Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1816-14-JD**

Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183, Applicants v **Quantum Murray LP**, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers and its Local 721, The International Union of Painters & Allied Trades and Ontario Power Generation Inc., Responding Parties

BEFORE: Jesse M. Nyman, Vice-Chair

APPEARANCES: Lorne A. Richmond, Kristaq Lala, Billy Barbosa, Luis Pimental, F. Massari and R. Teixeira for the Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183; Blair McCreadie, Peter Keohane and Frank Meisner for Quantum Murray LP; Rob Gibson and Thomas Black for the International Union of Painters & Allied Trades; Rob Gibson and Marc Arsenault for the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers and its Local 721; no one appearing for Ontario Power Generation Inc.

DECISION OF THE BOARD: June 8, 2015

1. This is a jurisdictional dispute filed with the Board pursuant to section 99 of the *Labour Relations Act, 1995,* S.O. 1995, c.1 as amended (the "Act").

2. By decision dated October 23, 2014 the Board, differently constituted, described the work in dispute as follows:

> 3. Having regard to the agreement of the parties, the description of the work in dispute is as follows:

> all work, including moving, handling and rigging work in connection with the removal and disposal of all existing parapet walls, including any flashing and vertical insulated metal sandwich panels, all existing exterior glazing and prefinished insulated metal sandwich panels and soffits from roof level down to top of precast concrete wall panels at Ground floor, including but not limited to all steel framing supports, slab edge tie ins, insulation and firestopping, all existing steel angles and structural beams, which took place at the Darlington Nuclear Power Development Operating Support Building ("OSB") of Ontario Power Generation Inc.

3. The work in dispute can be described generally as dismantling the existing curtain wall at the Operating Support Building ("OSB") for scrap. I use the term "dismantling …for scrap" because, as will become apparent, whether the work is ultimately found to be "demolition or "removal and replacement" of the curtain wall has a substantial impact on the resolution of this proceeding. While no linguistic term is perfect, dismantling for scrap is intended to be neutral, recognizing the positions of the parties.

4. The OSB is located at Darlington Nuclear Generating Station ("Darlington") in Board Area 9.

5. The work dismantling the existing curtain wall at the OSB for scrap was part of the work related to the refurbishment of the OSB. This ultimately involved stripping the OSB down to its concrete base structure and then rebuilding it.

6. Ontario Power Generation Inc. ("OPG") subcontracted much of the refurbishment work on the OSB to Black & McDonald. Black & McDonald self-performed some of that work, including in particular the disconnection and removal of the mechanical systems. Black & McDonald also subcontracted out some of the work. The disconnection and removal of the electrical system was subcontracted to an electrical contractor called Areva. Work that was described at the mark-up meeting as the demolition of the interior finishes and exterior finishes to the base building was subcontracted by Black & McDonald to EllisDon who in turn subcontracted this work to the responding party, Quantum Murray LP ("Quantum").

7. The work in dispute was part of the work subcontracted to Quantum. Quantum assigned all of the work it performed, including the work in dispute, to members of the applicant, Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 (the "Labourers"). In this proceeding, the responding parties, the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers and its Local 721 (the "Iron Workers") and the International Union of Painters & Allied Trades (the "Glaziers") claim that the work in dispute should have been assigned to their members to perform in a composite crew with all work functions being performed interchangeably.

8. Once a portion of the existing curtain wall was removed, the installation of the new curtain wall began. For a period of time, the Labourers were removing portions of the existing curtain wall in one area of the OSB and the Iron Workers and Glaziers were installing portions of the new curtain wall in another.

Failure to Claim the Work in Dispute at the Mark-Up Meeting

9. The Labourers and Quantum assert that the Board ought to dismiss the Iron Workers' and the Glaziers' claim because the Glaziers failed to claim the work in dispute at the mark-up meeting or at any reasonable time thereafter. The chronology of events is not in dispute.

10. On March 17, 2014, Quantum held a mark-up meeting for the purpose of assigning what it described as "OSB Demolition". The Glaziers attended the meeting. The Iron Workers did not. At the meeting, Quantum proposed to assign work described as the "Demolition of Interior Finishes… [and] Exterior Finishes to Base Building" to the Labourers. The Glaziers did not claim any of this work.

11. On March 21, 2014, the minutes of the mark-up meeting were distributed by email. On March 25, 2014 the Iron Workers emailed Quantum and the Labourers (and the other relevant parties) and claimed "Exterior Finishes to Base Building. More specifically, all curtain wall, archetecural [*sic*] metal dismantle/demolition and associated civil Hot Work support."

12. On March 28, 2014, Quantum confirmed its tentative assignment of all of its work to members of the Labourers. The dismantling of the existing curtain wall commenced on or around July

17, 2014. On July 18, 2014, the Iron Workers grieved Quantum's assignment of the work in dispute. On July 22, 2014, that grievance was referred to the Board.

13. On August 12, 2014, the Glaziers grieved Quantum's assignment of the work in dispute.

14. The Labourers commenced this proceeding on September 23, 2014 by filing a Notice of Jurisdictional Dispute. Both the Glaziers and Iron Workers asserted in their Response to the Notice of Jurisdictional Dispute that the work in dispute was the "trade specific removal and/or replacement in respect of curtain wall…".

15. On October 23, 2014, the Board convened a pre-consultation conference. At the pre-consultation conference, the Glaziers and Iron Workers asserted that the work should be performed by a composite crew made up of their respective members.

