1455-88-G Labourers' International Union of North America, Local *506,* Applicant v. **Four Seasons Drywall**, Respondent

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *J. Lear* and *H. Kobryn.*

***APPEARANCES**: Elizabeth Mitchell, Nick Barbieri and Larry D'Andrea for the applicant; Robin B. Cumine and Vein Zapfe for the respondent; Donald McNeill for subpoenaed witness, Jim Holmes.*

DECISION OF THE BOARD; May 30, 1990

1. This is a referral of a grievance to the Board made pursuant to section 124 of the *Labour Relations Act* ("the Act"). The applicant, Labourers' International Union of North America, Local 506 ("the Labourers" or "Local 506") has grieved that the respondent, Four Seasons Drywall ("Four Seasons") has violated the subcontracting provisions of the collective agreement between the Employer Bargaining Agency and the Labourers International Union of North America, and the Labourers International Union of North America, Ontario Provincial District Council ("the ICI agreement") to which these parties are bound.

2. Four Seasons had a contract for the supply and installation of drywall and other acoustic construction material for a highrise senior citizens home in Scarborough, Ontario ("the project"). The grievance alleges that the following work performed at the project was subcontracted by Four Seasons in violation of the ICI agreement:

> (1) The off-loading of drywall at the point of delivery on the construction site;
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> (2) conveying the drywall to local stockpiles, if any, on the floors of the building, or to the point of installation; and
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> (3) stockpiling the drywall at the local stockpiles, if any, or at the point of installation if there was no local stockpile.

The movement of drywall from stockpiles to point of application, or the movement of drywall from stockpile to stockpile is not an issue in these proceedings.

3. Although the Labourers originally claimed damages for the alleged breach of the ICI agreement, at the hearing counsel indicated that damages were no longer being sought. The remedy requested was limited to a declaration that the work was construction work which, under the circumstances, was covered by the ICI agreement. The Labourers also seek a declaration that the performance of this work by persons who are not members of the Labourers union is a violation of the security provisions of the ICI agreement including the subcontracting provisions. Finally, the Labourers requested that the Board direct Four Seasons to comply with the provisions of the ICI agreement and direct Four Seasons to ensure that Labourers perform this work.

4. The respondent raised a number of defences to the grievance including *inter alia* that the work in dispute was not construction work or alternatively work covered by the ICI agreement, and in any event the work complained of was not work which was subcontracted by Four Seasons.

5. At the commencement of the hearing counsel for Four Seasons also raised as an issue

that the project did not fall within the industrial, commercial and institutional sector ("ICI") of the construction industry. It was asserted that because the ICI agreement did not apply to this project and the grievance alleges *only* a violation of that agreement this grievance must be dismissed. The parties agreed that because that issue was clearly severable from the other outstanding issues raised in this grievance and could potentially be dispositive of the entire matter the Board should deal with that issue first. We agreed to do so.

6. On January 10, 1990, after having heard the evidence and submissions of the parties as to whether this project fell within the ICI sector of the construction industry we orally ruled as follows:

> The issue to be determined is where, on the continuum between the residential sector on the one hand and the ICI sector on the other hand this project falls. As counsel stated, viewed objectively or standing back from this building would one look at it and say this is residential or not. Having carefully considered the evidence and submissions of the parties we have concluded that this project falls within the type of project which the Board found to be in the ICI sector of the construction industry in *Sword Contracting Limited*, [1985] OLRB Rep. May 743. On the basis of the evidence before us we also find that this is a project which falls within the ICI sector.

Counsel for Four Seasons requested written reasons for our decision which we now provide.

7. The work which led to this dispute was performed at a project which involved the construction of a building in Scarborough, Ontario. The building constructed is called Seven Oaks and is a Home for the Aged, constructed and operated pursuant to the *Homes for the Aged and Rest Homes Act.* It is one of seven Homes for the Aged operated on a non-profit basis by the Municipality of Metropolitan Toronto, Metropolitan Community Services Department. Application for residence in the building is administered by a central Intake Department of the Metro Homes for the Aged. A day care program for senior citizens is also operated from this facility. There is no statutory requirement that Homes for the Aged be "licensed".

