STATE OF WISCONSIN CIRCUIT COURT – BR. 5 ROCK COUNTY

FRANK BROTHERS, INC.,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF TRANSPORTATION and JAMES S. THIEL, GENERAL CONTRACTOR,

Defendants.

DECISION

Case No. 04CV924

Petitioner Frank Brothers, Inc. sought a declaratory ruling of the Wisconsin Department of Transportation (hereinafter "WisDOT") under Wis. Stat. 227.41. The declaratory ruling was whether the Plaintiff had to pay State of Wisconsin prevailing wage rates to drivers delivering mineral aggregates to certain road projects under Wis. Stat. 103.50. In its Decision, the DOT held that Wis. Stat. 103.50 required Petitioner Frank Brothers, Inc. to pay prevailing wage rates to drivers delivering mineral aggregates to certain road projects. Petitioner Frank Brothers had sought review by this Court under Wis. Stat. 227.53.

Petitioner is the operator of a commercial quarry within the meaning of Wis. Stat. 103.50. Petitioner delivered materials from its commercial quarry to two WisDOT projects in Rock County. Petitioner delivered

materials for use as "base course" on the projects. Base courses comprises the second layer of materials placed in road projects, and is laid on top of the first layer, or "sub-grade". The base course is usually in turn covered by concrete or blacktop.

The aggregate the Petitioner delivered to the projects was crushed limestone. Petitioner extracted the limestone from its quarries before crushing it and using screens to sort it to different gradations.

Part of Petitioner's work on the project was delivery of recycled concrete and base course aggregate. Petitioner reclaimed concrete for use in crushed limestone, not only from the roads replaced by the projects but from prior projects as well. Petitioner used the same process to crush recycled concrete as it did to crush limestone. The only difference in the two processes was the removal of steel from concrete by magnets.

Petitioner customarily used crushed limestone containing approximately twelve (12%) percent-crushed recycled concrete to meet specifications for base course material for delivery to the highway project. Crushed limestone retains essentially the same appearance regardless of whether it contains crushed recycled concrete. Petitioner mixed crushed limestone with recycled crushed concrete prior to delivery. Petitioner testified that it is usually 90/10 homogeneous mix for the highway work of

crushed limestone and recycled, crushed concrete. The same hauling and delivery process is used for base course aggregate regardless of whether it contains crushed recycled concrete.

Deliveries to the project were usually by quad-axle trucks. The driver would dump the aggregate approximately ten feet from the roadbed, in a pile measuring ten to twelve feet in diameter and four to five feet in height. Within minutes, a bulldozer would push the pile of aggregate into the roadbed. According to the findings of the Examiner:

> **. . .[The material was delivered] by truck to the highway project by or for commercial sources when the truck dumps or spreads the mineral aggregate on the project roadbed while the highway contract is in effect.**
>
> **[And the material was] . . . deposited substantially and placed directly or through spreaders from the transporting vehicle if it deposited, dumped, placed, spread or laid on the roadbed within the site of the work where it will be or is being bladed, spread, scraped, pushed, raked, rolled, compacted or similarly worked without further hauling.**

There was also testimony in the record from Joseph White in which White stated that:

> **When used in crushed aggregate base course, I consider crushed concrete to be a hard and durable granulated material with characteristics similar to that of crushed rock. We equate the two as the same.**

The Hearing Examiner found White's testimony credible. The Hearing Examiner decided four issues in the course of his declaratory ruling. They are as follows:

1. Wis. Stat. 84.015 requires that the State of Wisconsin's prevailing wage under Wis. Stat. 103.50(2m) be applied to the delivery of crushed and processed limestone from a commercial quarry. This is so even though such delivery is exempt from the application of the federal prevailing wage under the Davis Beacon Act and its regulations.

2. Crushed and processed limestone from a commercial quarry is not a manufactured product (exempt from prevailing minimum wage under Wis. Stat. 103.50(2m)) when highway contract specifications require that recycled concrete be crushed and blended into a mix of limestone for delivery to the highway project.

3. Crushed and processed limestone from a commercial quarry is not a manufactured product (exempt from prevailing minimum wage under Wis. Stat. 103.50 (2m)) even though: a) the material is crushed and blended by equipment; and b) such process is defined as manufacturing under Wis. Stat. 77.54(6)(m).

4. The delivered and processed limestone was not stockpiled because; a) delivery by the truckers was in the piles without the use of

spreaders from the transporting vehicle; and b) the delivered material was immediately incorporated into the work by depositing the material substantially in place, directly with other contractors moving the materials from the piles.

