ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **2441-12-JD**

Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v **Intrepid General Limited** and, Labourers' International Union of North America, Local 625, Responding Parties

BEFORE: Jack J. Slaughter, Vice-Chair.

APPEARANCES: Doug Wray and Tomi Hulkkonen appearing for Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America; Leslie A. Brown and Flo Mandarino appearing for Intrepid General Limited; Mark Wright and Rob Petroni appearing for Labourers' International Union of North America, Local 625

DECISION OF THE BOARD: October 23, 2015

1. This is an application concerning a work assignment dispute filed by Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America ("the Carpenters") pursuant to section 99 of the *Labour Relations Act, 1995* S.O. 1995 c.1 as amended ("the Act"). The responding parties are Intrepid General Limited ("Intrepid"), and Labourers' International Union of North America, Local 625 ("the Labourers").

2. The Board conducted a consultation in this matter on October 6, 2015.

3. Prior to the consultation date, this panel and the parties engaged in extensive but ultimately unsuccessful efforts to reach a mediated resolution of this matter. During the course of the consultation, the Board asked the parties whether the Board should consider issuing an order that went beyond either upholding or reversing the work assignment in issue. None of the parties urged the

Board to do so. Accordingly, the Board will not go beyond making the usual type of determination limited to the work assignment in question.

4. The description of the work in dispute in this case is:

> The portion of the concrete forming work that was performed by a member of the Carpenters' Union on the following Intrepid projects:
>
> 1. 7th Concession Drain (Structure No. 021)
> 2. North Rear Road Drain (Structure No. 028)
> 3. Woltz Creek (Structure No. 036)
> 4. Malden Road Drain (Structure No. 037)
> 5. North Talbot Road Drain (Structure No. 3130)
>
> All of these projects are culverts, and are located in the Town of Lakeshore in Ontario Labour Relations Board Area No. 1.

5. Intrepid assigned the work in dispute to members of the Carpenters. The Labourers seek to reverse that assignment.

6. At the consultation the Board afforded the parties full opportunity to make legal argument. Both the Carpenters and Labourers availed themselves of that opportunity. Intrepid elected not to do so, and stated that it was remaining neutral between the two competing trade unions, although it had supported the work assignment in its brief and written materials. Intrepid did address certain factual issues during the course of the consultation. None of the parties asked the Board to hear any oral evidence. In light of the extensive written submissions and documentary materials filed by the parties, and the thorough representations made by experienced counsel at the consultation, the Board finds that it is able to render a final decision in this matter without the need to hear oral evidence.

LEGAL FRAMEWORK

7. The Board has developed standard criteria for the determination of jurisdictional disputes arising in the construction industry. The Board typically applies the following criteria:

a) Collective bargaining relationships;
b) Trade agreements between the competing unions;
c) Employer Practice;
d) Area Practice;
e) Safety, Skills and Training;
f) Economy and efficiency
g) Any other relevant factor.

See *Canada Millwrights Ltd.*, [1967] OLRB Rep. May 195; *Anchor Shoring Ltd.*, [1974] OLRB Rep. Aug. 528; *Tilechem Ltd.*, [1982] OLRB Rep. July 1074; *PCL Constructors Canada Inc.*, (2004), 104 C.L.R.B.R. (2d) 132 (Ont.) *("PCL 2004")*; *PCL Constructors Canada Inc*. [2010] OLRB Rep. September/October 672 *("PCL 2010"); Bruce Power LP*, [2014] OLRB Rep. May/June 439 ("*Bruce 2014*").

8. The significance of any one of the factors will depend upon the circumstances of each individual case. In certain cases, some of the factors may be of little importance, while in other cases those same factors will be determinative: *Ecodyne Limited*, [1997] OLRB Rep. March/April 197; *PCL 2010, supra.*

9. The Labourers bear the onus of persuasion in this jurisdictional dispute. Although the language may vary from case to case, the standard applied by the Board has been consistent: the party seeking to overturn the work assignment must convince the Board that the contractor's assignment was incorrect: *Ecodyne Limited, supra*; *Comstock Canada Ltd*. [2002] OLRB Rep. May/June 327; *Kel-Gor Limited*, [2004] OLRB Rep. September/October 956. The degree of proof required is the standard civil law test of establishing a proposition based on the balance of probabilities: *Comstock Canada Ltd.*, 2010 CanLII 26754 (ON LRB), (May 18, 2010); *PCL 2010, supra; Aker Construction Canada Ltd.,* 2010 CanLII 67959 (ON LRB), (November 16, 2010).