16. The work in dispute was substantially completed in early November, 2014.

17. The Labourers and Quantum rely on a number of cases where the Board has held that a union's failure to claim the work in dispute at a mark-up meeting disentitled that union from subsequently pursuing a claim for the work in a jurisdictional dispute proceeding before the Board. In *Tornado Insulation Ltd.*, 2003 CanLII 45413 the Board held as follows:

> 3. Tornado either held or was one of the employers participating in a mark-up meeting that was called for the relevant trades before commencing this project. A mark-up meeting was held on November 2, 2001. At that meeting, the Labourers did not claim the work in dispute. Mr. Robert Leone, Business Manager of Labourers Local 1089, filed a declaration which states:
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> > "Local 1089 did receive notice of a mark-up meeting in connection to the Shell Hydrotreater project. I attended the mark-up meeting on behalf of Local 1089. At that time, I did not think it was necessary to claim the mixing and clean-up portion of the work because it was not specifically mentioned and I believed that it would be performed by labourers in the employ of DiCocco. DiCocco is a company in contractual

> relations with Local 1089, which was generally supplying labourers to work with the companies involved on that project".
>
> The work was performed from June to October 2002. A grievance was filed by Labourers Local 1089 against Tornado on September 20, 2002 but was not referred to arbitration. No copy of the grievance was filed in these proceedings. I was not advised of what discussions, if any, took place among the parties or any of them with respect to the filing of a grievance or a possible jurisdictional dispute. In any event, Labourers Local 1089 on January 15, 2003 filed a notice of jurisdictional dispute.

4. This failure on the part of Labourers Local 1089 to claim the work at a mark-up meeting is, in my view, fatal to the Labourers' claim in this application. It may well be true that the specific work was not mentioned. On the other hand, Mr. Leone was aware that the work would be necessary to be performed, and believed that this was work that his members would be assigned to perform.

5. *The purpose of a mark-up meeting is to assist an employer in deciding which trades should be assigned which work. An employer must know what work is claimed so that it can make an informed decision about work assignment. Building trades unions are typically not shy about setting out their work jurisdiction claims, or reluctant to state those claims to their fullest extent. Any employer who holds a mark-up meeting and does not hear a claim from a particular union is entitled to assume that that union does not claim the work on that job. Where another union does so, it would be an unusual situation where an employer would refuse to assign it to the trade asking for it (assuming that claim was a reasonable one) and assigning it to a trade that, by its silence, indicates it does not claim the work*.

[emphasis added]

18. The Labourers also relied upon *Canadian Union of Skilled Workers v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry Local 527*, 2014 CanLII 75773. In that case the UA failed to claim certain piping work at the mark-up

meeting and then filed a jurisdictional dispute. The Board dismissed the jurisdictional dispute on the basis that the UA had failed to claim the work at the mark-up. In reaching that conclusion, the Board reasoned as follows:

> 22. The Board's case law on this point is consistent. A union that does not claim work at a mark-up meeting will not be able to ask the Board to adjudicate its claim. In *Tornado Insulation Ltd*. 2003 CanLII 45413 (ON LRB), 2003 CanLII 45413, the Board dealt with a similar motion on very similar facts...
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> 23. This principle has been followed consistently by the Board since then. Indeed, the cases that the UA relied on are all cases where the Board distinguished the facts in those cases from the facts in *Tornado*, above. They are all cases where the work was misleadingly characterized or innocently mischaracterized or was not assigned in the way at least one of the parties reasonably understood them to have been assigned: *Kiewit Alarie* 2012 CanLII 76093 (ON LRB), 2012 CanLII 76093 (only in part, in part the claim was dismissed); *E. S. Fox Limited* 2010 CanLII 15374 (ON LRB), 2010 CanLII 15374; and *Aecon Industrial* 2009 CanLII 20475.
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> 24. This is not an empty formulaic rule designed to trap the unwary. Mark-up meetings are an important opportunity for eliminating disputes or reaching agreements or compromise before the work actually begins. They provide unions an opportunity to persuade a contractor to change his initial assignment. The Board agrees with Mr. Zorzi that a contractor should be prepared to engage in full, frank and detailed discussion of the work to be performed. However the Board equally expects parties to act rationally in their own self-interest. If a union representative is unclear about the work that is being performed, he or she should ask. Indeed, Mr. Zorzi did so in this case. If he or she believes or suspects that there is other work, the representative should ask about it. Absent some misinformation or refusal to answer a question, there is no good reason not to inquire fully and to claim work that is identified, regardless of whether the representative anticipates the work may not be discussed or may be deferred to some other time.

> 25. The use of a mark-up meeting is not something invented by the Board. It appears to have arisen in the construction industry in the 1930's at least, and to have found formal expression in the *Plan for Settlement of Jurisdictional Disputes in the Construction Industry* sponsored by the Building Trades Department of the AFL-CIO. It was the parties in the industry who sought to address the issue of conflicting jurisdictional disputes before there were labour boards at all. The Board has adopted and accepted that industry generated dispute resolution mechanism where it still has some meaning. Where a mark-up meeting is not a common practice, typically in residential or civil construction, the Board has never attempted to force this sort of mechanism on anyone.
>
> 26. The mandate of the Board is to resolve disputes in the construction industry that cannot be resolved in the workplace, not to run the construction industry in its entirety. If the parties do not use the forum created by the industry to attempt to put forward their claims at the mark-up stage, or earlier if possible, and to attempt to resolve the conflicts that emerge from those claims, then the Board will not, and should not, become the initial or primary forum in which to resolve them.
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> 27. In the end, any jurisdictional dispute application is an attempt to persuade the Board to find that an employer was incorrect in assigning the work to one trade rather than another. An employer can hardly be faulted for not assigning work to a trade that has expressed no interest in doing the work.

19. The Labourers also referred to *H.B. White Canada Corp*., 2015 CanLII 23632 in which the Board affirmed and followed the principles set out in the passages reproduced above.

20. The Labourers argue that the Glaziers' claim is clearly untimely. It was not made at the mark-up or within a reasonable time thereafter. The Labourers argue that therefore the Board must dismiss the Glaziers' portion of the claim to the work in dispute.

21. The Labourers go further and argue that in addition, by virtue of the fact that the Iron Workers are claiming the work in dispute ought to be assigned to a composite crew made up of its members and members of the Glaziers, the Board must also dismiss the Iron Workers' claim. The Labourers argue that having hitched themselves to the untimely claim of the Glaziers, the Iron Workers claim must also be dismissed, notwithstanding the fact that the Iron Workers made a timely claim of their own to the work in dispute.