Based on these rulings the DOT Examiner held that Wis. Stat. 103.50 required Petitioner Frank Bros., Inc. to pay prevailing state wage rates to drivers delivering these products to the road projects.

The transcript of the proceedings has been filed with the Court. The Petitioner has filed a brief in support of his Petition for Review and a Reply Brief. The Teamsters Joint Council 39 has filed a brief in opposition, as has the Respondent Wisconsin Department of Transportation.

DISCUSSION
WIS. STAT. 84.015

The Petitioner contends that Wis. Stat. 84.015 requires that Wisconsin construct federally assisted highways in accord with federal law, with a result that material supply drivers cannot be paid prevailing wages. According to Petitioner, federal regulations under the Davis Bacon Act at 29 CFR §5.2 (j) (2) has specifically exempted material supply drivers from the application of prevailing wages since 1992. Petitioner asserts that Wisconsin Law under §103.50 includes some types of material supply drivers within the application of state prevailing wages. Petitioner argues that §84.015 Wis.

Stats. requires the State to construct federally aided highways **"in accordance with"** federal laws and policies. Under the DOT ruling in Petitioner's declaratory ruling action, §84.015 does not require the State to follow federal law under the Davis-Bacon Act.

Wis. Stat. 84.015 provides as follows:

> **84.015 Federal highway aid accepted. (1) The state of Wisconsin assents to the provisions of Title 23, USC and all acts of congress amendatory thereof and supplementary thereto. The state of Wisconsin declares its purpose and intent to give assent to all federal highway acts and to make provisions that will insure receipt by this state and any federal highway aids that have been or may be allotted to the state including all increased and advanced appropriations, and insure that such highways and related facilities in this state as may be eligible to be improved or constructed in accordance with any such federal highway acts may be improved, constructed and maintained in accordance therewith. The good faith of the state is pledged to make available funds sufficient to adequately carry out such construction and maintenance (Emphasis Added).**

The Examiner ruled that nothing in the language of Wis. Stat. 84.015 requires WisDOT to apply interpretations of the Davis-Bacon Act to the Wisconsin prevailing wage law, Wis. Stat. 103.50. According to WisDOT, the purpose of Wis. Stat. 84.015 is as follows:

> **Wisconsin Statute 84.015 on its face does not expressly nor implicitly preempt or override other Wisconsin law nor does Wis. Stat. 84.015 expressly adopt any specific federal law, as it exists on a particular date. Wis. Stat. 84.015 does authorize cooperation and compliance with provisions of federal highway laws that are prerequisites of receipt of**

> **federal highway funds under Title 23 of the U.S. Code, if within the reasonable scope of authority granted to WisDOT by Wisconsin statutes.**

In short, WisDOT concluded that no conflict arises when both the Wisconsin prevailing wage law and Davis-Bacon are applied to jointly funded highway construction projects in a manner which requires higher wage rates or broader coverage under the Wisconsin prevailing law (Wis. Stat. 103.50).

The Petitioner's argument on this point appears in direct conflict to the decision of the United States District Court for the Western District entitled ***Frank Bros., Inc. v. Wisconsin Dept. of Transportation***, 297 F.Supp. 2d 1140 Western District Wisconsin 2003. In that case, the U.S. District Court specifically held that application of Wis. Stat. 103.50 to federal highway act funded contracts did not conflict with the federal aid highway and Davis-Bacon Acts. On p. 1147 the Court states:

> **It is not impossible for the plaintiff to comply with both the federal-aid highway act and the state's prevailing wage law. The federal-aid highway act requires that laborers 'shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined . . . in accordance with the Davis-Bacon Act. 23 U.S.C. §113(a). (Emphasis Added) The fact that workers who haul material to and from a job site are not covered by the Davis-Bacon Act does not make it impossible for the plaintiff to pay workers engaged in such work higher wages in accordance with state law. . . .**

The District Court ruled against Frank Brothers holding that federal law does not preempt state law in this area and also holding that application of the Wisconsin prevailing wage law to federally funded highway projects does not violate the Davis-Bacon Act.