10. On this topic, the Board may usefully refer to the decision of the Supreme Court of Canada in *H.F.* v. *McDougall* 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, where the Court stated:

> Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at

> common law and that is proof on a balance of probabilities.
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> ***
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> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

11. At the end of the day, the Board simply must be satisfied that the work assignment should be altered: *Priestly Demolition Inc.* 2006 CanLII 9944 (ON LRB) (March 29, 2006); *Deep Foundations Contractors*, 2006 CanLII 18101 (ON LRB) (May 24, 2006).

12. In this case, there are no relevant trade agreements. The Labourers suggest that the Minutes of Settlement of a grievance between the Labourers and Intrepid is a separate relevant factor that the Board should take into account. The competing trade unions argued about the MOS and the other remaining factors, although argument on the safety, skills and training and economy and efficiency criteria was made with considerably less fanfare and gusto. The Board now proceeds to its analysis of the six factors in play.

ANALYSIS AND DECISION

(a) Collective Bargaining Relationships

13. Both the Carpenters and the Labourers questioned the validity of the other trade union's collective bargaining relationship with Intrepid. Despite the sound and fury of the respective arguments, the

Board finds they are all about form and not about substance. Therefore, the Board finds that this criterion is neutral for the reasons set out below.

14. The Labourers were certified to represent the construction labourers in the employ of Intrepid in 1990. Since that time, the Labourers and Intrepid have entered into a series of collective agreements for Intrepid's construction labourers. Some are styled as "Provincial Heavy Construction Agreements" and some pick up the Windsor Heavy Construction Agreement as a "Reference Agreement". In most instances, there is an explicit reference to concrete formwork but in some cases that explicit reference may be absent.

15. The Carpenters were certified to represent the carpenters and carpenters' apprentices in the employ of Intrepid in 2010. They displaced the Christian Labour Association of Canada ("CLAC"), which previously had represented the carpenters employed by Intrepid. To date, the Carpenters have not entered into a collective agreement with Intrepid, but they have applied for conciliation in respect of their bargaining rights and a Conciliation Officer has been appointed. That was the state of affairs at the time of the filing of this application and remained the state of affairs when the consultation took place.

16. In his declaration, Flo Mandarino, the principal of Intrepid, asserted that Intrepid has applied the terms and conditions of the respective Labourers' and Carpenters' Heavy Construction collective agreements for Board Area No. 1 to the work done by Intrepid's construction labourers and carpenters when performing the work in dispute. Furthermore, the information before the Board indicates that remittances of union dues, pension contributions and other contributions were made to the competing trade unions under the respective collective agreements. Neither trade union provided any persuasive reason to doubt Mr. Mandarino's assertion, which is supported by documentary evidence.

17. Furthermore, the Board has a long history of determining jurisdictional disputes over concrete formwork between the Carpenters and the Labourers. This is a type of work long claimed and performed by both trade unions as is illustrated by the following passage from *UCC Group Inc.* 2014 CanLII 54367 (September 10, 2014):

> 12. The fact that there is an overlap between the skill sets of labourers and carpenters with respect to concrete formwork is again illustrated by the following observation

found at paragraph 20 of *Gisar Contracting Limited*, [1985] OLRB Rep. April 528 where the Board wrote:

> ...just as the use of the term form setter does not necessarily preclude someone from being a carpenter for the purposes of an application for certification by the Carpenters' Union, neither would being a carpenter appear to necessarily preclude that same person from being a form setter under the terms of the Labourers' collective agreement.