22. Quantum supported the Labourers' arguments on the impact of the Glaziers' failure to claim the work at the mark-up. Quantum referred the Board to *Comstock Canada Ltd.*, [2010] OLRD No. 619 which follows and adopts the Board's approach in *Tornado*, *supra*.

23. As the foregoing cases make clear, a trade union's failure to claim the work at a mark-up meeting (or within a reasonable time thereafter) will generally disentitle that trade union from subsequently seeking relief from the Board. If the only claim and only consideration in this case were the Glaziers' claim for the work in dispute, I would have no difficulty concluding that the jurisdictional dispute ought to be dismissed. No explanation was given as to why the Glaziers waited five months after the mark-up and one month after the work in dispute commenced to formally assert their claim.

24. However, the approach urged by the Labourers and Quantum is too draconian in my view. No one asserted that the Iron Workers failed to make a timely claim. Moreover, the Iron Workers claim was to all of the work in dispute. The only distinction between the Iron Workers claim following the mark-up and their position before the Board is that they claim the work should have been performed with the Glaziers.

25. The basis for the composite crew assertion is a Memorandum of Agreement ("MOA") entered into in 1999 between the Glaziers Local Union 1819 and the Iron Workers. The MOA resolved a number of outstanding Board proceedings between the two Local unions. Pursuant to that MOA, the Glaziers and Iron Workers agreed that the performance of certain work, including work installing and removing curtain wall, within the geographic jurisdiction of the two Local unions, must be performed by a composite crew made up of equal numbers of members of both unions, performing the work interchangeably. In addition, they agreed that where such work is assigned to persons who are not members of either union, both unions will grieve and claim the work. Thus, in the circumstances of this case, the claim that the work

in dispute ought to be performed by a composite crew is simply recognition of and adherence to the MOA entered into in 1999.

26. If the Glaziers had never intervened and Iron Workers had simply pursued their claim, there would be no argument that the Iron Workers claim ought to be dismissed on the basis that it was not asserted in a timely manner. Moreover, if the Iron Workers were successful in asserting a claim on their own (either at the mark-up or in a subsequent jurisdictional dispute proceeding), they would then be obligated pursuant to the MOA to recognize that half of the crew must be comprised of members of the Glaziers. In this way, the Glaziers' participation is really compliance with the MOA by both the Glaziers and the Iron Workers at the front end of this jurisdictional dispute, as opposed to after a determination is made. In my view, this is not a basis on which the Iron Workers claim should be dismissed. In other words, the Iron Workers should be no worse off because they were obligated to recognize that the claim they made was on their behalf and on behalf of the Glaziers.

27. Second, while I agree with the Board's comments in the cases above that the Board should encourage parties to comply with jurisdictional dispute resolution procedures that they have created, I am also of the view that the Board should encourage parties to live up to the jurisdictional trade agreements and settlements they reach. Penalizing the Iron Workers in the circumstances of this case for observing the terms of their settlement and trade agreement sends the wrong message.

28. Finally, the timely claim by the Iron Workers means that at the time it made its final assignment Quantum was not in a position of choosing between the Labourers and no union as was the case in *Tornado*, *supra* and *Canadian Union of Skilled Workers*, *supra*. Quantum was choosing between the Labourers (the trade it had already tentatively assigned the work in dispute to) and the Iron Workers. Moreover, there was no suggestion in any of the Briefs or submissions that Quantum would have made any different assignment had the Glaziers asserted their claim earlier. Ultimately, I do not find that this is a case where the trade union parties so failed to make use of the institutional jurisdictional assignment procedures they created that the Board ought to decline to inquire into this jurisdictional dispute.

"Demolition" or "Remove and Replace"

29. The parties agreed that the Iron Workers and Glaziers bear the onus in this case. The onus on a trade union claiming a work assignment ought to be overturned was explained by the Board this way in *KEW Steel Fabricators Ltd.*, 2006 CanLII 2118:

> 12. In this case, the Iron Workers are the named applicant, but it is really the Sheet Metal Workers who are seeking something from the Board. They bear the onus. They do not bear any higher obligation than any other party seeking relief from the Board.
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> 13. It is true that the reasoning process the Board undertakes in a jurisdictional dispute is somewhat different from that undertaken in most other applications. A jurisdictional dispute is more of an interest dispute than simply a rights dispute. The Board must be sensitive to the limitations of a jurisdictional dispute process in terms of the fact-finding function. The Board must also be alive to the reality of the need to ground the jurisdictional claims of a trade union in the real and practical world of construction projects. Such projects frequently involve making fairly quick decisions in the context of what may be complex construction projects that are often difficult to plan in detail in advance. That is simply part of the Board's evaluative process in making a decision. It does not mean that a trade union must meet any greater or higher standard of proof or persuasion.
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> 14. This is not simply verbal formulation. In its argument, KEW argued that this higher standard applied to every factor that the Board considers in determining a jurisdictional dispute. The Sheet Metal Workers argued that economy and efficiency favoured neither trade. The Iron Workers and KEW argued that it favoured the Iron Workers. KEW went further and said that there was an onus on the Sheet Metal Workers to demonstrate that it was more efficient to use sheet metal workers than ironworkers and that therefore KEW was "clearly wrong" in the sense of operating in a manner that was clearly less efficient by using ironworkers rather than sheet metal workers.

> 15. That argument, of course, confuses the overall onus in a case (in this case, on the Sheet Metal Workers) with the burden of persuasion on a party seeking to assert a particular fact for conclusion (in this case, the Iron Workers and KEW). More than that, it demonstrates the error of the kind of formulation of the onus question quoted above.
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> 16. The onus on the Sheet Metal Workers is to demonstrate, on a balance of probabilities, that the work should have been assigned to them rather than to the Iron Workers, having regard to all of the relevant factors in the case. That is all that the onus is, and there is no need to state it in any grander terms.