8. The facility consists of private and semi-private rooms for residents. It has two hundred and fifty beds. Fifty percent are in private rooms and fifty percent are in semi-private rooms. The rooms contain individual washroom facilities but do not contain any cooking facilities. The building has an open reception area, lounge area, gift store, meeting rooms, a common dining area and common recreational facilities.

9. The building consists of at least five floors. On each floor there is an area where someone is or can be stationed behind the desk with a telephone. Although there are medical and nursing services available on a twenty-four hour basis the parties disagreed as to whether this area was a "nursing station" as that term is commonly understood in a hospital setting. The area does have oxygen equipment. The rooms of the residents are or can be connected to the telephone located in this area through a central switchboard.

10. The criteria for admission to the facility is that residents must be sixty years of age or over. Persons with Alzheimer's disease may qualify for admission if they are under sixty years of age. Residents in the building pay a fee to live in the facility. That fee is dependent on the type of care required by the resident as well as their type of accommodation (private or semi-private).

11. There are two levels of care provided in the facility -"residential care" and "extended care". The type of care provided was described as "daily living assistance". That term includes assistance in dressing, bathing, personal functions, feeding, etc. It does not include medical or

diagnostic care although qualified staff may administer prescription drugs. "Residential care" was described as providing less than one and a half hours of care per day. "Extended care" on the other hand provides between one and a half hours and three hours of care per day. We note that Regulation 502 to the *Homes for the Aged and Rest Homes Act* defines "extended care services" and "residential care" in section 1(1)(d) and section 1(1)(l) in the following manner:

> (d) "extended care services" means care and maintenance given to a resident that includes skilled nursing and personal care given by or under the supervision of a registered nurse or where the Director approves, a registered nursing assistant, under the direction of the physician of the home appointed under subsection 12(4) of the Act, for a minimum of one and one-half hours per day;
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> (1) "residential care" means care and maintenance that is not extended care services given to a resident in a home;

12. The facility provides emergency or vacation services for persons who require temporary (seven to twenty-eight days) accommodation as a result of an emergency or because another primary care-giver is on holidays. The facility designates at most two beds for this purpose. Of the two hundred and forty-nine occupied beds at the time of the hearing, thirty beds were occupied by persons who were classified as "purely residential". The remainder of the beds were for extended care or for residential care residents. Unlike the "purely residential" group these residents all have some physical or psychological infirmity. The extent of that infirmity and the consequent care required varies. Within the extended care group there is a subgroup of thirty-two beds for persons who suffer from Alzheimer's disease. That group occupies one wing on the first floor of the facility. Security measures which prevent residents from leaving this area differentiate this group from other residents of the facility.

13. A note provided by the Metropolitan Community Services Department, Homes for the Aged Division outlines the accommodation offered in the following manner:

> ACCOMMODATION:
> 249 BED CAPACITY MADE UP OF PRIVATE AND SEMI-PRIVATE ROOMS WITH
> ENSUITE WASHROOMS.
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> 1st Floor: special Care Unit
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> 2nd Floor: Physical Care/Cognitively Impaired Unit
>
> 3rd Floor: Physical Care/Alert Unit
> 4th Floor: Psycho Social Unit
> 5th Floor: Independent Unit & Armenian Unit

Using this framework the "purely residential" residents inhabit the fifth floor while those with Alzheimer's are on the first floor. The Home does have some relationship with what was described as the "nursing home system" although the nature of that relationship was not precisely defined before us. Apparently, as the need for care increases residents may move from Seven Oaks to a licensed nursing home.

14. The facility is not affiliated with any particular hospital. It does have staff, including medical staff, to provide care to the residents. At the time of the hearing the staff consisted of fifteen registered nurses, eight registered nursing assistants and fifty-four health care personnel. In addition, a medical doctor attends at the home one or two days in the week for scheduled periods

of time. The nursing professionals employed wear a uniform.