13. The commentary found at paragraphs 22 and 23 of *Runnymede Development Corporation Limited*, [1987] OLRB Rep. October 1305 is also instructive:

> ...
>
> 22. Except for bargaining units of or including operating engineers, it is the long-standing practice of the Board to describe bargaining units in the construction industry in terms of trades or crafts (for our purposes these terms are synonymous) rather than in terms of the work performed. This practice recognizes that trade union representation in the construction industry has traditionally been along trade lines and attempts to avoid interfering with established trade union work jurisdictions (see *Robertson-Yates Corporation Limited,* [1979] OLRB Rep. April 344; *Semple-Gooder Roofing Ltd.,* [1983] OLRB Rep. Nov. 1908). Unfortunately, the work jurisdictions of trades do overlap. In addition, as we have already noted, collective agreements in the construction industry often identify the employees in the bargaining unit to which they apply in terms of the work they perform. As a general rule, there is no necessary congruence between the bargaining rights held by a trade union and its work jurisdiction. Consequently, a construction industry trade union does not necessarily have a general absolute right to a particular kind of work, even though that work may be performed by employees whom it represents (which in the construction industry usually means its members) pursuant to the terms of one or more collective agreements. The fact is that, in the construction industry, more than one trade union may have bargaining rights for employees who, though described in terms of different job categories, perform some of the same work. These overlaps give rise to competing

claims for work between trade unions; that is, jurisdictional disputes (see for example *Toronto Star Newspaper Limited,* [1979] OLRB May 451). An application for certification is not the appropriate forum for settling such disputes or for determining the jurisdictional limits of trade unions *(Industrial Lighting and Contracting Limited,* [1979] OLRB Rep. Oct. 985). Further, because the Board's practice in the construction industry is to describe bargaining units in terms of trade rather than work performed, the mere fact that members of one trade union, pursuant to the terms of a collective agreement, perform work that members of another trade union perform as well (for other employers), does not mean that that collective agreement covers that other trade (see *The Frid Construction Company Limited,* [1975] OLRB Rep. March 146; *Graff Diamond Products* (Board File No. 2817-86-R) decision dated June 29, 1987, unreported).

23. Some of the work covered by the Housing Bureau Agreement is work which can be, and is, performed by either construction labourers, or by carpenters or carpenters' apprentices; that is, it is work over which both trades assert jurisdiction. In other words, some of the work covered by the Housing Bureau Agreement can be done by either members of the United Brotherhood of Carpenters and Joiners of America, (the "Carpenters") or by members of the Labourers' International Union of North America (the "Labourers"). It is both "labourers work" and "carpenters work". In such circumstances, the work being performed cannot be determinative of the trade of the person performing it; that is, it is not work belonging to the Labourers just because a labourer is doing it, nor is it work belonging to the Carpenters just because a carpenter or carpenter's apprentice is doing it. An employee is not a construction labourer merely because s/he is doing work that a construction labourer sometimes does if carpenters also perform that work as part of their trade. Consequently, the fact that members of the intervener sometimes perform work (for the respondent) that carpenters also do does not mean that the intervener represents all carpenters employed by the respondent.

...

14. To the same effect are the following statements from

> the Board in *Ellis-Don Limited*, [1988] OLRB Rep. December 1254 at paragraph 32:
>
> > ...It may also be that both carpenters and labourers are able to build, erect and set concrete forms .... form setters may be, but are not necessarily, carpenters (and vice versa) ... The same can be said for form builders.
>
> 15. There are many more examples of contests between the Labourers and Carpenters over the performance of various aspects of concrete formwork over the past 25 years including *Ellis-Don Limited*, [1993] OLRB Rep. November 1130 ("*Ellis-Don 1993*"); *Rapid Forming Inc.*, [1996] OLRB Rep. January 26; *Well-Bur Construction Ltd.*, [1998] OLRB Rep. January/February 124 ("*Well-Bur January*"), reconsideration denied [1998] OLRB Rep. March/April 339 ("*Well-Bur March*"); *Dineen Construction Corp.*, 2005 CanLII 25499 (July 14, 2005); *PCL Constructors Canada Ltd.*, [2010] OLRB Rep. September/October 672 ("*PCL Hamilton*"); *PCL Constructors Canada Inc.*, [2010] OLRB Rep. November/December 771 ("*PCL North Bay*"); and *PCL 2014 supra*.

