ONTARIO LABOUR RELATIONS BOARD

1223-09-JD Millwright Regional Council of Ontario and its Local 1007, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 and **Aker Kvaerner Songer Canada Ltd.,** Responding Parties v. Electrical Power Systems Construction Association ("EPSCA"), Intervenor.

1224-09-JD Millwright Regional Council of Ontario and its Local 1007, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 and **E.S. Fox Ltd.,** Responding Parties v. Electrical Power Systems Construction Association ("EPSCA"), Intervenor.

BEFORE: Charles E. Humphrey, Vice-Chair.

APPEARANCES: Jesse Nyman, Mich Sinclair and Ron Coltart appearing for the applicant; Jim Fyshe, Les Ellerker and Mark Ellerker appearing for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67; Daryn M. Jeffries and Carla Nassar appearing for Aker Kvaerner Songer Canada Ltd.; Keith Burkhardt and Bill Kunkel appearing for E.S. Fox Ltd.; M. Patrick Moran and Ron Martin appearing for the Electrical Power Systems Construction Association.

DECISION OF THE BOARD: February 11, 2010

1. These are applications under section 99 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). There are two applications before the Board, one relating to E.S. Fox Ltd. ("Fox") and one to Aker Kvaerner Songer Canada Ltd. ("Aker"). The applicant in both applications is Millwrights Regional Council of Ontario and its Local 1007 ("the Millwrights"). The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 ("the Plumbers") is the responding party union. The Electrical Power Systems Construction Association ("EPSCA") intervened in both applications. The applications were filed by the Millwrights in response to grievances filed by the Plumbers.

2. Both applications relate to the same work in dispute performed at the same worksite. The work in dispute is:

> The *in situ* use of a machine to grind, power lap, polish and refurbish valve gates and seats at the OPG Nanticoke Generating Station.

3. The work in dispute is a small part of a large contract, covering a variety of work, awarded to Fox and Aker by Ontario Power Generation ("OPG"). The contract referred to as the Master Services Agreement is awarded for a period of three years. Both Fox and Aker have employees from various trades performing a variety of work at the Nanticoke Generating Station over the life of the Master Services Agreement. The work involves repair and replacement parts of the generating station systems.

4. The Plumbers and the Millwrights are both bound to collective agreements with EPSCA. The responding party employers are bound to these agreements. The collective agreements contain provisions describing how work assignments are to be made. The Plumbers' collective agreement provides for a mark-up meeting to be held and states that, "the purpose of this mark-up process is to indicate to the union the work which is planned to be carried out by the Employer in order to minimize the potential for jurisdictional disputes". The collective agreement provides that following the mark-up meeting, "The Employer will advise the Union of the final assignments prior to the work commencing".

5. In accordance with the terms of the EPSCA collective agreements both Fox and Aker held mark-up meetings to deal with work assignments for the Master Services Agreement. Fox held its meeting on July 24, 2008. Aker's meeting was held on July 29, 2008. At the Fox mark-up meeting representatives of both the Millwrights and Plumbers were present. The minutes of that meeting indicate that both the Millwrights and the Plumbers claimed the work in dispute. The minutes also indicate that the final assignment of the work in dispute was to the Millwrights. It is not clear from the evidence exactly when the final assignments were communicated to the two unions but there seems to be no dispute that it was delivered in August 2008.

6. At the Aker mark-up meeting on July 29 representatives of both unions were present. The minutes of that meeting indicate that the Millwrights claimed the work in dispute. The Plumbers claimed the work in dispute when it took place away from the turbine floor. The final assignment of the work in dispute was to Millwrights. Again, it is not clear when the parties were provided with the final assignments but there appears to be no dispute that this occurred in August 2008.