30. The factors the Board typically considers in a jurisdictional dispute proceeding are fairly well established. In *Ecodyne Limited*, [1997] OLRB Rep. Mar./Apr. 197 the Board explained the analysis this way:

> 14. In jurisdictional dispute complaints, the Board will consider everything which is relevant. Accordingly, it is neither possible nor appropriate to describe an exhaustive list of factors, or to construct or mechanically apply some formula or "checklist" in that respect. Nevertheless, the Board has developed a general practice, which has been accepted by the construction industry, of referring to several broad overlapping categories and factors which it will consider. These were first set out some 30 years ago in *Canada Millwrights Ltd*., [1967] OLRB Rep. May 195, as follows:
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> - trade union constitutions and collective agreement;
> - skill, training and safety;
> - economy and efficiency;
> - employer practice and preference;
> - area practice.
>
> 15. In any given case, some of these five general factors will be of little or no assistance.

31. In this case, a great deal hinges on how the work is ultimately characterized because of the way in which the parties prepared their briefs. If the work in dispute is characterized as "demolition work" the Iron Workers and Glaziers have very little, if any, evidence to support

their claim. The same is true of the Labourers and Quantum if the work is found to be "remove and replace" work.

32. The Iron Workers and Glaziers argue that on EPSCA sites there is a clear demarcation line between "demolition" and "remove and replace" work. They argue that this demarcation line is reflected in Board jurisprudence that emanates from an established Ontario Hydro policy.

33. The starting point of the Iron Workers' and Glaziers' argument is the Board's decision *Ontario Hydro*, [1993] OLRB Rep. March 227. That case involved a dispute over the "removal for scrap of exterior sheet metal siding from the roof of the Bruce Nuclear Power Developments Steambridge – Reactor and Turbine Buildings." The work had been assigned to members of the Labourers and was claimed by members of the Sheet Metal Workers. The Board ordered that the work in dispute ought to have been assigned to the Sheet Metal Workers, to the first drop point. In reaching this conclusion the Board reasoned as follows:

> 10. On the other hand, the Sheet Metal Workers were able to point to Hydro's own written policy with respect to the assignment of "removal" work. This policy appears in various forms, although its thrust is consistent. The following example, taken from documents with respect to a Hydro mark-up meeting held on January 17, 1991 is as clear a statement of that policy as any;
>
> > *the trade group who installed the equipment/system will be assigned the removal activity the trade assigned the removal will move the equipment or system to the first drop point*.
> >
> > if the equipment/material is considered "scrap" the labours will be assigned the removal from the first drop point to the loading area. (Subject to trade work assignments and agreements)
>
> [*sic*]
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> The Sheet Metal Workers were also able to provide a number of examples of assignments of work like the work in dispute herein by Hydro to their members, and also examples of applications of the aforesaid Hydro

> policy to the removal of material installed by other trades.
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> 11. *The Board was satisfied that Hydro's express policy is to assign removal work of scrap material to the installing trade as far as the first drop point*, and that this policy favoured the Sheet Metal Workers claim to the work in dispute. Further, Hydro's own practice in the Board Area #3 has been consistent with that policy insofar as the assignment of work through the mark-up process is concerned. Because assignments made through a mark-up process are greater weight than field assignments, the factor of area practice favoured the Sheet Metal Workers as well.
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> [emphasis added]

34. The Iron Workers and Glaziers also referred to *T.A. Andre & Sons (Ontario) Ltd.*, 2001 CanLII 14003. In that case the work in dispute was the dismantling and removal of sheet metal siding and other equipment from the Lennox Generating Station for reuse at a location off Ontario Hydro property. Once again the work was assigned to members of the Labourers and claimed by members of the Sheet Metal Workers. This time the Board upheld the assignment to the Labourers. In the course of its reasons the Board found as follows:

> 11. In *Ontario Hydro, supra*, the Board dealt with the removal for scrap of sheet metal material. In this application, the work in dispute involves the dismantling of a structure and the removal of material for reuse at a location not owned or operated by Ontario Hydro. The Board agrees with the argument raised by the Sheet Metal Workers that the ratio in *Ontario Hydro, supra*, favours the assignment to its members of the dismantling of the sheet metal components of a structure should the materials be removed for reuse. The Board disagrees, however, with the position taken by the Sheet Metal Workers that the fact the materials are to be reused at a location not owned or operated by Ontario Hydro is irrelevant and should not be taken into consideration in creating a distinction from the general proposition that the dismantling of a structure and the removal of materials for reuse should be assigned to members of the installing trade.

12. The Board is satisfied that Ontario Hydro has a long-standing policy which does create a distinction based upon where the materials, which come from a structure which has been demolished or dismantled, are to be reused. The Board was provided with a copy of Ontario Hydro's Interpretation Bulletin on this very point dated April 4, 1975 which reads as follows:

> Where an employer working under the EPSCA Agreement demolishes or dismantles a structure and the material is not to be reused on another site covered by the scope of the EPSCA Agreement, the classifications, wages, weekly hours of work, shift differential rate and overtime rates appropriate for demolition work will be as are established in the nearest influencing representative agreements between locals of the union and builders' exchanges or contractors' associations for the class and character of work. At present the nearest influencing representative agreement at all work sites in the Province would be the agreement negotiated between the Metropolitan Toronto House Wreckers Association and the Labourers' International Union of North America, Local 506.
>
> Where an employer working under the EPSCA Agreement demolishes or dismantles a structure in order that the materials can be reused on another site covered by the scope of the EPSCA Agreement, working conditions for this operating will be as established in the EPSCA Agreement for power systems construction.

13. EPSCA asserts that Ontario Hydro has applied its policy as set out in the aforementioned interpretation bulletin. Counsel for EPSCA provided the Board with two examples in which EPSCA confirmed Ontario Hydro policy with respect to the dismantling of materials to be reused off-site. Both examples relate to the dismantling of Units 1 and 2 Precipitators at the Lakeview Generating Station in 1991. EPSCA provided the Board with correspondence dated October 2, 1991 which sets out an agreement between EPSCA and the Boilermakers International Union Local 128. The correspondence indicates that the terms of the agreement were in settlement of a grievance being the subject matter of Board File No. 2040-91-G. The text of the correspondence reads as follows:

October 2, 1991

Mr. Joseph Maloney
Business Manager
International Brotherhood of
Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers
7 Queen Elizabeth Boulevard
ETOBICOKE, Ontario
M8Z 1L9

OLRB FILE #2040-91-G

As full and final settlement of the above-noted board file, the parties agree to the following:

1) *Where an employer working under an EPSCA Agreement dismantles and/or disconnects a component of a free-standing structure that has outlived its usefulness (worn out, outdated technology, etc), and is being replaced by a similar updated component at the same location, and the work commences during the same period of time the structure is out of service for the dismantle/disconnect* **or** if the material is being reused on another site covered by the scope of an EPSCA Agreement, *working conditions for this work will be as established in the respective EPSCA Agreement*.