15. In *Sword Contracting Limited,* [1985] OLRB Rep. May 743 the Board held:

> . . .
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> However, while the fact people reside in a facility is one factor that suggests that the construction of the facility comes within the residential sector, it is not by itself necessarily determinative. People reside in a number of facilities that do not come within the generally understood meaning of the term residence. For example, servicemen may reside in army barracks and convicted criminals reside in correctional facilities, and yet it is questionable whether the construction of either of these types of facilities involves work coming within the residential sector of the construction industry.
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> 37. In assessing what type of construction does come within the residential sector, the logical place to start is with the construction of a single family home to be owned by the family that will be residing in it. Such construction clearly comes within the residential sector. When one moves away from this clear-cut example, however, the matter becomes more complex. For example, it might be argued that the construction of a rental apartment building should be viewed as commercial construction because the owner intends to operate the facility to make a profit. On the other hand, however, once an apartment unit is rented out it becomes someone's home in the generally accepted use of that term. The residents carry out their activities of daily living in a physical area they have a tenancy interest in, and immediate control over. There has grown up a clear and generally accepted practice in the Toronto area of treating the construction of apartment buildings as coming within the residential and not the ICI sector of the construction industry. Based on this practice, the Board has in the Toronto area recognized such construction as coming within the residential sector. Indeed in the *West York* case, on the basis of a generally accepted local practice, the Board concluded that a building built by an institution but comprised primarily of self-contained apartment units also came within the residential sector. The Baker Centre is, however, even further removed from the example of the single family home. Although accommodation will be provided at the Centre, it will not be in self-contained units. Rather, individuals will be required to conduct a major part of their activities of daily living, including eating and bathing, in shared areas not under their direct control. No matter how concerned staff might be about giving residents as much autonomy as possible, it seems reasonable to assume that residents will have to conform to certain rules and norms relating to matters such as meal times. In the nursing home portion of the Centre, residents will be receiving daily nursing care under the direction of a professional nursing staff. Staff working in both the retirement and nursing home portions of the Centre will not be under the immediate direction of the residents, as would be the case of domestics employed in a home, but rather under the direction of a company hired for the express purpose of managing the Centre.
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> 38. In the health care field the word institution has developed a negative connotation, primarily because it connotes a medical model of care where an individual loses more autonomy over his daily living activities than is necessary. However, outside the health care field, the word institution has a much more neutral connotation. The term is generally used to refer to an organization established to provide a service viewed as being of benefit to either the public at large, or to some specific group. For example, schools,

> universities and churches are generally viewed as institutions. In this sense of the word, we also view the Baker Centre as an institution. It is a non-profit organization formed in part for the socially beneficial purpose of providing facilities for the elderly who are unable or unwilling to live independently. Through an outside management firm and a fairly large staff of employees, the Centre will be providing nursing care and other forms of assistance to its elderly residents. The Centre will also house day care facilities for children and elderly persons. The Baker Centre is held out to the public as being associated through the Northwestern Health Centre with the Northwestern General Hospital. The bylaws of the Baker Centre require that a majority of the directors of the Centre, including the chairman, either be connected with the Northwestern General Hospital or be approved by the board of directors of the Hospital. Given all of these factors, we are satisfied that the construction of the Baker Centre does come within the industrial, commercial and institutional sector of the construction industry as that term is used in the *Labour Relations Act.*

16. Similarly, on a spectrum which starts with the construction of the single family home (which is clearly within the residential sector) on one end, and ends with the construction of a public institution which provides medical care such as a hospital (which is clearly in the ICI sector) on the other, we are of the view that Seven Oaks falls within the latter part of this spectrum.

17. The rooms of the residents are not self-contained apartment units. Individuals who reside in the facility must share a number of common areas including the dining room and presumably conform to rules relating to those common areas such as scheduled hours of use, scheduled hours for meal times, etc. Unlike the kitchen or family areas in a private residence, persons who reside in Seven Oaks cannot simply make use of the eating and recreation areas at Seven Oaks whenever and however they please. As was the case in *Sword Contracting, supra,* residents at Seven Oaks will be required to conduct a significant part of their daily living in "shared areas not under their direct control".