18. Very recently, the Board determined yet another dispute between Carpenters and Labourers over concrete formwork in *TC Contracting Inc.*, 2015 CanLII 54967 (August 28, 2015).

19. The Labourers say that the Board should discount the Carpenters' claim under this criterion because the Carpenters do not have a signed collective agreement with Intrepid. The Board does not agree.

20. There is no doubt that the Carpenters hold bargaining rights for Intrepid's carpenters. The Board can certainly take administrative notice that building forms to receive concrete is a well-established task within the work jurisdiction of a construction carpenter, as reflected in the case law referred to above. No more is necessary to establish a relevant collective bargaining relationship for the purpose of this criterion. There is an equally long history of construction labourers performing concrete formwork. Exactly the same reasoning can be applied to the Labourers' claim.

21. The case law supplied by the Labourers does not provide any reason for the Board to depart from this line of reasoning. The Labourers cite the decisions of the Board in *Groff & Associates Ltd.*, [1994] OLRB Rep. July 846; and *Alliance Verdi Civil Inc.*, [2011] OLRB Rep. January/February 1. Neither case is of assistance on this point. In *Groff*, the challenging trade union had no collective bargaining relationship at all with the employer, but that is not the case here. In *Alliance*, the Board decided that the Carpenters' superior collective bargaining relationship claim in that case was outweighed by the countervailing consideration that the Labourers had superior area and employer practice claims in finally determining that jurisdictional dispute. That is a totally different issue than assessing which trade union has a superior claim under the collective bargaining relationship criterion.

22. The Board is satisfied that the certifications of the Carpenters to represent carpenters' and carpenters' apprentices and Labourers to represent construction labourers, coupled with the history of Intrepid applying and making remittances to the two trade unions under their respective Board Area No. 1 Heavy Construction Collective Agreements, are sufficient to give both trade unions equally valid collective bargaining relationship claims to the work in dispute.

23. For all these reasons, the Board finds the collective bargaining relationship criterion to be neutral.

(b) The Minutes of Settlement

24. The Labourers rely upon Minutes of Settlement of a grievance between the Labourers and Intrepid dated March 18, 2008 ("the MOS"). The text of the MOS reads as follows:

> **WHEREAS Local 625 and the OPDC have filed a grievance against the Employer in Board File 3696-07-G with respect to Intrepid's violation of the Provincial Civil Agreement (the "grievance");**
>
> **AND WHEREAS the parties wish to settle the grievance;**
>
> **THE PARTIES AGREE AS FOLLOWS:**
>
> 1. Intrepid agrees that it is, and was at all times material to the grievance, bound by and party to the Labourers'

Provincial Civil Collective Agreement (the "Agreement"), effective February 1, 2005 to January 31, 2008 and thereafter, as renewed and amended from time to time.

2. Intrepid agrees that it violated the Agreement by hiring two non-members of Local 625 to perform concrete forming work on a bridge or culvert, which work is within the exclusive jurisdiction of the Labourers' Union under the Agreement, and by failing to call the Local 625 Office for required personnel, or to obtain a clearance card.

3. Intrepid warrants that it is not employing any non-members of Local 625 to perform concrete forming work outside of the ICI sector, and agrees that to do so constitutes a violation of the Agreement.

4. Intrepid agrees that at all material times Local 625 had employed members who were ready willing and able to perform all necessary concrete forming work, and agrees to pay to Local 625 the sum of $1000.00 as damages in accordance with the principle set out in *Blouin Drywall.*

5. The parties agree that the grievance is hereby settled, and Local 625 and the OPDC will write to the Board and request that the Board terminate the proceeding in Board File No. 3696-07-G.