2) Where an employer working under the EPSCA Agreement demolishes or dismantles a structure and the material is not to be reused on another site covered by the scope of the EPSCA Agreement, the classifications, wages, weekly hours of work, shift differential rate and overtime rates appropriate for demolition work will be as are established in the nearest influencing representative agreements between locals of the union and builders' exchanges or contractors' associations for the class and character of work.

3) The work on Units 1 & 2 Precipitators at Lakeview TGS will continue as outlined in the pre-job/mark-up meeting of August 9, 1991. Future precipitators and/or components of this nature will be subject to paragraph One.

4) The applicant, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Lodge 128, agrees to withdraw its grievance pertaining to this issue.

J.G. Knight
General Manager
LU 128

Joseph Maloney
Business Manager

> 14. EPSCA also produced a copy of an agreement between EPSCA and the International Operating Engineers, Local 793 dated November 6, 1991. The agreement indicates a settlement of a grievance filed on September 10, 1991 pertaining to Delsan Demolition Limited and work it was performing at the Lakeview Generating Station. The terms of this agreement are identical to those between EPSCA and the Boilermakers as set out above.
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> [emphasis added]

35. In *T.A. Andre & Sons*, *supra*, the Board found that because the sheet metal that was removed was not going to be reused on an EPSCA site and because it was not being replaced, the assignment was properly made to the Labourers. The Iron Workers and Glaziers do not quarrel with that result, but argue that the facts of this case warrant a different result.

36. Specifically, they rely upon the fact that the existing curtain wall was being removed and that at the same time the new curtain wall was being installed. They rely on the emphasized portion of the Ontario Hydro policy set out above in the letter to the Boilermakers reproduced in *T.A. Andre & Sons*, *supra*, and submit that the Ontario Hydro policy supports the assignment to their members in these circumstances. The Iron Workers and Glaziers focus on the word "or" in that paragraph and argue that where "an employer dismantles and/or disconnects a component of a free-standing structure that has outlived its usefulness (worn out, outdated technology, etc.), and is being replaced by a similar updated component at the same location, and the work commences during the same period of time the structure is out of service for the dismantle/disconnect" the dismantling work is properly assigned to the installing trade. They argue that a careful reading of the policy indicates that in such a situation it does not matter whether the dismantled components are scraped or reused.

37. The Iron Workers and Glaziers also relied upon *Decew Construction Inc.*, 2013 CanLII 56856. In that case the Board had before it a dispute between the Carpenters and Labourers over the removal of hoarding at the Bruce Nuclear Generating Station. Relying on practice evidence from 1986 to 2012 the Board held as follows:

> 20. The Carpenters have presented evidence that the past practice in Board Area 3 in the Electrical Power Systems Sector is for the trade that installed a structure to be assigned to remove the structure and, where the material removed is scrap, the Labourers move the material from the first drop point. The Labourers have presented the past practice evidence relating to Decew which consists of a practice by a single employer in respect of which the work was not marked up.
> …
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> 23. *The area practice evidence strongly suggests that, for a considerable number of years dating back to at least 1993 and continuing up to the present, there has been a practice of assigning removal work to the installing trade*. The evidence before me specific to Bruce Power establishes that, where a structure installed by the Carpenters was to be removed for scrap, the removal work has been assigned to members of the Carpenters to the first drop point. This area practice evidence is established by way of minutes of mark-up meetings and Mr. Casemore's sworn declaration. It is thus deserving of much greater weight than the employer practice evidence.
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> 24. While area practice evidence is only one factor of many, it is an important factor. A consistent and long standing area practice demonstrates an understanding between the unions and contractors who are active in the sector and board area that work will be assigned in a particular way. Contractors rely on such understandings when making work assignment decisions and unions rely on them when deciding whether or not to advance a claim to work. In the absence of compelling reasons why a longstanding and consistent area practice ought not to prevail, it is sufficient to dictate the end result of a jurisdictional dispute. In this case there are no compelling reasons why the area practice ought not to prevail.
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> [emphasis added]

38. The Iron Workers and Glaziers argue the decision above is simply another manifestation of the Ontario Hydro policy with respect to "remove and replace" work.

39. The Iron Workers and Glaziers argue that all they are asking is for the Board to apply the above policy in this case. They argue the existing curtain wall had outlived its usefulness and was being removed and replaced by a newer curtain wall at the same time (or during the same project) as the removal was performed. They argue that in these circumstances their members ought to have been assigned the removal of the curtain wall to the first drop point.

40. The Iron Workers and Glaziers argue that Black & McDonald and Areva in fact applied the Ontario Hydro policy to their assignments on the OSB and that the Labourers agreed to it. Specifically, Black & McDonald assigned the removal of mechanical components on the OSB including piping, air conditioning, ducts and duct insulation to the trades that would install them. The Labourers claimed all this work and then grieved the assignment when Black & McDonald confirmed the installing trades would do the removal. After the grievance was filed, Black & McDonald altered the assignment so that the trades would remove the equipment and bring it to the lay-down area and thereafter the Labourers would dispose of the equipment. The Labourers considered this an acceptable settlement of their grievance.

41. Likewise, Areva assigned the work removing electrical components to members of the IBEW.

42. The Iron Workers and Glaziers argue that this is precisely the assignment they are requesting and is in accordance with Ontario Hydro's policy on a "remove and replace" project. The installing trade removes equipment or components to the first drop point. They submit that this is evidence that the Ontario Hydro policy is in place, that the OSB project was a remove and replace project, and that the Labourers have accepted both of these facts.

