

Work and the Employer in the Construction Industry

I.I “Work” and the “Employer” in the Construction Industry 092-001-001

(CONSTRUCTION INDUSTRY PANEL)

POLICY STATEMENT

on

“WORK” and “EMPLOYER” in the Construction Industry

The Construction Industry Panel of the Labour Relations Board (Nova Scotia), (“the Panel”), hereby issues the following guidelines pursuant to the Trade Union Act, R.S.N.S., 1989. c-475

In determining whether (a) work being performed by owners or employers is “maintenance” which falls outside the definition of “construction industry” in section 92(c) of the Act, and/or (b) an employer or owner is an “employer in the construction industry” under section 92 (f) of the Act, the following guidelines shall apply:

- A. (1) The Panel has decided that, in cases under Part II of the Act, the first issue to be dealt with is whether the work involved is “maintenance” work or work covered by Section 92(c) of the Act.
- (2) On this first issue of whether the work is “maintenance” or “construction” under section 92(c),
- (a) Save in exceptional circumstances ,(where the burden of proof shall be upon the person claiming them), the Panel will respect, and give effect to legitimate “maintenance agreements”, (past, present and future), reached between an employer, employers or an employers’ organization, on the one hand, and one or more construction trade unions on the other;¹
- (b) The Panel will consider evidence bearing upon the following questions:²
- (i) Does the work sustain and maintain an operating facility and enable that facility either to operate efficiently or to attain its designed or production capacity? If the answer is “yes”, the work is normally “maintenance”.
- (ii) Does the work assist in preserving the function of a system or part of a system? If the answer is “yes”, the work is normally “maintenance”.

¹Eg., “Project Agreement for Maintenance by Contract in Canada for Esso Petroleum Canada Dartmouth, Nova Scotia” or other similar local (Nova Scotia only) contracts such as those that exist either formally or informally between certain trade unions and industrial plant employers.

² The Panel’s intention is to apply, generally, the tests and analyses developed by the OLRB in the line of cases beginning with the Master Insulators Assn. of Ontario v. H.F.I.A. Local 95, [1980] O.L.R.B. 1477

- (iii) Is the work necessary to restore a system or significant part of a system that has ceased to function or to function economically? If the answer is “yes”, the work is normally “maintenance”.
- (iv) Does the work involve an addition to an existing facility? If the answer is “no”, the work is normally “maintenance”.
- (v) Does the work increase the designed or production capacity of an existing facility? If the answer is “no”, the work is normally “maintenance”.
- (vi) The size and complexity of the project in relation to the normal maintenance capacity and activities of an owner of a pre-existing facility may be taken into account in answering the above questions.

The burden of persuading the Panel that the work falls outside the “normally maintenance” conclusion, in accordance with the above questions, rests with a party making such an assertion.

- B. (1) In determining whether an employer falls within the definition of “employer” in Section 92 (f) of the Act, the Panel will apply the following tests:
 - (a) If an employer chooses to do “construction work”, (within the meaning of Section 92(c) of the Act), and employs for that purpose more than one (1) person to do it, and the work falls outside the normal business activities that had been pursued by the employer immediately prior to the commencement of the work, such employer falls within Section 92(f).
 - (b) In determining whether the work falls within or outside “the normal business activities that had been pursued by the employer immediately prior to the commencement of the work”, the Panel shall regard as relevant although not determinative, factors including but not limited to:
 - (i) the relative magnitude and/or duration of the project that comprises the work or of which the work is a part;
 - (ii) the hiring of persons to perform the work or to substitute for in-house regular employees who are performing the work;
 - (iii) the hiring of “outside” management for the work, ie., to hire persons who were not regular employees of the employer at the commencement of the work, and
 - (iv) the location of the project, ie., whether the work is performed on the same parcel of land as the facility or facilities that comprise the “normal business activities” of the employer.
 - (c) If an employer or owner holds itself out to the public as an employer in the Construction Industry and/or performs contracts and/or contracts out work that meets the definition of “Construction Industry” in Section 92(c) of the Act, and who employs or in the preceding twelve months has employed, more than one employee, such person is an “employer” in the Construction Industry.

- (2) The Panel rejects as irrelevant the “footprint” idea in relation to what falls within “the normal business activities that had been pursued by the employer immediately prior to the commencement of the work”.³
- C. For the sake of clarity, the Panel affirms its obligation to decide each case on its facts. Accordingly, the questions and/or tests described in these guidelines are to be considered as such. However, if a party seeks to apply other questions and/or tests either in substitution for or in addition to those set forth above, the burden of persuasion will lie with the party seeking such variance(s), additions or substitutions.

This policy statement will apply to any pending or future cases filed with the Construction Industry Panel (Nova Scotia)

³ Dalhousie University L.R.B. 2058C, dated August 4, 2000