In addition to the adverse federal decision in this matter, the Court believes it owes great weight to WisDOT's decision. The standard for review of an agency's legal conclusions and statutory interpretation is set forth by the case of ***Jicha v. DIHLR***, 169 Wis.2d 284, 290-291 (1992):

> **This court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence and specialized knowledge aid the agency in interpretation and application of the statute, the agency's determination is entitled to 'great weight.' The second level of review provides that if an agency's decision is 'very nearly' one of first impression, it is entitled to 'do weight' or 'great bearing.' The lowest level of review, the de novo standard is applied when it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. The great weight standard of review is appropriate if an agency's interpretation 'reflects a practice or position long continued, substantially uniform and without challenge by governmental authorities and courts.' *Cornwell Personnel Associates v. LIRC*, 175 Wis.2d 537, 544 (Ct. App. 1993).**

In determining application of the great weight deference, the Court looks at four factors:

(1) The agency was charged by the legislature with the duty of administering the statute;
(2) That the interpretation of the agency is one of long standing;
(3) That the agency employed its expertise or specialized knowledge informing the interpretation; and
(4) That the agency's interpretation will provide uniformity and consistency in the application of the statute.

UFE, Inc. v. LIRC, 201 Wis.2d 274, 284 (1996).

These four criteria are met in this case. WisDOT is charged with the duty of administering Wis. Stat. 84.015. The Examiner's opinion documents the lengthy and extensive interpretation of the statute for almost a half-century. WisDOT has interpreted 84.015 to require it to pay state prevailing wage laws without deference to the Davis-Bacon Act. Third, WisDOT has used its expertise and special knowledge in deciding issues concerning prevailing wage loss for more than a half century and has directly confronted the issue of whether Davis-Bacon supercedes the Wisconsin prevailing wage law in a 1984 opinion and declaratory ruling. The fourth factor is also met in that the agency's interpretation provides consistency and uniformity in the construction of jointly state-federally funded highways in the State of Wisconsin. In short, the agency's position on the prevailing wage law, in full force and effect since at 1984, should have been well known to Petitioner when bidding on these projects.

The Court concludes that it must give great weight to WisDOT's interpretation of Wis. Stat. 84.015. Under the great weight standard of review, the Court concludes that WisDOT's interpretation of 84.015 is reasonable. WisDOT's interpretation is that Wis. Stat. 84.015 on its face does not expressly nor implicitly preempt or override other Wisconsin law nor does Wis. Stat. 84.015 expressly adopt any specific federal law, as it exists on a particular date.

Nothing in the language of Wis. Stat. 84.015 requires WisDOT to apply interpretations of the Davis-Bacon Act to Wis. Stat. 103.50. Under WisDOT's interpretation, cooperation and compliance with federal highway laws are mandated. The federal highway act does not require and has not required states to implement lower or narrower federal Davis-Bacon requirements than any state prevailing wage requirements as a prerequisite to the receipt of federal funds. The history cited by the Examiner in his decision sustains the reasonableness of WisDOT's interpretation.

The Court ***affirms*** WisDOT's decision on issue 1.

MANUFACTURED PRODUCT – 103.50(2m)

The Examiner made two decisions concerning the manufactured product exemption from the prevailing wage statute under Wis. Stat. 103.50(2m). 103.50(2m) exempts from the prevailing wage statute:

A laborer, worker, mechanic or truck driver who is regularly employed to process, manufacture, pick up or deliver materials or products from a commercial establishment that has a fixed place of business from which the establishment regularly supplies processed or manufactured materials or products is not entitled to receive the prevailing wage rate determined un (3) or to receive at least 1.5 times his or her hourly basic rate of pay for all hours worked in excess of the prevailing hours of labor unless any of the following applies:

1)the laborer, worker, mechanic or truck drivers employed to go to the source mineral aggregate such as sand, gravel or stone that is to be immediately incorporated into the work, and not stockpiled or further transported by truck, pick up that mineral aggregate and deliver that mineral aggregate to the site of a project that is subject to the section by depositing the material substantially in place, directly or through spreaders through the transporting vehicle. (Emphasis Added)

The Examiner concluded that crushed limestone is a mineral aggregate, so that deliveries of crushed limestone to a highway project are subject to prevailing wages. The Examiner also concluded that reprocessed crushed concrete is not a manufactured product within the meaning of §103.50(2m). Consequently, whether the Frank Brothers drivers were hauling crushed limestone or reprocessed concrete Petitioner Frank is not exempt from the State prevailing wage.