43. The Iron Workers and Glaziers also relied upon two projects at Darlington involving the dismantling of buildings that they say are evidence of the remove and replace policy. In 1989 a number of foldaway buildings and pre-engineered buildings were dismantled at Darlington. Ontario Hydro assigned the removal of the various components to the various trades that installed them. The Labourers were also assigned the work disposing scrap materials to container (which suggests that the scrap material removed by trades was dropped somewhere by them and was then removed by the Labourers). While the assignment is generally consistent with what the Iron Workers assert is the remove and replace policy, there is nothing to clarify, however, whether the buildings were reused or

where. Nor do the mark-up minutes expressly refer to the policy being applied. The Board can only draw the conclusion that this assignment was consistent with the Ontario Hydro remove and replace policy.

44. The Iron Workers and Glaziers also asserted that in 2005 Crossby-Dewar, Black & McDonald and EMC assigned the removal of offices to clear a flood plain on a trade specific removal basis. However, the document referenced by the Iron Workers and Glaziers as supporting this assertion is less than clear as to which trades were assigned what work on what basis. It is impossible for the Board to draw any conclusions as to what was assigned and why on the basis of the evidence filed and so I give this assignment no weight.

45. The Iron Workers and Glaziers filed a number of documents which they assert relate to remove and replace work under the EPSCA Collective Agreements generally. From a practice stand point they are from a different Board Area and so are not relevant as area practice. However from the standpoint of establishing the remove and replace policy, they are generally consistent with that approach. Having said that, they do not refer to the policy expressly and most of the assignments do not provide the necessary facts to put the various assignments in context. Ultimately I have given these assignments some weight, only so far as they show a number of assignments that are consistent with the Ontario Hydro remove and replace policy set out in the Board decisions cited above.

46. The Iron Workers and Glaziers filed evidence of a mark-up from 1991. In that assignment, Ontario Hydro assigned the removal of the turbine and related equipment at Douglas Point (Board Area 3) on a trade specific basis. That mark-up references the Ontario Hydro policy that the Board quoted from in *Ontario Hydro*, *supra*. I give this assignment some weight in further affirming the existence of the Ontario Hydro policy.

47. The Iron Workers and Glaziers argued that on EPSCA sites the Ontario Hydro remove and replace policy sets out a clear demarcation line as to how the work in dispute ought to have been assigned. They argue that the cases that draw distinctions between demolition and removal in the ICI sector (or work beyond the scope of the EPSCA collective agreements) are only relevant if the Board finds the Ontario Hydro remove and replace policy does not exist or does not apply to the facts of this case.

48. The Iron Workers and Glaziers argue that *Multidem Inc.*, [1994] OLRB Rep. Feb. 166 is distinguishable. That case involved the demolition and removal of the Bruce Heavy Water Plant A at Tiverton. The plant had been inactive for nine years. The plant and the land were sold by Ontario Hydro to Dominion Metal and Refining Works Ltd. who subcontracted the demolition to Multidem Inc. Everything was knocked down, cut up and sold as scrap metal. The Board found that the work demolishing the building was properly assigned to the Labourers. The Board reasoned as follows:

> …No particular care, other than safety considerations is required in taking down or demolishing this facility. This is quite different from dismantling equipment or components for salvage and/or reuse where the integrity of the components or the surrounding area needs to be maintained.
>
> 5. Based on the materials and *viva voce* evidence the Board is satisfied that the entire plant was sold for scrap to Dominion Metal. In these circumstances Ontario Hydro practice and the Electrical Power Systems Construction Association agreement clearly establish this work belonging to the Labourers. It is work performed by construction labourers. There is no requirement to protect the integrity of the facility or any of its components. Dominion Metal/Multidem, subject to safety requirements, can take down this plant any way it chooses.
>
> 6. Having considered the evidence and submission [*sic*] we confirm the assignment of the work in dispute to the Labourers. The Board would emphasize this work assignment is with respect to the Electrical Power Systems sector in circumstances where the materials/equipment/facility are being demolished for scrap.

49. The Iron Workers and Glaziers argued this assignment is distinguishable because the entire building was being demolished for scrap and nothing was going up in its place, and no care was required in carrying out the demolition. The Iron Workers and Glaziers argue that care was required in this case because the curtain wall was being replaced.

50. The Iron Workers and Glaziers rely upon *E.S. Fox Limited*, 2009 CanLII 28163. In that case the Board upheld the assignment of the installation of multi-purpose steel supports to the Iron Workers. The Board concluded as follows:

> 35. In this case, I conclude the work is a multi purpose support, and therefore the kind of work that is assigned to Iron Workers. The area practice is not sufficiently specific as to the type of the support, nor are there numerous instances of contractors assigning work in a contrary manner, that I can conclude that contractors regularly ignore that distinction when making assignments of work on this kind of support.
>
> 36. Where a particular method or general rule of thumb is in wide use in a segment of the construction industry, and has (as here) a widespread acceptance as workable by contractors and as fair by the trades, then that factor should have very great significance. The object of any system of work assignment is to ensure that work is performed by persons with the necessary skills and experience in an efficient and economic manner in such a way that all the reasonable expectations of the trades on site or with bargaining rights for the employer on the job are met. In such circumstances, it will take a great deal of contrary area practice to cause the Board to ignore such a rule. There is no such countervailing evidence in this case.
>
> 37. Accordingly, the Board reaffirms the assignment of the work in dispute by E. S. Fox to the Iron Workers.

51. The Iron Workers argue that the remove and replace policy is a similar general rule of thumb and that it ought to carry great weight in this proceeding as a result.

52. Finally, the Iron Workers and Glaziers also filed a number of documents which establish they install curtain wall systems. Neither the Labourers nor Quantum challenged this assertion.

