Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **2154-12-JD**

Carpenters' District Council of Ontario, Local 2486, Applicant v **T C Contracting Inc.**, Mid-Canada Construction Corporation, and Labourers' International Union of North America, Local 1036, Responding Parties

BEFORE: Caroline Rowan, Vice-Chair

APPEARANCES: Douglas J. Wray for the applicant; L.A. Richmond, Yu-Sung So and Wayne Scott for Labourers International Union of North America, Local 1036; no one appearing for T C Contracting Inc. and Mid-Canada Construction Corporation

DECISION OF THE BOARD: August 28, 2015

1. This is a work assignment complaint made under section 99(1) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 as amended (the "Act") filed by the Carpenters' District Council of Ontario, Local 2486 (the "Carpenters Local 2486"). This complaint arose out of the assignment of certain work in respect of concrete forming construction carried out by T C Contracting Inc. ("TC") at the Algoma Health Building project and the Superior Heights School project in Sault Ste. Marie (the "Projects") to members of Labourers' International Union of North America, Local 1036 (the "Labourers 1036"). The general contractor at the Projects was Bondfield Construction Company Limited ("Bondfield"), which company subcontracted the work in dispute to TC.

2. The work in dispute is described as follows:

> The fabrication, installation, releasing and stripping of forms used in concrete forming construction carried out by

> employees of TC at the Projects but not including any concrete forming construction in relation to the buildings at the Projects. The work in dispute encompasses the exterior concrete hardscaping at the Projects, including but not limited to pads, curbs, sidewalks and retaining walls.

3. The Projects are in Board Area 21. The parties disagreed whether the exterior concrete hardscaping work at the Projects came within the industrial, commercial and institutional sector. The Carpenters Local 2486 contended the work in dispute was in the industrial, commercial and institutional sector. Labourers 1036 disagreed. However, it submitted that even if such work was in the industrial, commercial and institutional sector, it was properly assigned to its members. The parties agreed that the sector issue should be dealt with, if necessary, as part of the present work assignment complaint.

Sector Dispute

4. The Carpenters 2486 argue that the work in dispute is work in the ICI sector. The Labourers 1036's first position is that it does not matter whether the work in dispute is in the road sector or the ICI sector since such work is contemplated by their provincial collective agreement in either event. The Labourers 1036 submit that there is a long-standing practice of treating road work on an ICI project as work covered by the Labourers ICI Agreement, which work can be performed under a civil agreement. The Labourers 1036 suggest that the curbs and sidewalks in issue in this case are in the road sector and that the road sector ends on the projects when you reach the building. Even though the Labourers 1036 do not dispute that the projects are in the ICI sector, they submit that the work in dispute could be construed as road work.

5. I am persuaded that it is necessary to determine the sector issue in this case in order to determine the jurisdictional dispute. Notwithstanding the Labourers 1036's agreement (despite not conceding the sector issue) that evidence of area practice and employer practice in the assignment of work is relevant to the extent that it was done in conjunction with a project in the ICI sector, it is necessary to determine the sector of the work in dispute in order to assess the relevant practice evidence and collective agreement criterion.

6. Section 126(1) of the Act defines the term "sector" as follows:

> "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector;

In *City of Sault Ste. Marie,* [2002] OLRB Rep. Oct./Nov. 870, the Board described the preferred approach when interpreting the legislative definition of "sector", as follows:

> 39. 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 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 that 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.

In this proceeding, the parties addressed the factors of end use, work characteristics, and bargaining patterns in their submissions.

7. With respect to end use, the Carpenters 2486 argued that the work in dispute was part of the ICI projects for which the general contractor was responsible and that the work is clearly in relation to an ICI building. They note that TC was not building a road to anywhere in this case. The Labourers 1036, on the other hand, note that the use of the sidewalks and curbs is to facilitate the access and egress of human and vehicular traffic to the building even if they are related to the building. The Labourers 1036 therefore suggest that the end use is the same as the end use for such work when performed in the road sector and is distinct from the end use of the ICI buildings themselves.