18. With the possible exception of residents on the fifth floor, residents at Seven Oaks receive daily care from professional nursing staff and other health care providers employed at Seven Oaks. The staff complement cannot be said to be equivalent to domestic personnel employed in a private home. Similarly as in *Sword Construction, supra,* Seven Oaks is a non-profit facility which serves the community by providing accommodation to elderly persons who, at a minimum, require assistance with the functions of daily living. In that sense, it is an "institution" which provides a service to the community.

19. Finally, neither the fact that residents consider this to be their "home" (unlike the case of a barracks or jail) nor the fact that residents are not transient and may reside there for a long period of time in the same manner as residents of an apartment or a single dwelling, persuade us that the scales are tipped in favour of finding this to be a residential project. On balance, having regard to the entirety of the evidence we find that the project falls within the ICI sector of the construction industry.

20. We now turn to the merits to the grievance .

21. Four Seasons purchased the drywall material from a supplier called Builders Supply Company ("Builders"). The terms of purchase provided that the material be delivered to the local stockpiles on each floor of the building. Title to the drywall did not pass from Builders to Four Seasons until the drywall was delivered to the local stockpiles. Risk of damage to the drywall during transportation or delivery was therefore born by Builders. Builders either had to replace

damaged sheets of drywall or reimburse Four Seasons for repairing the damaged sheets of drywall.

22. Drywall can be delivered to designated places on a construction project either through use of a crane (generally for deliveries fifty feet up or more), a boom truck (generally for deliveries to the first three floors of a project), or manually (where drywall is unloaded and placed on the ground, or into a service elevator, or an outside hoist and then taken to the designated floor).

23. In this case Builders used a boom truck to raise the load of drywall to the fifth floor level of the project. On the fifth floor the load of drywall was received by employees of Builders who then stockpiled the drywall. The price of the drywall included the placement of the drywall on the different floors of the project as directed by Four Seasons.

24. The work which forms the basis of this grievance was performed on the project by the employees of Builders and not by the employees of Four Seasons. Builders does not have a contractual relationship with the applicant or with any of the affiliated local unions bound to the ICI agreement. Local 506 does have a collective agreement with a number of other building supply companies ("unionized suppliers") from whom the respondent does or can purchase drywall material.

25. Four Seasons has always purchased its drywall in this manner i.e. price includes delivery to the floors by the supplier. In the past it has used both unionized suppliers and supply companies which do not have a contractual relationship with the Labourers. In determining from whom to purchase material, Four Seasons considers availability of material, whether the supplier is already delivering drywall or other materials to the site for other contractors, and the service, dependability and flexibility of the supply company. Whether the supply company is unionized or not is not a factor in its decision. Neither is that a factor in the ultimate price paid for the supplies.

26. Typically, access to the building being constructed or the availability of elevators on a construction project for the purpose of delivering drywall to designated floors is limited. Delivery of drywall therefore often occurs at odd hours of the day or night when access to the building is more easily attained. Use of the employees of the building supply company eliminates certain scheduling problems which would result if Four Seasons had to coordinate the delivery of drywall with the availability of its own employees or Labourers "borrowed" from the general contractor on-site to unload the drywall.

27. The Labourers claim that the work performed by the employees of Builders is work in the construction industry. Relying upon *Cedarhust Paving Company Limited*, [19641 OLRB Rep. Dec. 442 at 445 the applicant argued that the work was construction work because it was an "integral and necessary part of the business" of Four Seasons in constructing the interior walls of the project. It was asserted that in the drywall contracting business the unloading of drywall was an "essential feature" of the business so that persons engaged therein were engaged in construction activities.