25. There are two very important facts to be noted about the MOS. Firstly, the Carpenters were not a party to it. Secondly, it predates the Carpenters' certification for Intrepid's carpenters. For these reasons, the MOS cannot be binding upon the Carpenters or determinative of the resolution of this work jurisdiction dispute. The MOS does provide proof that there is a binding collective agreement in place between Intrepid and the Labourers that covers the work in dispute, but there is already ample proof of that in the declaration of Flo Mandarino and elsewhere in the documentary materials.

26. Therefore, the Board finds that consideration of the MOS does not add anything to the weight of the Labourers' case. While the MOS is not irrelevant as claimed by the Carpenters, neither is it a document that assists the Board by adding anything material to its analysis. The fact that the MOS purports to exclusively assign concrete formwork to the Labourers cannot detract from the claim of the Carpenters who were afforded no opportunity to contest the MOS before it was signed. The MOS is therefore another neutral factor.

(c) Safety, Skills and Training

27. At the consultation, Intrepid took the position that both trades have the skills and training to perform the work in dispute safely and well. The Carpenters say that is true, but that its members perform it better. The Labourers acknowledge the ability of the members of the Carpenters to perform the work in dispute, but doubt the ability of Carpenters to supply skilled workers to Intrepid. However, the Labourers have nothing beyond mere supposition to support their argument on the latter point.

28. In the Board's view, there is ample proof in the documentary materials of members of both competing trade unions performing the work safely and well on many occasions.

29. This factor is likewise neutral.

(d) Economy and Efficiency

30. The Carpenters argue that their members perform the work more economically and efficiently, while the Labourers say it is more economical and efficient to do it with members of one trade rather than two.

31. Again, the documentary materials evidence many instances of the work being completed successfully by Labourers only crews, and by mixed crews of Carpenters/CLAC and Labourers members. There is nothing inherently inefficient about a mixed trade crew or inherently efficient about a single trade crew. It all depends on the facts of the particular case.

32. However, on the facts of this case, there is no objective basis to favour the economy and efficiency claim of one trade over the other.

33. This factor too is neutral.

(e) Employer Practice

34. In *Comstock Canada Ltd.,* [2002] OLRB Rep. Jan./Feb. 14, the Board discussed the parameters that have been developed for the reception and assessment of employer practice evidence in a jurisdictional dispute:

> 22. The relevant employer practice evidence has been defined as work assignments made by the employer that performed the work in dispute on similar work in the same sector anywhere in the province.

35. This approach has been followed in many more recent cases, including: *Deep Foundations supra; Lockerbie & Hole Eastern Inc/Adam Clark Company Ltd.* (2008), 153 Can L.R.B.R. (2d) 1; *Aker supra; Bruce 2014 supra.*

36. In this case, the relevant sector is the heavy engineering sector.

37. The parties disagreed over the temporal scope the Board should consider when assessing employer practice. There are three potential alternatives: (i) beginning with the Labourers' certification in 1990; (ii) beginning with the MOS signed in 2008; (iii) beginning with the Carpenters' certification in 2010.

38. The Board finds that the appropriate temporal scope is the period running from the date of the Carpenters' certification to the date of the filing of the jurisdictional dispute for the reasons set out below.

39. For the period prior to its certification in 2010, the Carpenters did not have a collective bargaining relationship with Intrepid. Given the importance of the collective bargaining relationship criterion, whereby the absence of a collective bargaining relationship makes it very difficult for a trade union to succeed in a jurisdictional dispute, the opportunity for the Carpenters to effectively contest a work assignment by Intrepid prior to 2010 was minimal, if not non-existent. Prior to that time, the bargaining rights for Intrepid's carpenters were held by CLAC.

40. CLAC is a well-established presence in the world of construction industry trade unions. However, it represents bargaining units of all unrepresented trades. CLAC is not a craft union. Prior to 2010, the Board would have had to assess competing claims by CLAC and the Labourers, not competing claims by the Carpenters and Labourers. Therefore, comparing events predating the Carpenters' certification with events postdating the Carpenters' certification would be comparing apples to oranges, instead of apples to apples. Hence, it is simply irrelevant if carpenters represented by CLAC performed the

work in dispute exclusively from 1990 to 2008 as claimed by the Carpenters, or if the Labourers performed it exclusively from the date of the MOS to the date of the Carpenters' certification as claimed by the Labourers. Sound labour relations reasons indicate that the Board should look to the period where the two competing trade unions stand on an equal footing as far as collective bargaining relationships are concerned.