8. With respect to work characteristics, the Labourers 1036 argue that the process used for the fabrication, installation, releasing and stripping of forms for pads, curbs and sidewalks outside of an ICI building is identical to the work that is performed in conjunction with

curbs and sidewalks adjacent to roads in the road sector. The process for forming pads, curbs and sidewalks involves preparing the base by excavation, placing granular A and compacting it then placing granular B and compacting it, then placing a pre-made steel form and a wire mesh. After the concrete is poured and cured, the steel forms are then stripped and re-used. According to the Labourers 1036, the concrete formations for pads, curbs and sidewalks are designed to facilitate the access and egress of human and vehicular traffic and to facilitate drainage. The Labourers 1036 point out that there is no suggestion in this case that the work characteristics and the skills required to put in sidewalks and curbs on an ICI job are any different from that on a road job.

9. The Carpenters 2486 contend that the work characteristics involved in performing the concrete formwork in issue in this case are the same as those involved in formwork in other kinds of ICI sector construction. They note that pads and curbs inside a building are formed in the same way and contend that the work in dispute is performed under traditional ICI sector collective agreements.

10. With respect to bargaining patterns, the Labourers 1036, assert that across the Province general contractors typically subcontract this work out as a discrete package separate from the building to specialty civil or road contractors who perform the work under the terms of an applicable local agreement in accordance with Article 2.05 of the Labourers ICI Agreement. The Labourers 1036 rely on a declaration of the President of Bondfield in which he makes a statement to the effect that, in the Sault Ste. Marie area, the general practice is for all parking lot paving and curbs and sidewalks outside of ICI buildings to be performed under the terms of the Labourers Local 1036 Civil Agreement.

11. The Labourers 1036 also rely on the declarations of Yvon Champagne and Shane Corbett of Mid-Canada and TC respectively, to similar effect, in which they specify that such civil work, including site services, parking lots, pads, curbs and sidewalks up to three feet outside of the building in connection with an ICI project is subcontracted to civil contractors who perform the work pursuant to the terms of the Labourers 1036 Local Civil Agreement. This practice is also referred to in the declaration of Paul Hickey, a business representative of the Labourers' International Union of North America, Ontario Provincial District Council (the "OPDC"), and in that of Wayne Scott, Business Manager of the Labourers 1036.

12. In *Ellis-Don Limited,* [1993] OLRB Rep. November 1130, the Board dealt with a similar issue involving whether the carpentry portion of concrete forming work relating to various outdoor structures, such as retaining walls, planters and seating was work that fell within the ICI sector or was work that falls within the "landscaping" sector of the construction industry. In reaching its decision that the work in dispute is work in the ICI sector, the Board reasoned as follows:

> 33. Turning to the merits of the sector issue, we are satisfied, having regard to all the material before us and the representations of the parties, that the work in dispute is work in the ICI sector of the construction industry. Even assuming for the present purposes there is a distinct sector known as the "landscaping sector", we are not satisfied that it extends to include the work in dispute. It does not appear to us that the concrete forming work in relation to the outdoor structures is materially different from the concrete forming work in relation to the building to which it is related. The types of materials used, skills required and problems and solutions to be dealt with are also similar. It may be, as the Labourers 1036 assert, that there are unique problems for concrete forming where its purpose is to sustain plant life. Yet it is also true that any concrete forming on an ICI project must take into account the particular needs of the structure being formed. Further, concrete planters are only one element of the work in dispute, much of which does not relate to plantings.
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> 34. Further, part of the work is physically situated on or connected to the ICI structure. For instance, on both the Ellis-Don project and the Jackson-Lewis projects, many of the structures are located on an underground garage serving the building. Other aspects of the work are directly connected to the building. It is all work which was done in conjunction with the erection of an ICI building and which came under the overall responsibility of the general contractor responsible for the erection of the building. To the extent that it is relevant to look to "characteristic relations with employees" in deciding sector issues, the materials indicate that on many other similar projects, the work has been done by ICI formwork contractors. Sometimes the analogous work forms part of the overall formwork package for the project, and on occasion it has been done under a separate contract for formwork in

> relation to outdoor structures. As well, on some ICI projects, fewer in number than the above, the formwork has been part of a contract which also included general landscaping work. We are satisfied that, overall, concrete forming work on outdoor structures on ICI projects has tended to be organized in the same or similar way as work on the ICI structure itself.