28. Counsel for the Labourers argued that the present circumstances were distinguishable from that line of cases where the Board has held that "delivery" of materials to a construction site does not constitute construction activity because of the "functions" of the work involved. Unlike the delivery cases where material was simply "dropped" on-site., here the employees of Builders were involved in more than a simple delivery. It was argued that in the present circumstances the employees of Builders were actively engaged on-site for several hours in the unloading, handling and conveying of materials. Counsel asserted that there was a significant difference between a truck driver who simply dumped a load of sand, gravel or asphalt on-site, and the present circum-

stances where employees were engaged on-site for lengthy periods of time to off-load a truck. She stated that the receipt and distribution of the material on the site is integral to the construction activity of applying the drywall. Counsel for Local 506 submitted that it has been long established in the construction industry that the unloading, handling, conveying and distribution of materials on a job site is construction activity and, subject to the jurisdictional claims of other trade unions to "handle" their own materials, is generally recognized to be Labourers work. Counsel also urged us to adopt the "first drop" principle accepted in other jurisdictions to find that although "delivery" of materials to a site is not construction activity, the unloading and handling of such materials in the circumstances of the present case does constitute construction work. (See for example, *Dillingham Corporation of Canada Ltd.*, [1981] Can. L.R.B. Rep. 25 and the cases referred to therein).

29. Moreover, counsel for the Labourers argued that the work was covered by the ICI agreement in Schedule "E" and in Article 17.03 of the Local Union Schedule for Local 506 (which relates to the work jurisdiction of employees engaged in plastering and drywall). Those articles provide:

SCHEDULE "E"

Subject to Article 2.06 - Work Claimed But Not Limited To

Tenders tending masons, plasterers and *carpenters. Tending shall consist of preparation of materials and the handling and conveying of materials.* Demolition work, debris handlers, dumpmen, watchmen, guards flagmen, material checkers, store keepers, tool crib attendants and yardmen, sewers, watermains, drains and the building and installation of manholes and catch basins.

ARTICLE 17- PLASTERERS' AND DRYWALL LABOURERS

17.01 The following additional provisions shall apply to Employees engaged in Plastering and Drywall:

17.03 Work Jurisdiction

The Jurisdiction of the Union in regard to this type of work shall be as follows:

The tending and assisting of plasterers, lathers, sprayers, and *drywall applicators,* the operation and maintenance of mixers, pumps or any other similar mechanical device used in the performance of the Employer's operations, *including the handling and distribution of all materials whatsoever into job area stockpiles or any other specific work areas designated by the Employer* whether or not the same are to be re-used again, the cleaning and removal of all debris associated with the above operations. All of the work involved in the erection of tubular metal or any other type of scaffolding

[emphasis added]

30. In the present circumstances, the Labourers claim the work from the unhooking of materials from the boom (or crane if a crane is used) on the fifth floor through to its distribution around the floor. In circumstances where the drywall is unloaded manually, the Labourers' claim

extends throughout the manual process. We note that the Labourers' witnesses each acknowledged that "tending" was different and distinct from the unloading of materials. The Labourers do not assert that the unloading of materials delivered to a site is the "tending" of carpenters or drywall applicators.

31. The Labourers further claim that the work has been subcontracted by Four Seasons to Builders insofar as Four Seasons has subcontracted the handling of construction material to Builders. The Labourers argue that the subcontracting is in violation of Article 2.05 of the ICI agreement. That article states:

> 2.05 The Employer agrees to engage only sub-contractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an ICI. General Contract, except as provided in Schedule "D" thereof.

It is asserted that Four Seasons has control of the work, chooses the drywall supplier and directs when, where and generally the manner of delivery and stockpiling of materials and that this work was improperly subcontracted to Builders in violation of Article 2.05. In so doing, counsel relied *inter alia* upon *Dalton Engineering & Construction Ltd.*, [1988] OLRB Rep. June 567 and *The Municipality of Metropolitan Toronto,* [1989] OLRB Rep. March 279. Counsel asserted that the unloading, handling and distribution of drywall material on-site was severable from the purchase of that material. Although Four Seasons can continue to purchase material from non-unionized suppliers, it must arrange for a different method of delivering and handling or conveying that material on-site. It is asserted that part has been improperly subcontracted in this instance.