41. Accordingly, the Board will examine the period from the date of the Carpenters' certification to the date of the filing of this application. The Board notes that in *TC Contracting supra*, employer practice predating the acquisition of bargaining rights by one of the competing trade unions was also discounted.

42. The parties have each filed declarations and other materials addressing this issue. Of the competing declarations, the Board finds the declaration of Flo Mandarino most persuasive. The declarations filed by the carpenters and labourers employed by Intrepid are less persuasive for the reasons set out below.

43. Firstly, the Board notes that the work in dispute consists of work performed by members of the Carpenters on culverts. It does not consist of work done on bridges. Nor does it include tasks regularly performed by the members of the Labourers on bridge and culvert projects that do not form part of the work in dispute such as chipping concrete, pouring concrete, vibrating concrete or general clean-up. Therefore, the relevant practice must be limited to concrete formwork similar in nature to the work performed by the Carpenters' members on the culvert projects in question.

44. The net result is that Intrepid had five projects during the relevant period, not counting the projects that form the work in dispute. On all of these projects, one or more members of the Carpenters was performing the work in question, and on all projects a member of CLAC was also performing this work. The member of CLAC performing the work was Jack Louwerse, whose right to do so was "grandfathered" by both competing trade unions. The time sheets submitted by Intrepid confirm this and belie the assertions in numerous declarations of Labourers' members that no carpenters were even on these projects, or that the carpenters were immediately removed by the Labourers' Business Representatives.

45. More specifically, the Board finds that all of the following projects are information in favour of the Carpenters: Campbell Side Road, Essex, 2010; Dickson Drain Culvert, Essex, 2010; Vasik Line Culvert, Chatham-Kent, 2010; 3rd Concession Line, Chatham-Kent, 2010; and River Canard Bridge Culvert, Essex, 2011. In his declaration, Mr. Mandarino is quite clear that he assigned this culvert work to composite crews including Carpenter and Labourer members. His declaration on this issue is convincing. The declarations of the Carpenter and Labourer members that they each did all the work to the exclusion of the other trade are not credible in light of the documentary evidence, and the realities of how a concrete formwork construction site works. There is no doubt construction labourers were on these sites and did work not claimed by the Carpenters and not part of the work in dispute, and likely some of the work in dispute. However, members of the Carpenters definitely were there and performing the work in dispute as assigned by Intrepid. The final count is 5-0 in favour of the Carpenters.

46. Accordingly, the employer practice criterion favours the Carpenters.

Area Practice

47. In assessing area practice, the Board's normal practice is to examine work performed in the Board Area within that sector of the construction industry in which the work in dispute falls: *Kvaerner Contractor Ltd.*, [2004] OLRB Rep. May/June 756; *Bruce 2014, supra*.

48. The competing trade unions dispute whether the Board should consider only the practice of employers who have collective agreements with both trade unions or whether the Board's consideration should also include the practice of single trade contractors.

49. The Board has consistently held that where there is area practice evidence of work assignments by contractors having collective bargaining relationships with both competing trade unions ("dual trade contractors"), the Board will give little or no weight to work assignments by contractors having collective agreements with only one of the competing trade unions ("single trade contractors"): *Ecodyne Limited, supra*; *Ellis-Don Ltd.*, [1999] OLRB Rep. January/February 28, reconsideration denied [1999] OLRB Rep. March/April 193. There is a sound labour relations reason underpinning this approach, namely that

the trade union without a collective bargaining relationship had no effective opportunity to contest the work assignment made by the single trade contractor: *Bondfield Construction Company (1983) Limited*, [2002] OLRB Rep. March/April 114; *Eastern Construction Company Limited*, [2002] OLRB Rep. September/October 784; *PCL 2004, supra*; *Chem-Thane Engineering Inc.,* 2005 CanLII 3105 (February 3, 2005).