In that case, like in the present one, the work in dispute was completed in conjunction with the erection of an ICI building, under the overall responsibility of the general contractor responsible for the erection of the building and the concrete forming work. The types of materials used and the work performed in relation to the outdoor structures in that case was found not to be materially different from the concrete forming work in relation to the building to which it was related.

13. Similarly, in the present case, the forming work relating to the exterior concrete hardscaping at the Projects is not materially different from the forming work in relation to the buildings under construction at the Projects or materially different from the formwork performed in relation to road work. It is nonetheless all work which was done in conjunction with the construction of the ICI buildings and which came under the overall responsibility of the same general contractor. As noted in *Ellis-Don Limited,* cited above, at para 42, in the absence of a clear and unambiguous practice in the construction industry to treat this work as being performed in a discrete sector, it is unwise to fragment construction projects by carving out the "outside construction" from the project as a whole.

14. This is precisely what the Labourers 1036 are asking the Board to do in the present case despite the absence of a clear and unambiguous practice of treating work outside the building as work falling within the road sector. The practice in Sault Ste. Marie to which the Labourers 1036 refers is one of allowing the work to be performed under a civil agreement pursuant to subcontracting language found in the Labourers ICI Agreement. In the circumstances, I am not persuaded that there is an unambiguous practice to treat the work as falling within the road sector, rather than in the ICI sector.

15. In *PCL Constructors Canada Inc.,* 2010 CanLII 78733 (ON LRB), the Board similarly found that all work associated with the carpentry portions of concrete forming for the footings, retaining walls

and planter boxes at a hospital was work in the ICI sector, rather than in the road sector. Unlike in *Ellis-Don Limited,* cited above, the work in dispute in that case was not as integrated with the construction of the main building and there was no meaningful connection between the work and the hospital. In addition, the work in dispute in *PCL*, cited above, was packaged separately by PCL, the general contractor, and was not performed by an ICI formwork contractor.

16. In the present case, there is no dispute that the Projects at issue fall within the ICI sector and that the construction on the buildings themselves was work in that sector. The end use of the Projects as a whole is further institutional in nature. While the concrete hardscaping at issue in the present case was part of a separate package of work let by Bondfield, it was nonetheless part of, or integrated with, the construction on the Projects as a whole and should, in my view, fall within the same sector, which is institutional in nature.

17. In *UCC Group Ltd.,* 2013 CanLII 24964 (ON LRB), the Board reached a similar conclusion with respect to the construction of a skateboard park and concluded that the project fell within the ICI sector. In that case, the Board found that, even accepting that the work characteristics were more commonly reflective of the road sector that was not enough to outweigh the fact that the end use of the project fell within the ICI sector.

18. In the present case, the end use of the work should be determined by reference to the end use of the Projects, which are institutional in both cases. The fact that the work characteristics might arguably be similar to those performed in the road sector is not sufficient to outweigh the fact that the end use of the Projects clearly falls within the ICI sector. In any event, the Labourers 1036 have not, in my view, established a province-wide practice of performing the work in dispute pursuant to the road sector collective agreements. The practice referred to is, instead, one of performing the work in a manner consistent with the subcontracting provisions in the Labourers ICI Agreement.

19. This proceeding will therefore be determined on the basis that the work in dispute is in the ICI sector.

Factors considered by the Board

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

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

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

In addition, the onus is on the party seeking to alter the work assignment to persuade the Board that the work assignment was incorrect. (See *Comstock Construction Ltd.*, [2002] OLRB Rep. May/June 327 at page 332). Resort to the onus is relevant to make a final decision only if the evidence is evenly balanced. (*International Brotherhood of Electrical Workers, First District, Canada,* 2011 CanLII 17827 (ON LRB).