53. In response, the Labourers argue that none of the materials were reused. They directed me to photos from which they argued the Board could tell that none of the clips embedded into the OSB concrete were reused to affix the new curtain wall. The Board cannot draw that conclusion based on the pictures. The Labourers did file declarations in which the declarant, who was involved in removing the curtain wall,

declared that the structure was cleaned of all metal braces and that they could not be reused. The Labourers argued that effectively everything with respect to the curtain wall was new except the existing concrete structure.

54. The Labourers argue that if the Ontario Hydro policy is as clear and well known as the Glaziers and Iron Workers claim, the Glaziers ought to have claimed the work in dispute at the mark-up. They argue that the Glaziers failure to do so is indicative that the policy is not as pervasive as argued.

55. The Labourers also argue that their practice evidence undermines the assertion that the Ontario Hydro remove and replace policy is actually applied on EPSCA sites. In this respect the Labourers filed evidence of having performed eight demolition projects in Board Area 9 and 17 demolition projects performed for Quantum under the EPSCA collective agreements. The Labourers argued that these assignments to its members belie the assertion that there is any understood or practiced remove and replace policy.

56. The problem with this assertion is that the Labourers assignments are generally consistent with the Ontario Hydro remove and replace policy. The vast majority of the assignments are demolition only assignments. In other words there is nothing on the face of the mark-up minutes that indicates anything was built or replaced following the demolition or that the demolished items were reused elsewhere on an EPSCA site. The Ontario Hydro policy, and the Iron Workers and Glaziers argument, assigns work in these circumstances to the Labourers.

57. At Tab 32 of their Brief, the Labourers filed an assignment from Darlington NGS in 2008. The Labourers were assigned the work demolishing an existing prefabricated building and they and other trades were assigned work constructing a new maintenance facility. It appears however, that this was the demolition of one structure and the construction of a very different one that included excavation, caisson work, forming and the construction of mechanical systems. It was not the demolition of a prefabricated building followed by its replacement with a new prefabricated building. It therefore is not inconsistent with the Ontario Hydro remove and replace policy.

58. The Labourers also referred to a number of assignments from outside Board Area 9 which they say undermine the existence of the remove and replace policy. The majority of those assignments are demolition assignments under the Ontario Hydro remove and replace policy. In other words, they involve demolishing a structure or equipment and not reusing the components or replacing them and thus the assignment of the work to the Labourers is consistent with the policy.

59. The Labourers argued that some of these assignments contradict the policy. The Board carefully examined the assertions of the Labourers and the documents upon which those assertions were based. For the foregoing reasons, despite the arguments of the Labourers, the documentary evidence does not support the arguments that they undermine the existence of the Ontario Hydro remove and replace policy.

60. At Tab 37 of the Labourers Brief there is an assignment at the Richview Transformer Station in 1999 (Board Area 8). That assignment involved the construction of two one storey office additions to an existing control room. The Labourers were assigned the work demolishing portions of the existing structure. Other trades, including the Glaziers were assigned trade specific work. It appears however, that the trade specific work did not involve replacing what had previously existed or reusing materials the labourers had demolished. Rather, the trade specific work was the construction of the new additions. This assignment therefore was not "remove and replace" work in accordance with the Ontario Hydro policy; but rather was demolition work properly assigned to the Labourers in accordance with that policy.

61. At Tab 43 of the Labourers Brief they referred to a bridge rehabilitation assignment from 2007 and 2008 in Board Area 15. The Labourers asserted in their brief that the assignment included the removal of steel beams to the Labourers and the installation of steel beams by the Iron Workers. It is not clear from the mark-up minutes however that that is what happened. The Iron Workers were assigned the installation of steel beams, but the Labourers were assigned to remove and dispose asphalt toping, wood deck and beams. It is ambiguous whether the beams the Labourers removed were wood or not. Given that the Iron Workers were clearly assigned the installation of "steel" beams and the Labourers assignment appears to reference wooden beams (which the Iron Workers would not install), the

assignment is at best ambiguous and so I do not conclude it undermines the policy.

62. At Tab 46 of their Brief the Labourers referred to an assignment of the demolition of a warehouse office in 2007 in Board Area 29. The Labourers point out that they were assigned the work demolishing the office and the Iron Workers were assigned the installation of structural braces in the warehouse. It is difficult to understand the reliance on this project because it does not involve reusing or replacing anything demolished by the Labourers.

63. At Tab 48 of the Labourers Brief they filled a berm decommissioning assignment from 2008 in Board Area 8. That assignment is actually consistent with the policy. In particular, any removal work was assigned on a trade specific basis. If the equipment was to be scrapped, the Labourers were assigned the disposal after the disconnect, which is equivalent to the first drop point.

64. At Tab 55 of the Labourers Brief is an assignment of the construction of a cold storage building in 2013 at Otto Holden Generating Station in the White Areas. The Labourers were assigned demolition work, but it is not clear at all what was demolished or specifically that it involved anything that was replaced or reused.

65. The assignment at Tab 56 of the Labourers Brief does support its position somewhat. It is the assignment of various work in connection with the rehabilitation of the Admin building at RH Saunders Generating Station in Board Area 31. It appears that that project involved the removal and replacement of various components of the building. The roof was removed and replaced by roofers, while the Labourers removed existing windows and curtain wall and the Glaziers installed the new curtain wall and windows. It therefore appears that that the remove and replace policy was not applied to this project. Given the Iron Workers' and Glaziers' failure to comment on this assignment the Board accepts it at face value. This however, is a single example from another Board Area of all of the many assignments that were placed before the Board.

66. The Labourers argued that the Ontario Hydro policy, if there is one, is not clear. They point out that in *Ontario Hydro*, *supra*, Ontario Hydro argued that its policy was to assign work to the Labourers if the material was to be scrapped. The Labourers argue that in *T.A. Andre*

& Sons, *supra*, it appeared that the Ontario Hydro policy had changed. They argue there is no clear policy that is in force or can be applied.

67. The Labourers argue that if the Iron Workers and Glaziers theory is accepted all demolition is a form of remove and replace. They ask rhetorically whether the Bricklayers should remove bricks since they installed them. With respect, that argument fails to recognize the distinctions in the policy between the removal of materials that will be scrapped and not reused, and the removal of materials that will be replaced or reused.