The Petitioner argues that the WisDOT's decision in each of these matters does not take into account that crushed limestone is deemed to be manufactured product under §77.54(6m) Stats. Ch. §77 of the Wis. Statutes

deals with the application of sales and use taxes to forest cropland. §77.54 deals with exemptions from taxes proposed by the Chapter. Paragraph 6 is an exemption for the gross receipts from the sale of and the storage user consumption of:

> . . . [m]achines and specific processing equipment and repair, parts or replacements thereof, exclusively and directly used by a manufacturer in manufacturing tangible personal property and safety attachments for those machines and equipment.

(6m) attempts to define manufacturing for the purposes of determining the exemption under para. (6)(a) stating as follows:

> **For purposes of sub. (6)(a)' manufacturing' is the production by machinery of a new article with a different form, use and name from existing materials by a process popularly regarded as manufacturing. 'Manufacturing' includes but is not limited to:**
>
> **(a)Crushing, washing, grading and blending sand, rock, gravel and other minerals.**

The Petitioner argues that the definition of manufacturing in §77.54 (6m) is controlling, particularly in light of a ***Hammersly Stone Co., Inc.*** decision by the Department of Revenue which concluded that the process of creating crushed limestone constituted "manufacturing." The Petitioner also argues that the decision by the Department is a matter of first impression so that the Court is required to review the decision under the ***de novo*** standard of review.

The initial decision as to each of these two issues requires the Court to analyze what deference is owed to WisDOT'S decision. In ***Green v. Jones***, 23 Wis.2d 551 (1964) the Highway Commission concluded that there was no rational basis for distinguishing drivers transporting aggregate from drivers transporting pit run or crushed base. In affirming the conclusion that all drivers should have been paid the rate applicable to Occupation 25 for 1957, the Supreme Court states:

> **Finally, the Highway Commission's view of the matter is entitled to some particular weight. It is true that the final determination of the appropriate wage rate rests with the Industrial Commission. However, the statute provides that the Highway Commission will supply the Industrial Commission with relevant data. In those situations where the details of highway construction, and more specifically the nature of the construction materials hauled, determine the wage rate, the Highway Commission's view of the appropriate rate is entitled to considerable weight.**

In addition, great weight is given to an administrative agency's interpretation of a statute if **"the administrative practice is long continued, substantially uniform, and without challenge by governmental authorities in courts."** ***Beloit Education Assoc. v. WERC,*** 73 Wis.2d 43, 67 (1976).

In this case, the Examiner went through the history of the categorization of these materials. The Examiner concludes that the exception under 103.50(2m)(b) is not applicable because the truck drivers were placing

the mineral aggregate (either crushed limestone or crushed concrete) substantially in place. The Examiner's Findings of Fact in this regard are supported by substantial evidence in the record and is reasonable. The Court concludes under that the WisDOT decision is entitled to great weight deference.

The Examiner refused to apply the definition of manufacturing found in Wis. Stat. 77.54. As is pointed out by WisDOT in its analysis of the statute, 77.54 is an area of an exemption from the general sales and use taxes. The statute relied upon by Petitioner specifically limits the definition of manufacturing to the interpretation of the exemption under Wis. Stat. 77.54(6)(a). On its fact, the definition of manufacturing contained in Wis. Stat. 77.54(6m) only applies to (6), not Wis. Stat. 103.50. ***See Town of LaFayette v. City of Chippewa Falls***, 70 Wis.2d 610 (1975).

The Court owes the Examiner's decision in each of these two matters great deference under the authority cited. The question is whether the Examiner's interpretation and decisions are reasonable. The Court concludes that the Examiner's definition of manufactured material as applied to crushed limestone and as applied to reprocessed crushed concrete is reasonable and supported by previous rulings of the Department. The Court also concludes that the Findings of Fact made on pages 18-20 made by the

Examiner are supported by substantial evidence in the record and are reasonable. In particular, the Court believes that the process of crushing and screening are the same where they involve limestone or recycled concrete.

In short, the Court ***affirms*** WisDOT's conclusions that both crushed and processed limestone and crushed and processed concrete are not a manufactured product which exempts Petitioner's drivers from the State prevailing wage rates. The ALJ's decision is supported by the testimony of Joseph White. White testified the ALJ summarized testimony as follows:

> **For the reasons stated in response to the previous issue, it is immaterial whether the 'mineral aggregate such as sand, gravel or stone' is a manufactured material or a product from a commercial source but falls within the remainder of the exception from the exemption. The fact that crushed recycled concrete and crushed virgin limestone are screened and blended together to meet WisDOT's specifications does not remove it from the definition of the phrase 'mineral aggregate such as sand, gravel or stone' promulgated in the 1985 binding declaratory ruling.**

Mr. White testified that crushed concrete is an item of the same type as those specifically enumerated in Wis. Stat. 103.50 (2m)(b)1.