21. In the present case, the parties referred to the factors set out under separate headings below. They did not suggest that there were any relevant trade agreements.

Collective Agreement and Trade Union Constitutions

22. By decision dated July 5, 2012, the Board (differently constituted) found that Mid-Canada Construction Corporation ("Mid-Canada") and TC are under common control and direction and/or that there was a sale of business from Mid-Canada to TC. The Board further found that TC is bound by the carpenters' provincial collective agreement applicable to the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario ("Carpenters ICI Agreement"). There is no real dispute that the work in issue in this case is covered by that agreement.

23. The Labourers 1036 hold bargaining rights for construction labourers employed by TC in the industrial, commercial and institutional sector by virtue of a voluntary recognition agreement secured with TC. As such, TC is also bound to the Labourers ICI

Agreement. In addition, at all material times, the Labourers 1036 held bargaining rights for construction labourers employed by TC in Board Area 21 in all sectors of the construction industry other than in the industrial, commercial and institutional sector by virtue of TC being bound by the Labourers 1036 Civil Agreement applicable to Board Area 21.

24. While the Labourers 1036 do not dispute that the Carpenters 2486 have a claim to the work in dispute, they contend that their claim to the work is better, since it is covered by both the Labourers ICI Agreement (assuming it is work in the ICI sector, which I have found) and also by their Civil Agreement whereas the Carpenters 2486 do not have a claim to the work outside of the ICI sector.

25. It is common ground that the work in dispute, being formwork for exterior concrete, such as pads, curbs and sidewalks, is not referred to in Schedule "E" of the Labourers' ICI Agreement. However, the Labourers 1036 take the position that it is nonetheless covered by that agreement by virtue of subcontracting provisions of Article 2.05, which provide, in part, as follows:

> 2.05 (a) For all work in the industrial, commercial and institutional sector, which is covered by this Agreement, the Employer agree to engage only contractors or subcontractors bound to this Agreement.
>
> (b) For work forming part of an ICI general contract, but not covered by 2.05 (a), the employer agrees to engage contractors and/or subcontractors that are bound to an applicable agreement with the OPDC or bound to an applicable agreement with the local Union in whose geographic jurisdiction the work is being performed.

The Labourers 1036 contend that the general contractor on an ICI project may, by virtue of Article 2.05(b) of the Labourers ICI Agreement, subcontract the work in dispute to a civil contractor bound to an applicable agreement with the Labourers 1036. They further note that the obligation for that civil contractor to apply the terms and conditions of an applicable agreement arises from the Labourers ICI Agreement. In this connection, they argue that the ICI agreement requires TC to perform this work with members of the Labourers 1036

under the terms and conditions set out under the local's Civil Agreement regardless of whether the work is in the ICI sector.

26. The Labourers 1036 note that, in the Sault Ste. Marie area, they have a standard local agreement for civil work, including work in the heavy engineering, sewer and water main and roads sector, and that this is the agreement to which most local excavation, road, paving and sewer and watermain contractors with whom the Labourers 1036 have bargaining rights are bound. The Labourers 1036 Civil Collective Agreement with TC Contracting renewed on August 8, 2011 provides the following recognition provision and contains a classification of "Form Builders" under the wage schedules:

> 1.01 The Company recognizes the Union as the exclusive bargaining agent of all Construction Labourers in the employ of the Company and engaged in the construction of Sewer and Watermain, Civil work and Heavy Civil work, Sewer and Water Treatment Plants, including Pumping Stations, Roads, Bridges, Paving Parking Lots, Site Preparation and Servicing in the District of Algoma including that portion of the District of Algoma which lies North of the 49th parallel of latitude and which is not within the Ontario Labour Relations Board Area #21, save and except Superintendents and persons above that rank.

The Labourers 1036 state that there is a practice of performing civil work exterior to a building under their Civil Agreement, and note that the language of the Labourers ICI Agreement allows work to be performed under an applicable local agreement.

