regardless of their origins), and the Board is required to assess both of them to see which one more closely reflects the actual reality of what work is done in the industry in Board Area 26.

36. The most significant weakness of the declarations filed by the both unions is that neither attempts to deal with the theory of the other. The Iron Workers are certainly not required to adopt or accept the parameters of the case as presented by the Millwrights. However, they do have the onus in this case, and that onus requires it to come up with an explanation as to why the Employer was incorrect in making the assignment it did. The most obvious way of addressing the issue of the most appropriate area or employer practice is to examine the details of the performance of each of these projects and determine how they may relate to the two conflicting theories, if at all. The question then is not whether the theory of the other union is correct is in some abstract term, but whether it stands up to a comparison with what people actually do.

37. It is not enough to say simply that "we construct more chutes than they do" when the Millwrights themselves concede that this is likely the case. The Millwrights have a theory as to when they say they are usually assigned the Work in Dispute, and the employer has a different approach to the decision it made. Both relate to a distinction between chutes that are involved in mechanical processes and those that are not. The Iron Workers' brief itself acknowledges the issue. In the declaration of Gord Joudrey, (Tab 49) Mr. Joudrey says:

> 3. My understanding of the current work in dispute is that there is a fixed scrap chute going from conveyor to a stationary steel hopper.
>
> 4. Iron Workers have expertise in doing all kinds of chute work in Board Area No. 26, whether from conveyor to conveyor or conveyor to hopper, etc.

38. The issue was squarely before him, and he could have addressed the issue of the extent to which the chutes that he was referring to were involved in mechanical processes or not. It is not the business of the Board to tell a party how to argue its case, but surely the best way to refute the position of the Millwrights (which was known to the Iron Workers) or Matrix, was to identify from among the chutes described in their brief, which ones that Iron Workers have installed can be classified as the kind of "mechanical" work that Millwrights say they perform. If a significant number had been assigned to Iron Workers, then the Millwrights' theory of their case would collapse. I can draw no such conclusion from the Iron Workers' evidence.

39. The Iron Workers have a different theory which the Millwrights did not address. If the Iron Workers maintain the claim to all chutes, being able to point to a few "mechanical" chutes that have been installed by Iron Workers might support that assertion. If a distinction can be made between fixed chutes or moving chutes (hinted at but not developed by the Iron Workers) that too may be subject to the same kind of analysis as the Millwrights' theory described above. However, the Millwrights did not attempt to demonstrate anything about the fixed (or otherwise) nature of the chutes that they installed.

40. Neither union attempted to subject the theory of the other to that sort of analysis. Hence the Board is left with the task simply of using the evidence that each union filed to assess whether there is any discernable pattern in the assignment of this sort of work. There are times when the evidence is, for the Board's purposes, ambiguous. That is not a criticism of the evidence as presented in the briefs, but simply because it was not focused on the conflicting theories of the two unions, it is sometimes missing the crucial detail.

Millwrights' practice

41. The Millwrights' practice since 2000 is consistent with their theory of work assignments. In reviewing the employer and area practice I reach to following conclusions. The reference is to the paragraph numbers in the Millwrights' brief.

42. There are six examples of the installation of one or more chutes that are from conveyor to conveyor or machine to machine (including employer practice). 35 (e) 38(b), (e), (f), (l) and (m). The two State Group projects at the #3 Temper Mill in Dofasco in

paragraph 38(e) and the #6 Pickle Line at the #2 Tandem Cold Mill in paragraph 38 (f) appear to be very similar to the Work in Dispute in this jurisdictional dispute.

43. (I do not accept the inferential reasoning in the Iron Workers' reply brief that asserts that this was a field assignment. Even if it was (like many of the Iron Workers' assignments) that goes to weight rather than to whether to consider it.)

44. In four of those examples there are markup minutes or communication from the Employer that specifically references the "Chute Agreement" or the "1970 Agreement" (all but 35(e) and 38 (f)). These Employers are not minor players in the industry: Songer Canada; E. S. Fox, State Group, and its predecessor, State Electric Company.

45. Four contactors provided letters stating that this is the principle they believe applies to such work, although one of them had not done the work before November 2014 (paragraph 35 (b), letter from Songer Canada Limited and the pre-2000 letters from Black and McDonald and Lummus).