32. The Labourers assert that in circumstances such as these a drywall contractor can use its own labourers to receive and stockpile the drywall on the various floors of the project when it is boomed up by the driver of the supplier's truck. Alternatively, the drywall contractor can use the general contractors' labourers to perform that work and reimburse the general contractor for the use of such labourers. Finally, it was argued that a drywall contractor such as Four Seasons can purchase drywall from a unionized supplier whereupon the employees of such unionized supplier could perform the work. It was asserted that each of these options would be in compliance with the subcontracting provisions of the ICI agreement.

33. In response to these submissions and in defence of the grievances counsel for Four Seasons argued that the delivery of materials to be used in construction is not itself a construction activity. The "delivery" of materials in this instance includes the unloading of those materials from the delivery truck to the stockpiles on the floor either by crane, boom or manually. Counsel relied upon *Ethier Sand & Gravel Limited,* [1979] OLRB Rep. Oct. 962 at paragraph 9, *Canadian Road Asphalts Limited,* [1980] OLRB Rep. March 299 at paragraph 17 and *Maitland Redi Mix-Concrete Products Limited,* [1980] OLRB Rep. Dec. 1751 at paragraph 6. Counsel argued that the concept of a "first drop" was not applicable in Ontario or in the circumstances of this case.

34. Counsel for Four Seasons also submitted that the applicant itself has recognized that the work is not construction work because it has negotiated a collective agreement outside the ICI collective agreement in respect of this work. He argued that the collective agreement which the applicant has with the unionized suppliers covers the work which, in this case, was performed by the employees of Builders. The evidence discloses that Local 506 negotiates the same "standard" collective agreement with each of the unionized suppliers (the "suppliers agreement"). Counsel pointed to section 146(2) of the Act and argued that, as an affiliated bargaining agent and member of the designated employee bargaining agency, Local 506 can only be bound to or conclude one collective agreement affecting the employees it represents in the ICI sector of the construction industry. That collective agreement is the "provincial agreement" as defined in section 137(1)(a). In light of the statutory provisions, Local 506 cannot, in the ICI sector, have two

different collective agreements covering the same work. Therefore, if the suppliers agreement covers the work performed by the employees of Builders, that work must be excluded from the ICI collective agreement. The alternative is to find that those portions of the unionized suppliers collective agreement are null and void. Counsel submitted that this latter alternative should not be accepted and that the Board should presume Local 506 intended to act within the law (especially section 146(2) of the Act) when it negotiated the jurisdiction clause in the suppliers agreement.

35. In support of this submission, counsel referred to the evidence of the applicant's own witnesses. Those witnesses testified that the work performed by the employees of Builders is described in Clause 23 of the suppliers agreement. Moreover these witnesses agreed that if Four Seasons had purchased the drywall material from one of the unionized suppliers the "delivery" of that material by the employees of the unionized supplier would have been performed pursuant to the terms of that agreement.

36. The relevant provisions of the suppliers agreement are Articles 3 and 23.

> ARTICLE 3: RECOGNITION
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> 3:01 The Employer recognizes the Union as the sole and exclusive Bargaining Agent for all of its employees working in and out of the Employers yards in O.L.R.B. Board Area #8, *engaged in the handling and delivery of Building Materials to Construction Sites,* save and except non-working foreman, office and Sales Staff.
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> ARTICLE 23: APPLICATION OF PLANT/WAREHOUSE
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> EMPLOYEES IN THE FIELD
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> 23.Ot The jurisdiction of employees covered by [sic] this Agreement shall be restricted to the following:
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> (a) All work in connection with the handling and placing of stockpiles of drywall and other materials, as may be introduced into the industry.
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> (b) It is agreed, whenever the above materials are hoisted directly from truck or conveyance into the building, this material will be received and distributed into area stockpile or stockpiles in the approximate area of installation by members of the Labourers' International Union of North America, Local 506 covered under this Agreement.
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> (c) When materials are placed in a *common location* inside the building all of the work involved in the handling and placing of materials into area stockpile or in the approximately areas of installation shall be done by the members of the Labourers' International Union of North America, Local 506 covered by this Agreement.
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> DEFINITION OF COMMON LOCATION SHALL BE:
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> The area immediately adjacent to the opening of a building wall, or entrance of elevator, or any give floor of building.
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> DEFINITION OF STOCKPILES SHALL BE:
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> Areas other than the common location above, i.e. partitions, rooms and areas

of installation.