27. The Carpenters argue that it is unlawful for the Labourers 1036 to purport to have another collective agreement that covers the ICI sector that is not covered by the designated Provincial ICI agreement. They also submit that the employer and employee bargaining agencies cannot purport to define the ICI sector in a broader manner than it is defined in the Act. They therefore take the position that, if the work in dispute is not covered by Labourers ICI Agreement, then the Labourers 1036 are fighting this jurisdictional dispute without a valid collective agreement. They, in any event, deny that that is what the Labourers 1036 have done under the Labourers ICI Agreement as a matter of collective agreement interpretation. They also contend that Article 2.05 of the Labourers ICI Agreement is

irrelevant to this jurisdictional dispute because TC did not subcontract the work and that, as a consequence, Article 2.06 is the relevant clause.

28. The Board has on a number of occasions rejected the illegality argument raised by the Carpenters 2486; that is, the argument that there are specific tasks performed by the trade of carpenter which can only lawfully be performed by one of their members in the ICI sector. As noted in *UCC Group Inc.,* 2014 CanLII 54367 (ON LRB) at para 42, "[t]he mere fact that a collective agreement contains work claimed by another trade does not elevate the issue from a jurisdictional to a representational claim unless the particular facts warrant that conclusion being drawn."

29. The issue in the present case is whether the assignment of work in dispute to the Labourers 1036 was correct having regard to the relevant criteria applicable in assessing work assignment claims. With respect to the collective bargaining criterion, the work jurisdiction claimed under the Labourers ICI Agreement does not appear to cover the work in dispute. In fact, the Labourers 1036 only relied on the subcontracting provisions of Article 2.05(b) thereof in support of its position that the Labourers ICI Agreement permits the work in dispute to be performed by a subcontractor bound to a civil agreement with the Labourers if the work in question forms part of an ICI general contract.

30. The difficulty with this argument is that Article 2.05 of the Labourers ICI Agreement has little application to the work in dispute in this case. The work in dispute was not contracted out by TC, but rather was performed by TC directly. The fact that the general contractor, Bondfield, was also bound to the Labourers ICI Agreement does not make Article 2.05 relevant, since TC was the entity that did the work with its own forces and is also bound to that agreement. Having performed the work with its own forces, TC cannot be said to have done the work under the terms of Article 2.05 of the Labourers ICI Agreement.

31. In the circumstances, I conclude that the Labourers 1036 do not have a collective agreement that covers the persons performing the work in dispute in this case. The Carpenters ICI Agreement to which TC is also bound does cover the work in dispute. As such, the collective bargaining criterion very strongly favours the assignment of the work to the Carpenters 2486.

Employer Practice

32. There is little relevant or reliable evidence concerning employer practice. In this regard, I note that the Carpenters 2486 refer to a list of jobs, on which the respondent employers are alleged to have assigned the kind of work in dispute to the Carpenters 2486. However, that list does not appear to be entirely reliable given that it includes the two Projects at issue in this case where the Carpenters 2486 did not perform the work in dispute. Even though the Carpenters 2486 repeated their reliance on that list in reply, the inclusion of the present work in dispute was not explained, nor was the contention of Mid-Canada and TC that it was not involved in performing the work on the majority of the listed projects. The suggestion in the declarations of Yvon Champagne and Shane Corbett, representatives of Mid-Canada and TC, respectively, to the effect that the list appears to be a list of all ICI projects in the area where the Carpenters 2486 were involved was not specifically disputed.

33. The Carpenters 2486 specifically refer to a handful of projects performed by Mid-Canada in 2007; namely, the TSC Store and the Clergue Park Boardwalk. Mid-Canada acknowledged that members of the Carpenters union did formwork for the walls and footings for the building in one case and did some specialty formwork for decorative concrete in the other instance. However, it disputes that the work involved at those two projects was similar to the work in dispute. According to Mid-Canada, the work in dispute at those projects (i.e. formwork for all curbs and sidewalks) was done by members of the Labourers union. The Carpenters 2486 rely on their members declarations which speak only very generally of all formwork and which declarations may not even refer to those two specific jobs. Neither the referral records filed, nor the letter from the Carpenters union to Mid-Canada concerning the TC store in 2007, appear to refute the claim that the Carpenters union did certain formwork on those projects but not the work in dispute. The evidence relied upon by the Carpenters 2486 in respect of the Steel Back Centre parking lot job in 2006 simply refers to members of the Carpenters union having been used to do *some* of the formwork.