7. When the work in dispute was actually performed is not entirely clear from the evidence before the Board. This is because the work in dispute was a small part of extensive work activities and because employer records do not provide the degree of detail necessary to identify with precision the time the work in dispute was done. From the material that is before the Board it appears that the work in dispute may have been performed by Aker employees on September 19, 2008 and October 2, 2008. In both cases as many as three employees may have been involved in performing the work. There is no evidence that the work in dispute was performed again by Aker employees until March of 2009. There is some evidence indicating that Aker employees performed the work in dispute on March 25, 26, 27 and 31, 2009. The evidence suggests that between three and four employees may have been involved in performing the work in dispute on those occasions. In the case of Fox the evidence of when the work in dispute was performed is even less clear. It appears that the work in dispute was performed by Fox employees at some point in March and April 2009.

8. While there is doubt about exactly when the work in dispute was performed between August 2008 and the end of April 2009 there is no dispute about the fact that when the work was done it was done by members of the Plumbers not the Millwrights. Given the work assignments made by both employers how it came about that the Plumbers rather than the Millwrights performed the work in dispute is not clear. Both employers say that they did not change the work assignment. They also say that until the situation was brought to their attention by the Millwrights in May 2009 they were not aware that the Plumbers were performing the work in dispute. The Millwrights say that they were not aware until May 2009 that the work in dispute was being performed by the Plumbers. They brought the issue to the attention of Fox and Aker as soon as they became aware that work was not being done in accordance with the assignment made in 2008. Both employers responded by directing that the work in dispute be performed by

the Millwrights. The evidence is that as of May 28, 2009 the work in dispute was performed by Millwrights employed by Fox and Aker.

9. The Plumbers' brief filed in this matter describes the way in which the work in dispute came to be performed by the Plumbers as it being "finally assigned" to the Plumbers. Counsel for the Plumbers argued that since the work in dispute had been "finally assigned" to the Plumbers, the Millwrights had the onus of demonstrating that the work assigned to the Plumbers should be altered. In my view to characterize what happened with regard to the work in dispute after July 2008 as being "finally assigned" to the Plumbers does not accord with the facts.

10. Following the issuance of the Final Assignments by Fox and Aker in August 2008 the Plumbers took no public action to challenge or to change the assignment as communicated to them. That is, they did not communicate with either employer or the Millwrights, they did not seek redress under the collective agreement nor did they bring an application under section 99. From the perspective of the employers and the Millwrights the Plumbers accepted the assignment of the work made by Fox and Aker following the mark-up meetings in July. Unless one was aware of what was occurring intermittently on the shop floor an objective observer would have concluded that the Plumbers had accepted the July 2008 assignment of the work in dispute to the Millwrights.

11. Does the fact that the Plumbers performed the work in dispute after the formal assignment was made in July 2008 change the assignment? As we have indicated how it came about that the work in dispute was performed by the Plumbers is not clear from the evidence. Attempting to determine how this occurred is an undertaking for which the jurisdictional dispute resolution process contained in section 99 is ill suited. The process relies on written briefs, documentary evidence and declarations and generally does not and should not require the Board to engage in hearing evidence to determine whether a formally communicated job assignment was changed on the shop floor. Where a party claims that a formally communicated job assignment has been changed but an authorized employer representative has not made a decision to change the assignment and not communicated any such decision to affected parties they should not be surprised if the Board is unwilling to conclude that a change in assignment has in fact been made. One of the essential characteristic of an effective work assignment process is transparency. For a work assignment process to meet its objective, of avoiding conflict on job sites and the resort to self help in the form of strikes and slowdowns, it must be transparent. All interested parties must have the opportunity to express their positions, have those positions considered and know and be able to rely on the result of the process. The EPSCA collective agreements contain such a transparent process. The Board will not support efforts by parties to gain advantage by avoiding or ignoring such processes.

12. There may be situations where a job assignment can be said to have been properly changed on the shop floor after a formal job assignment has been made and communicated to the competing unions. Those situations will be rare and in any case would have to meet the requirement of transparency. It is not necessary or appropriate for me to speculate on, in what circumstances the Board would consider such an assignment effective. Whatever such circumstances may be they do not exist in this case. Here the Plumbers obtained the opportunity to perform the work in question in a manner that was lacking in transparency. Neither the responsible representatives of the employers or the Millwrights were aware of the fact that the work in dispute was not being done by the Millwrights. Once they became aware they acted promptly to enforce the work assignment.