46. There are three instances where members of the Millwrights state in declarations that they did the work of installing chutes that moved material between conveyors or machines, but where the markup is ambiguous referring only to the "Iron Workers / Millwright" Agreement. (35(d), 38(a) and (o). I cannot assume, as the Millwrights ask, that they were referring to the "tentative agreement", or some other Trade Agreement, or indeed, that they had any particular agreement in mind.

47. One other assignment to Millwrights was made pursuant to a different Millwright / Iron Workers Agreement (paragraph 35 (f) – the Stack Rake Agreement).

48. Thus I conclude that the Millwrights' theory is largely reflected in the evidence. The number of instances is, perhaps, not large for an industrial city the size of Hamilton, but it is not the proper role of the Board to assume it knows something about the state of economic and industrial activity in an area that is not contained in the parties' evidence.

49. Further, the Millwrights state in their brief that much of the work in the Iron Workers' brief takes place in connection with Blast Furnaces. They assert that for historical reasons Millwrights have done no work in Blast furnaces. This is not a reason to exclude the evidence. There is no basis that anyone could identify for treating work in the blast furnace any differently from work done elsewhere in a mill. The practice seems to be one that is acknowledged by the Iron Workers (see the March 24, 2015 email and the emails and correspondence it refers to at Tab 10 of the Iron Workers Reply brief), but that is no reason to exclude it.

50. I can find no evidence put forward by the Iron Workers that refers to a mechanical chute of any description in a Blast Furnace installed after January 1, 2000. There are some earlier ones (e.g. Iron Workers' brief paragraph 33(i)). However, the fact that the Millwrights felt that they needed to distinguish practice in that manner suggests that the work may have taken place in a blast furnace area. This does not really affect the evidence as filed, but it does weaken the Millwrights' claim that this is how the work is performed in the industry.

Iron Workers' practice

51. The Iron Workers practice is extensive, but subject to a number of general observations. Although the specific number of projects is extremely voluminous, almost all of them predate January 1, 2000. It is simply not part of the evidence that the Board is prepared to consider.

52. In respect of employer practice, the Iron Workers' brief lists only two projects performed by Kvaerner or its predecessors since January 1, 2000 although there are many other projects listed as performed by Kvaerner and the other predecessors of Matrix before that date. Neither of these two documents tells the Board anything more than that some sort of chute was installed by Iron Workers. In the first (paragraph 31 (a)) is a manhour report (presumably an internal Kvaerner document, perhaps for a time and materials contract) that says:

> Relocate and modify the existing "strip chute" installed during the by-pass.

53. This tells us nothing about the nature of the chute or whether it was part of a mechanical system (or indeed whether the chute itself moved). The second is found in a declaration that attests to the following:

> I also worked on a project for Kvaerner around ten to fifteen (10 – 15) years ago at a company called Sanimax that produces dog food. We installed chutes and screw conveyors. Joe Boyder, who is also an Iron Worker, was the foreman on the project.

This description is similarly unhelpful with respect to the nature of the work.

54. The area practice is more numerous within the past fifteen years, but equally unhelpful as to the nature of, or context in which the work was performed.

55. Paragraph 31 (b) might contain one reference to the work in dispute. That assertion is based on a declaration by Paul Blais. He certainly seems to be claiming all chutes as work of the Iron Workers (see paragraph 4), although he defines the dispute in this case as a conflict over a fixed scrap chute. His declaration states that

> For the past 16 years I have done the installation and maintenance on chutes, conveyors, conveyor side guides including wear liners and weld build on liners.

56. That makes it difficult to ascertain whether the work he describes later as work that he performed, is anything like the Work in Dispute. Maintenance can cover a wide range of work, most of which is not the same as the rigging and installation of a new chute. There is one paragraph that might refer to the Work in Dispute:

> Performing general maintenance at all M1 and D1 Series Conveyors which feeds product from one conveyor to another or a hopper or stacker conveyor in Coal Handling.