34. The practice evidence put forth by the Labourers 1036 is also unsatisfactory. It does not, in many cases, indicate the collective agreement under which the work in question was performed and, more

specifically, whether the work was performed under the terms of the Labourers ICI Agreement.

35. The Labourers 1036 also rely on TC's practice of performing curbs and sidewalks using members of the Labourers union in the period from 2009 to 2012. While it is not clear whether the work referred to was work in the ICI sector or was work in the road sector as the Carpenters 2486 claim it was, that evidence is, in any event, of limited value since TC did not recognize the Carpenters 2486's bargaining rights until July 2012. Similarly, the practice evidence concerning Mid-Canada is of limited weight to the extent that it pre-dates bargaining rights acquired by the Carpenters 2486 in March 2006. It also bears noting that a number of the projects listed, including those in 2008, appear to be either in the road sector or in the residential sector.

36. While there is no doubt that both Mid-Canada and TC have employed members of the Carpenters 2486 to do formwork, the extent to which such work actually involved the hardscaping work in dispute is not entirely clear. The declarations of Mr. Champagne and of Mr. Corbett provide some limited relevant support for the assignment of the work in dispute to members of the Labourers 1036. On balance, having considered all of the practice evidence offered by the parties, I find that the employer practice evidence criterion is neutral.

Area practice

37. Both trade unions filed evidence in support of their claim that the work in dispute has been performed by their members in Board Area 21. The Carpenters 2486 filed a number of signed declarations from members, which declarations specifically refer to the work in dispute in this case and which indicate that the work in dispute was personally performed by them. The jobs referred to span a time period from 1990 to 2012 and involve a large number of jobs done by Graham B. Newman Construction Inc. ("Newman"), George Stone & Sons ("George Stone") and some by Gough Masonry Ltd. ("Gough Masonry") among many others. These declarations carry significantly more weight than those signed by members of the Carpenters 2486 which refer more generally to "all formwork in Board Area 21" and are signed by members who purport only to have worked on the sites involved.

38. In a letter dated January 3, 2013, Mr. Rick Thomas, the Director of Labour Relations of the Sault Ste. Marie Construction Association indicated that it is a consistent practice of contractor members who are bound to the Carpenters ICI Agreement to perform and/or award work including the work in dispute to members of the Carpenters union in Board Area 21. In a subsequent letter dated March 16, 2013, Mr. Thomas clarified that local general contractors in Sault Ste. Marie who are bound to both the Carpenters and Labourers unions (such as George Stone) will assign the fabrication of forms for curbs and sidewalks to carpenters when such work forms part of an ICI contract and they self-perform the work. However, he also notes that many dual trade general contractors (including George Stone and Newman) subcontract curb and sidewalk work including the fabrication of forms that is part of an ICI contract, to civil contractors that are typically bound only to LIUNA civil agreements employing members of the Labourers' union to perform such work.

39. In a letter dated April 10, 2013, Mr. Thomas advised that effective immediately, the Sault Ste. Marie Construction Association Labour Relations Section would no longer be providing information in regard to work practices, jurisdictional or construction sectoral assignments made by contractors working in Board Area 21 given various developments which have created a situation in which there is no reasonable expectation that this type of evidentiary request by Unions can be fulfilled accurately or with sufficient consistency to be of any value to arbitrators. His comments in that regard, written as they were shortly after his earlier letters, cast significant doubt on the reliability of the information previously given.