68. The Labourers argue the proper approach to determining whether the work in dispute was demolition or not is the practice followed in the ICI demolition jurisdictional dispute cases such as *PCL Constructors Canada Inc*., 2010 CanLII 46852 and *Laframboise Mechanical-Electrical Limited*, 2009 CanLII 41193. They argue the distinctions in those cases support the Board finding that the work in dispute was demolition work because it was not performed in a live environment and the removal work did not require the specialized expertise of the Iron Workers and Glaziers. The Labourers argue the proper question to be asked is which trade's skills are needed to perform the work.

69. The Labourers argued that the trade specific assignment at the OSB by Black & McDonald was an example of the application of this question because the trades were using their specialized expertise to cap off the existing mechanical components. They argue that this distinguishes that assignment from the work in dispute.

70. Quantum supported the Labourers and adopted their submissions. Quantum emphasized how the factors in *PCL*, *supra*, and *Laframboise*, *supra*, supported their assignment to the Labourers. Quantum also highlighted the fact that it only performs demolition. It argued that this fact distinguishes this case from the assignments relied upon by the Iron Workers and Glaziers where the same contractor removed and replaced equipment.

71. Ultimately I have difficulty reaching any other conclusion than that the Ontario Hydro remove and replace policy is generally applied to projects on EPSCA sites. Virtually all of the assignments that were filed, save for one which is from another Board area, are consistent with the policy as it is explained and set out in *Ontario Hydro*, *supra*, *T.A. Andre & Sons*, *supra*, and *Decew*, *supra*. That policy is also consistent with the reasoning in *Multidem*, *supra*.

72. Moreover, the existence and application of the Ontario Hydro remove and replace policy at Darlington is supported by all of the examples of Area practice filed by the parties including the 1989 project. More specifically, it is consistent with the Black & McDonald and Areva assignments on the OSB building with which the Labourers agreed. With respect to this latter assignment, while I accept that some of the mechanical components were caped, the evidence before the Board is that the OSB was stripped to its concrete base. The only conclusion to reach is that most, if not all, of the mechanical components were scrapped. Despite this, the Labourers agreed to a resolution where they would only remove materials after the first drop, an understanding entirely consistent with the Ontario Hydro remove and replace policy.

73. In my view, it takes much more than a single assignment from another Board Area to undermine the general application of a general policy which the Board has affirmed on at least three occasions and which is reflective of the overwhelming majority of the assignments placed before the Board.

74. Having concluded that the Ontario Hydro remove and replace policy exists, the question becomes was this a remove and replace project? I find that it was. The circumstances of the OSB project fall squarely within the remove and replace policy. Specifically, where an employer working under an EPSCA Agreement dismantles and/or disconnects a component of a free-standing structure that has outlived its usefulness (worn out, outdated technology, etc.), and is being replaced by a similar updated component at the same location, and the work commences during the same period of time the structure is out of service for the dismantle/disconnect the removal work will be assigned to the installing trade. Here the existing curtain wall was outdated and was replaced during the same outage as it was being removed. Under the policy, the removal of that component is work that ought to have been assigned to the trade that installs the replacement.

75. I agree with and accept the Iron Workers' and Glaziers' argument that the existence of the Ontario Hydro remove and replace policy on EPSCA sites means that the distinctions between removal and demolition in the ICI sector, in cases such as *PCL*, *supra*, and *Laframboise*, *supra*, do not apply. On EPSCA projects, the

jurisdictional lines are drawn by the Ontario Hydro policy and all that must be decided is how the assignment in issue fit into that policy.

76. For these reasons. I conclude that the work in dispute is properly characterized as remove and replace work. That finding strongly weighs in favour of the work being assigned to members of the Iron Workers and Glaziers because, as between them and the Labourers, they are the trades that unquestionably install curtain wall.

Practice Evidence

77. Having found that the work in dispute is properly characterized as remove and replace work, for the same reasons that that the practice evidence is consistent with the existence of the Ontario Hydro policy, that same evidence supports the assignment to the Iron Workers and Glaziers under the policy.

Collective Agreements and Constitutions

78. Both trades have relevant Collective Agreements and Constitutions under which they can substantiate a claim to the work in dispute. I find this factor is neutral.

Skills, Safety and Training

79. I do not accept the parties' submissions that one trade or the other is less skilled or more unsafe in performing the work. At best, the parties established that there are different ways to perform the work, neither of which is inherently less safe or an indication of less skill. There is no evidence the Labourers method of performing the work in dispute was unskilled. Likewise, the Iron Workers and Glaziers were able to erect the curtain wall in a safe and skillful manner, which for the reasons expressed in their brief, demonstrate their proposed method of performing the work in dispute would be equally skillful and safe. I find this factor favours neither trade.

Economy and Efficiency

80. A party asserting that it is more economical or efficient to assign work to one trade over another must demonstrate that with evidence. It is not enough to say that an assignment to one trade is more efficient than a composite crew, particularly where, as here, the members of the composite crew are working interchangeably as if they

were a single trade. I find that neither party has demonstrated that it is any more efficient or economical to assign the work in dispute to one trade over another as the Board has applied this factor in the past. In particular, there is no evidence that either assignment will result in one trade or another standing around with no work to perform.

Conclusion

81. I agree with the Board's comments in *E.S. Fox*, *supra*, that where a particular method or general rule of thumb is in wide use in a segment of the construction industry, and has (as here) a widespread acceptance as workable by contractors and as fair by the trades, then that factor should have very great significance. Here the Ontario Hydro remove and replace policy is in wide use under the EPSCA collective agreements as evidenced by the Board's prior decisions and the many assignments before the Board. The Board should be very reluctant to disturb that workable and accepted understanding in the absence of overwhelming evidence that it ought not to be applied. There is no such evidence in this case.

82. For all of the foregoing reasons, the factors in this case are all neutral or weigh in favour of assigning the work in dispute to members of the Iron Workers and Glaziers. The Board therefore declares that the work in dispute ought to have been assigned to members of those trades.

"Jesse M. Nyman"
for the Board