57. This raises more questions than it answers. What was the maintenance work? Was the work performed on the chutes or only on the conveyors (which is what the sentence says grammatically)? Which work was conveyor to conveyor and which work was conveyor to hopper? Most importantly, were any chutes installed?

58. This may seem to be an unfairly minute examination of the declaration that Mr. Blais obviously put some thought into. I do not mean to criticize, but simply to point out the difficulty of extracting information for the question that needs to be answered in this case.

59. The projects listed at paragraphs 33 (c), (k), (l), and (m) are similarly unclear as to the nature of the work and the context in which it was done.

60. Paragraphs 33 (f) and (j) describe repair and maintenance. The Work in Dispute is "the rigging and installation of a fixed scrap chute". Hence this is not the Work in Dispute.

61. Paragraphs 33 (d) and (e) were performed after the application was filed and are therefore not matters one would expect the employer to consider when making an assignment.

62. Paragraphs 33 (g) and (h) involved the repair of wear liners in chutes that are not described in any fashion. There is a general statement that the declarants have worked on both kinds of chutes (conveyor to conveyor and conveyor to hopper) over the years, but no reference in either on which particular projects the Iron Workers rely. In any event, repair to wear liners is not the same as the rigging and installation of a chute.

63. Most of the evidence about these projects comes in the form of declarations from members of the Iron Workers, and most of it appears to describe "repairs and maintenance" contracts. While it limits the weight one can give to the evidence, I do not think it should be excluded for that reason. Strictly speaking the work may not be construction work, but mechanical trades working in an industrial setting tend not to draw much of a distinction between the two, except in terms of the wage rate and hours of work that apply on the job. Their members are working for the same contractors under very similar terms and conditions as under the collective agreement and subject to generally the same craft organization. To the extent that someone makes a decision about which trade to assign certain work to, the decision making process shows no difference in construction versus maintenance settings. That is, I conclude that the evidence is worth considering in the process.

64. However, there are limitations to the evidence thus obtained. Typically there are no markups (the Iron Workers evidence consists almost exclusively of member declarations) and so the precise description of the work is often not available. It is therefore often impossible to find a precise definition of the work performed to determine if the maintenance in fact involved the installation (as opposed to repair or relining) of a chute at all. The evidence consists of the recollections of persons who have an interest in the outcome of the case. In addition, the evidence is not at all accessible to the employer who must make the decision. The declarations were all prepared for the purposes of this case. It is inappropriate for the Board to require an employer to make the "right" decision, and then assess that decision in the light of information that could not have been accessible by the employer at the time the decision was made.

65. Finally, at least some of the decisions will likely be made based on the exigencies of the project on a day to day basis. Repair and maintenance is typically hard to predict. One often does not know what one will encounter until one opens the particular equipment up. For this reason many large maintenance contracts are paid on a time and material basis. It is harder to plan the work and hence work assignment decisions are more likely to be field assignments (that are nonetheless assignments) based on the available staff and the crews who are employed in the first place. Finally, of course, the description of the work as "repair and maintenance" begs the question of whether the Work in Dispute (the rigging and installation of a chute) was even performed.

66. There are few conclusions that one can draw from all of this evidence. Ironworkers appear to have done a lot of work on chutes, perhaps more than the Millwrights, over the years. There are fewer instances of the performance of such work in the past 15 years. Both unions agree or concede that Millwrights perform the work of installing chutes in certain circumstances. There is considerable support for the theory of the Millwrights (based on a distinction that is no longer accepted by the Iron Workers), but none for the theory of the Iron Workers (the fixed versus moving or moveable chutes). There is an implicit acknowledgement in the submissions of the Millwrights that there might be some work in blast furnaces that fits their theory, but because of a long-standing practice, they have not performed. No such chutes were identified however, even assuming that any had been installed in the last 15 years.

67. In the end, all that one can say is that the theory of the Millwrights appears to be more consistent with the actual performance of the work in Board Area 26 since January 1, 2000. Hence both employer and area practice favour the Millwrights, though the evidence is not clear enough to say that this factor is strongly in favour of the Millwrights.