40. The Carpenters 2486 also filed a letter dated January 8, 2013 from the President of Gough Masonry in which he refers to the company as being signatory to both the Carpenters and Labourers unions and to the company's standard practice of assigning the work in dispute to members of the Carpenters union. However, in a subsequent letter dated February 14, 2013, he clarifies that he was, in fact, only referring to forms that were in connection with the construction of the building itself. He also notes that Gough Masonry has not performed forming for exterior, pads, curbs, and sidewalks. This statement appears to be contradicted by a statement from a foreman for Gough Masonry, in which the foreman confirmed that the curb and sidewalk work on pictures he identified was work done by members of the Carpenters union. This apparent contradiction suggests that either the pictures relate to work done by a

company other than Gough Masonry or the amount of such work done by Gough Masonry was too little for the President of Gough Masonry to recall it having been done. In either case, I place little weight on the evidence that members of the Carpenters union employed by Gough Masonry performed curb and sidewalk forming work.

41. In addition to Gough Masonry, the practice of Newman and of George Stone is of most significance since these three companies are apparently the only contractors who are said to have performed the work in dispute in Board Area 21 and are bound to both the Carpenters and the Labourers unions. In a letter dated January 7, 2013, the President of Newman contends that that company's standard practice as it relates to curbs is to perform all forming and stripping work not performed by machine using carpenters to form and strip and to use labourers to pour the concrete. In a letter dated January 9, 2013, the President of George Stone contends that that company's standard practice is to form concrete, including stairwells, retaining walls, pads and sidewalks with Carpenters and to have Carpenters form concrete curbs that are not machine cast.

42. The evidence also indicates that George Stone did assign formwork for curbs to the Labourers, rather than to the Carpenters, back in 1997 and that this resulted in a grievance which was settled on the basis of the company's confirmation of its intention to have future work of a similar nature performed by the Carpenters and in particular to have the Carpenters do the hand forming work with the Labourers performing their traditional carpenter tending work.

43. The Labourers 1036 do not dispute that general contractors, such as George Stone and Newman, have from time to time self-performed the forming of exterior concrete outside of building structures under the ICI Agreements. They however note that, when general contractors subcontract the work to a civil or paving contractor, the work in dispute has almost invariably been performed by members under the terms and conditions of the Local Civil Agreement. The evidence offered in support of that contention is limited and does not appear to relate necessarily to work performed by contractors who are bound to both the Carpenters and the Labourers unions.

44. By way of example, the statement from the President of Bondfield to the effect that that is the general practice in the Sault Ste. Marie area does not set out the basis of his knowledge in that regard

and does not take account of the contradictory evidence filed by the Carpenters 2486 (which, as noted, was not disputed at least to the extent that it refers to work which was self-performed by general contractors). In addition, the member statements filed by Labourers 1036 refer only to the declarant having performed "work *in relation to* the fabrication, installation, releasing and stripping of forms for exterior concrete pads, curbs and sidewalks" [emphasis added] in connection with the listed projects. The declarants do not make clear whether they performed the work in dispute or simply had a role in relation to the work in dispute such as in tending the Carpenters. In addition, the list of jobs referred to in the Labourers 1036 consultation brief does not indicate where the evidence in support of the job listing is found.

45. In summary, the area practice evidence is mixed in that there is a practice of general contractors, such as those bound to both Carpenters and the Labourers unions, performing the work in dispute using members of Carpenters 2486. On the other hand, there is evidence that when the work in dispute is contracted to a civil or paving contractor, the work in dispute has been performed by members of the Labourers 1036 under the terms and conditions of the Labourers' Civil Agreement. On balance, I find that the most relevant evidence is that of contractors bound to a collective agreement with both trade unions, such as the practice of George Stone and Newman. That evidence favours assignment of the work to the Carpenters 2486.

Employer Preference and Economy and Efficiency

46. The only evidence with respect to employer preference and economy and efficiency is contained in the declarations of Mr. Champagne, President and owner of Mid-Canada and of Mr. Corbett, project coordinator/estimator of TC. They suggest a preference for the use of Labourers over Carpenters on the basis that there is insufficient work for Carpenters to do in the event TC were required to divide the tasks of placing the forms/stripping forms and the pouring of concrete between the Carpenters and Labourers respectively. According to their evidence, there would only be enough work for a Carpenter to perform for approximately half of a day every three or four days. In this regard, they explain that a curb machine was used for most of the curbs and that only 5% of the curbs at the two jobs were actually hand formed using formwork. They contend that this work would take approximately three or four hours in a day, after which the Labourers would then spend the next day and a half

pouring concrete into the forms and thereafter would spend half an hour stripping the forms.