13. Parties should be able to rely on the job assignments that are made and communicated to them. They should not be put in the position of having to be constantly vigilant for fear that the union that did not get the assignment finds a way to get the work anyway. In this case the work in dispute was performed infrequently. The work formed a very small part of the overall work activity. The work in dispute was performed in conjunction with work that it is acknowledged was work of the Plumbers. The work in dispute was often performed in confined areas in a very large facility. All of these factors made it difficult for the Millwrights and indeed the employers to identify when and by whom the work in dispute was being performed. It is not in the interest of unions or employers that parties be in any way encouraged to take advantage of such situations to obtain work assigned to another union through a process mandated in their collective agreement. As the Board indicated in the *State Group Inc.*, [2006] O.L.R.D. No. 3357, September 13, 2006 at paragraph 14:

> ... Where a formal mark-up is held and an assignment is made in writing, the fact that the assignment may have been adjusted on the ground has no bearing. The number of reasons for that adjustment are likely to be many, and no doubt would itself generate disputes about precisely why or whether it happened. If a trade union objects to the assignment made at a mark-up meeting, then its proper response is to file a jurisdictional dispute. This Board will not do anything to encourage "self-help" remedies on the ground during the course of work, nor will it create obstacles to getting the job done with the available resources when work progresses in a manner other than that planned or expected.

14. Counsel for the Plumbers argued that given that the Plumbers had the work "finally assigned" to them there was no reason for them to raise any issue about the assignment until the events in May 2009 which resulted in the Millwrights performing the work. Based on this argument, counsel said there had been no delay by the Plumbers pursuing their issues with the assignment because it was not until May 2009 that they lost the assignment. This position fails to distinguish between the assignment of work and the performance of work. In some situations it can be said that an employer by having the work performed by employees represented by a particular union has assigned that work to members of that union. This will likely be the case in situations where, for example, no formal mark-up meeting process is followed or mandated by a collective agreement and the employer simply directs that employees represented by a particular union do the work. However, that is not the situation in this case. In this case the collective agreement requires that a work assignment process be followed. That process was followed by the parties and an assignment made of the work in dispute. The fact that through some means the union to whom the work was not assigned did the work does not, in the circumstances of this case, mean there was a change made in the assignment. Rather, work was performed by the Plumbers members contrary to the assignment. The assignment was not changed by the Plumbers' members performing the work in circumstances where both the employers and the Millwrights were not aware that this was occurring. It is more accurate to characterize what has occurred in this case as the Plumbers performing work not assigned to them.

15. Having regard to the facts in this case it is the finding of the Board that the assignment of the work made by the two responding party employers in July 2008 was never changed. The assignment remained in place from the date it was issued through to the present. Given that the Plumbers did not openly challenge the job assignment after it was formally communicated to them in August 2008 they are deemed to have accepted the assignment of the work in dispute made by Acker and Fox in July 2008. The Plumbers did not openly question the assignment of the work in dispute until they filed grievances in June 2009 following the action of Acker and Fox to ensure that the 2008 assignments were followed. The Plumbers' challenge to the

assignment of the work in dispute came almost a year after they were aware of the assignment. Given this it is not necessary for the Board to inquire further into the assignments of the work in dispute. Having regard to the transient nature of the construction industry and the interest of all parties in prompt and final resolution of issues relating to work assignments the Board, in the exercise of its discretion, is not prepared to consider the Plumbers' claim to the work in dispute given that it was made almost a year after the formal assignment was communicated to them. The assignments were not challenged in a timely manner and therefore the Board declares that the work in dispute was properly assigned to the Millwrights.

"Charles E. Humphrey"
for the Board