The decision made by Matrix

68. Matrix said that it made its decision based only on a general division of work between Millwrights (mechanical) and Iron Workers (structural). As the current people in charge of Matrix are all from Kvaerner, they did not have access to the history of the other predecessors. Matrix had a general sense of what work had been performed in the recent past, and particularly some of the projects identified by the Millwrights. Given the difficulty the Board has had extracting useful information from the mass of data assembled by the two unions, it is impossible to say that Matrix ignored any significant or pertinent information. It did not suggest that it was more efficient to employ one trade or the other.

69. Its decision is captured in the following paragraphs from its brief:

> 18. Matrix states that the assignment of the work in dispute to the Millwrights is consistent with its past practice. Where work is integral to the operation of automated machinery, Matrix typically assigns the work to the Millwrights.
>
> 19. In fact, Matrix has assigned work associated with similarly designed chutes to the Iron Workers where, unlike the instant chute in dispute, the chutes are not affixed, or otherwise integral, to the proper functioning of machines. The relation to machinery (over which the Millwrights have jurisdiction) is a significant factor considered by Matrix when assigning work associated with a chute to either trade union.
>
> . . . . .
>
> 25. However, resort to Matrix's practice of considering the ultimate function of a chute when making a trade assignment is efficient because it significantly lessens the amount of time required to determine which trade

> union should perform the work on a particular chute. Absent this practice, the typical process for determining the trade to which work should be assigned must be engaged in respect of each chute Matrix is contracted to install.

70. Given the lack of clarity about the dividing line between the chutes installed by Millwrights and the chutes installed by Iron Workers, this analytic process is hard to criticize. The practice may not follow precisely the analysis of Matrix, but it is a similar theory with the same result. Even if the practice evidence was less clear, it would still not cause the Board to see any reason to disturb the assignment.

71. For these reasons the Board confirms the assignment made by Matrix in this case.

The Rigging Work

72. While the other parties paid scant attention to it, the Iron Workers also claimed the rigging work involved in the removal and replacement of the chute during the process when it was being fitted to the spot in which it was to operate. In doing so, they rely on the Rigging Agreement between the Millwrights and the Iron Workers. That agreement provides:

> (a) The unloading and transporting of machinery and/or equipment to a temporary holding point in the area of installation or any cleaning and sub-assembly area as designated by the responsible contractor shall be the work of the Iron Workers.
>
> (b) The rigging work required in the cleaning and sub-assembly area shall be performed by the Millwrights.
>
> (c) The handling of machinery and/or equipment from the temporary holding point in the area of installation or the cleaning and sub-assembly area to the final point of installation will be performed by an equal numbered composite crew of Iron Workers and Millwrights.
>
> (d) After composite rigging crew has safely placed machinery and/or equipment, Millwrights will complete installation, i.e. final alignment.

73. While it was not really addressed in argument, I conclude that the Agreement does not explicitly cover the work. The rigging is not from the "temporary holding point or subassembly area to the final point of installation". On the other hand it is hardly "final alignment" either.

74. This is a jurisdictional dispute that is to be resolved on the particular facts of this case. I have no evidence to tell me whether or not more than one person was needed as rigger (if this was to be the joint crew called for in paragraph (c) of the Rigging Agreement). It would appear that it might be inefficient to call over an Iron Worker to the area for rigging work when Iron Workers were doing no work in the area. Given that the Millwrights' description of the way in which the final adjustments were made it would seem to make more sense for the people who were making the adjustments to the structure of the chute to squeeze it into place should be the ones rigging it up and down to achieve that perfect fit.

75. The parties really did not spend much time arguing this point other than the Iron Workers who devoted a lengthy part of their brief to describing rigging as a core function of the Iron Workers. Generally speaking I accept that Iron Workers spend much more time that Millwrights performing rigging, but it can hardly be at the exclusive core of the Iron Workers when they explicitly agree to joint rigging crews with the Millwrights.

76. I conclude that because the Millwrights were properly assigned the work of installing the chute, it was appropriate in the peculiar circumstances of this one project, to assign the rigging work to the Millwrights.

77. In conclusion then, I conclude that the assignment of the installation of the chute in this case, and the rigging during the adjustment of the chute were properly assigned to the Millwrights. Accordingly the application and request for relief by the Iron Workers is dismissed.

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for the Board

<u>APPENDIX A</u>

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