47. The basis for their suggestion that Carpenters would have nothing to do in the intervening period of several days is not explained. In this regard, they refer in their evidence to the work done on the curbs, but do not address other aspects of the work in dispute such as the sidewalks as well as other available work. They also did not provide any evidence from members who actually performed the work on the site.

48. The only evidence I have with respect to this criterion suggests a preference for the use of Labourers. However, as noted in *PCL 2010* at para 97, "...the Board has hesitated to put much (if any) weight on this factor [economy and efficiency], particularly if the effect of doing so would be to trump collective agreement obligations (see, for example, *Ecodyne Ltd.,* cited above, at paragraph 22)". The criterion of economy and efficiency will therefore only be significant as a kind of "tie-breaker" when an assessment of the other factors provides no clear answer and cannot be used to "trump" other factors and particularly not the collective agreement factor (*Kel-Gor Limited*, [1990] OLRB Rep. March/April 231, at para 44). As such, this criterion is of limited weight in this case where the collective agreement factor very clearly favours the Carpenters 2486.

Other Considerations

49. The Labourers 1036 also submit that I should take into account the fact that their bargaining rights with TC were settled before those of the Carpenters 2486.

50. The Labourers 1036 rely on the decisions in *Phoenix Restoration*, [1998] OLRB Rep. Jul./Aug. 707 and *Limen Group Ltd.*, 2011 CanLII 71736 (ON LRB) for the proposition that the claim of a recently recognized trade union to perform the work is weak and that the assignment should have been made to the trade union with pre-existing bargaining rights. In the latter decision, the Board adopted the principle established in *Phoenix Restoration*, cited above, and concluded as follows at para 33: "We believe a union with jurisdiction over the work has a much stronger claim to that work than a union that recently obtained those bargaining rights so its members might be assigned that work."

51. The present case is not however one in which the contractor who performed the work voluntarily recognized one of the trade unions shortly prior to performing the work in dispute. In this case, the Carpenters 2486 had pre-existing bargaining rights with Mid-Canada, which was bound by a collective agreement with Carpenters 2486 in respect of carpenters and carpenters' apprentices working in the industrial, commercial and institutional sector of the construction industry. The Carpenters 2486 were required to file an application under subsection 69 and 1(4) of the Act in order to have those bargaining rights recognized by TC.

52. By decision dated July 5, 2012 in Board File No. 2038-11-R, the Board, differently constituted, granted the declarations sought by the Carpenters 2486 to the effect that Mid-Canada sold its business within the meaning of section 69 of the Act to TC and to the effect that TC and Mid-Canada are under common control and direction and ought to be declared one employer for the purposes of the Act. As a result, TC was found to be bound by the Carpenters ICI Agreement by which Mid-Canada is also bound. In these circumstances, it is not reasonable to suggest that the Carpenters 2486 is a trade union that did not have pre-existing bargaining rights and should be treated as one which acquired its bargaining rights shortly before or after the work in dispute was performed.

53. In all the circumstances, the Board finds that this additional consideration is of no significance.

Disposition

54. The evidence in this case indicates that the Carpenters 2486 has a strong claim that its members ought to have performed the work in dispute, which I have found to be ICI sector work. The Carpenters 2486 have a collective agreement covering the work whereas the Labourers 1036 do not. The claim under the subcontracting provisions of the Labourers ICI Agreement did not apply to the work performed by TC. The evidence of employer practice is neutral and the evidence of area practice favours assignment to the Carpenters 2486. To the extent that the evidence concerning economy and efficiency supports the assignment of the work in dispute to members of the Labourers 1036, that evidence is insufficient to outweigh the collective agreement obligations owed to the Carpenters 2486.

55. For all these reasons, I conclude that the Carpenters 2486 have established on the balance of probabilities that the work in dispute ought to have been assigned to its members rather than to members of the Labourers 1036.

"Caroline Rowan"
for the Board