The rates of pay and other terms and conditions of employment of the employees covered by the ICI agreement are significantly different from the rates of pay and terms and conditions of employees covered by this suppliers agreement.

37. The respondent also asserted that its method of arranging for the delivery of drywall materials to a construction project have been well established and well known for a significant number of years. The same practice by which Four Seasons obtains the building materials and supplies on-site has also been the general practice of other drywall contractors in the industry for many years. Counsel argued that the fact that this well known and well established practice of delivering drywall materials has not been challenged by either the Labourers or any other trade union (and in particular Carpenters Local 675) is indicative of the fact that the work is recognized as being outside the construction industry and outside the provisions of the ICI Collective Agreement.

38. Finally, counsel for Four Seasons submitted that the work which was performed by the employees of Builders was not subcontracted by Four Seasons to Builders. He asserts that the contract between Four Seasons and Builders was for the supply of materials to the floors of the project. Counsel argues that it is impossible, and in any event impracticable to sever from that supply contract that portion which relates to delivery or unloading of the drywall on the floors of the project. In this regard counsel points to the uncontradicted evidence led by the respondent that throughout the course of the respondent's own business undertakings (and generally within the drywall contracting industry) the price for the supply of drywall includes delivery to the floors of a project. Counsel also argued that the ownership of the drywall does not pass from the vendor supply company to the purchasing contractor until the drywall is delivered to the floor of the project. Therefore, it cannot be said that Four Seasons subcontracted work over which it had control.

39. Notwithstanding counsel's submissions to the contrary, we find that we do not have to decide in any general or all encompassing terms whether "delivery" of materials is or is not construction work. Neither do we have to determine where the "delivery" of materials stops and the "handling and conveying of materials" or the "handling and distribution of all materials whatsoever into job area stock piles" begins. We do not read the cases referred to by counsel as standing categorically for the proposition that delivery of materials to a construction site is not construction work. Indeed in our view the cases indicate that whether or not "delivery" of materials is construction work is a question which can only be answered having regard to the particular facts and circumstances of the case. In our view it is neither necessary nor desirable that the Board precisely define what is "delivery" and what is "handling" or "conveying" or 'distribution". An all encompassing definition of any of these terms is neither possible nor practical. Each case must turn on its own facts.

40. In the circumstances of this case we find that the delivery of drywall to the fifth floor of the building and the work performed by the employees of Builders in this regard is not construction work and is not work covered by the ICI agreement. On the basis of the facts and evidence before us and after consideration of the submissions of the parties we find that the work performed by the employees of Builders is work specifically covered and referred to in Article 23 of the suppliers agreement.

41. We agree with the respondent's submissions that Local 506 cannot have two different collective agreements covering the same construction work in the ICI sector. The evidence of the Labourers' witnesses, and their position throughout the hearing indicates that if Four Seasons had purchased from a unionized supplier, the "delivery" of the drywall to the fifth floor could have

been performed by the employees of the supplier pursuant to the terms of the suppliers agreement. The reasonable inference to be drawn from that evidence and that position is that the work is not construction work and is not covered by the ICI agreement because construction work in the ICI sector *must*, by reason of statute, be covered by the ICI agreement. In the circumstances, we therefore conclude that the delivery and unloading of drywall by employees of a building supply company (and specifically the work performed by employees of Builders in this instance) is not construction work and does not, and was not intended to fall within the "handling", "conveying" and "distribution" of materials as referred to in Schedule E and Article 17.03 of the local union schedule for Local 506 of the ICI agreement.

42. As the delivery of the drywall to the local stockpiles on the fifth floor is not work covered by the ICI agreement it is unnecessary to determine whether the contract between Four Seasons and Builders in respect of that work is a subcontract. Assuming without deciding that the work was in fact subcontracted by Four Seasons to Builders, such subcontract would not be a violation of the ICI collective agreement because it is not with respect to work covered by the ICI agreement.

43. The grievance is dismissed.