50. There are limited circumstances where the Board will give weight to the practice of single trade contractors. Those circumstances are identified in the case relied on by the Labourers: *Alliance supra*. Those circumstances are where there is an "absence of dual trade area practice". The Board in *Alliance* also made the following observations at paragraph 38 thereof:

> 38. It is intuitive that for the purposes of a work assignment dispute the area practice of dual trade contractors is preferable to the area practice of single trade contractors. When considering work assignment disputes the Board looks for evidence that work similar in nature to the work in dispute has been assigned by area employers more often to one trade over the other. In circumstances where the assigning employer is bound to both trades, the evidence of which trade has had the work assigned to its members reflects a choice made by the contractor in question. In addition, the existence of dual collective agreement obligations allows the trade not assigned the work to challenge the choice made by the contractor. If that trade chooses not to do so, a conclusion may be drawn as to the appropriateness of the assignment made by the contractor.

51. The Board will now apply the legal principles set out in the jurisprudence to the facts of this case. This is not a case where one of the competing trade unions had no area practice at all, which was the state of affairs in *Alliance supra*. According to the information before the Board, there are three groups of unionized contractors which perform the work in dispute in Board Area No. 1. The first and largest group is single trade Labourers contractors. The second smaller group is single trade Carpenters contractors. Finally, the third group consists of two dual trade contractors: Intrepid and Elmara Construction Company Ltd. ("Elmara").

52. Therefore, both competing trade unions have a history of organising contractors performing the work in dispute. This is not an

instance where one competing trade union has no area practice at all. There are numerous single trade contractors out there performing the work with either Carpenters or Labourers. It would not be appropriate for the practice of those single trade contractors who only deal with one trade union to determine the practice of dual trade contractors who have collective bargaining relationships with both trade unions.

53. Accordingly, the Board will only have regard to the practice of the dual trade contractors performing the work in dispute in Board Area No. 1.

54. The Board has already dealt with the information pertaining to Intrepid. As for Elmara, there is information from Elmara's Vice-President, supported by declarations from members of the Labourers that Elmara assigned concrete formwork on culverts to members of the Labourers on two projects in the relevant time period: Mill Creek Culvert, Kingsville, 2011; and Honeywell, Amberstburg, 2012. The only information the Carpenters rely on to rebut this information is a declaration from Carpenters' Business Representative Tomi Hulkkonen that the President of Elmara told him at some specified time that Elmara has not worked on concrete box culverts since 2007. The Board will not place any weight on Mr. Hulkkonen's declaration in this respect, as the contents are clearly hearsay, there is no declaration from Elmara's President, and all parties agree that the Carpenters were certified for Elmara in 2009 when its members were performing concrete formwork. This also means that the Vice-President of Elmara was exaggerating on behalf of the Labourers when he said Elmara had "never" employed Carpenters' members to perform concrete formwork, but that puffery does not cause the Board to disregard the documented evidence that demonstrates the Labourers performed concrete formwork on the two aforementioned projects. Therefore, the practice of Elmara favours the Labourers.

55. The net result for area practice is that Intrepid assigned the work in dispute on 5 projects to the Carpenters, while Elmara assigned the work in dispute on 2 projects to the Labourers. Given these facts, there is no clearly predominant area practice.

56. Accordingly, the Board finds the area practice criterion to be neutral.

CONCLUSION AND DISPOSITION

57. For the reasons given above, the Board finds all of the relevant factors to be neutral, except for employer practice which favours the Carpenters. Accordingly, the Labourers have not met the onus of proving the work assignment to the Carpenters is wrong.

58. Therefore, the Board hereby confirms the assignment of the work in dispute to the members of the Carpenters and hereby grants this application. The Board's decision is limited to determining the particular issue before it in this case. Nevertheless, the Board wishes to note that the information before it clearly indicates that both carpenters and labourers are capable of performing the work in dispute and co-operating with one another to get the work done safely and efficiently. The Board urges the parties to carefully consider this in their relationships going forward.

"Jack Slaughter"
for the Board