The Court concludes that WisDOT's interpretation of the term mineral aggregate as applied both to crushed and pressed limestone and crushed and reprocessed concrete is consistent with the Legislature's intent, the Court's construction of 103.50, WisDOT'S own longstanding prior interpretations set forth in the Examiner's opinion, and the common and

approved usage of the term mineral aggregates. The Court affirms the WisDOT's interpretation of the term mineral aggregate and affirms WisDOT's rulings and holdings that neither crushed and processed limestone nor crushed and reprocessed concrete are manufactured products exempt from the prevailing minimum wage under Wis. Stat. 103.50(2m).

SUBSTANTIALLY IN PLACE

The final matter to be reviewed by the Court is the WisDOT decision that the delivered materials were immediately incorporated into the work and not stockpiled or further transported by truck. Under Wis. Stat. 103.50(2m), regardless of the nature of the delivered materials, the truck driver must be paid prevailing wage if the truck driver is employed to go to the source of the mineral aggregate such as sand, gravel or stone **"that is to be immediately incorporated into the work, and not stockpiled or further transported by truck."** Under the statute, the Legislature distinguished **"immediate incorporation"** from situations where materials are **"stockpiled or further transported by truck."** There was no evidence in the record that the aggregates at issue in this case were **"further transported by truck."** The issue is whether the materials were **"immediately incorporated into the work and not stockpiled."** The Examiner made findings that the materials were immediately incorporated

into the work and not stockpiled, concluding that the Petitioner would have to pay State prevailing wage to its truck drivers.

The Examiner concluded based on the testimony that after the Frank drivers had delivered the base course material, there was no further hauling of the material, even when the mineral aggregate was dumped in a pile or piles on the base course. According to the testimony of Roger Frank cited by the Examiner, Frank admitted that the material was usually pushed from the surface of the base course to the sub-base or roadbed by a dozer as soon as it was dumped. The only exception was when rain forced discontinuation of the work one or two times. Sometimes trucks would arrive in a group that require some pushing by a dozer further than ten feet. The material was pushed onto the sub-base or roadbed within **"a couple minutes, maybe three, four."**

On page 23 of the Examiner's Opinion, the Examiner concludes:

> **No matter how it happened, however, Roger Frank confirmed that the material was immediately incorporated into the work and was intended to be incorporated into the work and not 'stockpiled' or further transported by truck.**

In the application of §103.50(2m)(b) 1 it is clear from the facts found by the Examiner that the trucks delivered material almost directly adjacent to where the material was to be used. The material was not further transported

by truck. Bulldozers incorporated the delivered material immediately into the work. One truckload does not constitute a stockpile.

In the Court's judgment, the Court's owes great deference to the analysis and findings by WisDOT. In the first place, the decision deals with details of highway construction and the construction and the application of construction processes to the construction materials hauled. Under ***Green v. Jones***, 23 Wis.2d 551, 566, WisDOT'S decision in this area is entitled to great weight deference. Second, even though it is not clear to the Petitioner, it is clear to the Court that WisDOT has engaged in rulings along these lines going back to 1985, made determinations under the statute on frequent occasions as shown by the Examiner's decision on page 21, and concludes: **"the new statute codifies the 1985 declaratory ruling and expands the applicability of the exception for delivery of mineral aggregates such as sand, gravel or stone from commercial sources so that the required prevailing wage law is applied to these operations."**

The Court concludes, giving great weight deference to WisDOT'S decision that its interpretation of the statute is reasonable and consistent with previous declaratory rulings. More importantly, under the facts found by the Examiner, the delivery of the aggregates by the Petitioner's trucks was made on or adjacent to the road bed and thus was the depositing of those materials

substantially in place. WisDOT'S conclusion that the work is covered by Wis. Stat. 103.50(2m)(b) 1 is ***affirmed***. The Court does not find persuasive the Petitioner's reliance on the Minnesota Court of Appeals decision in ***SA-AG, Inc. v. Minnesota Dept. of Transportation***, 447 N.W.2d 1 (Minn. App. 1989) because it was not interpreting Wisconsin law.

CONCLUSION

The decision of WisDOT in this case is ***affirmed*** in its entirety. Counsel for WisDOT is directed to prepare an Order for the Court's signature affirming the decision with costs.

Dated this 9th day of February, 2005.

BY THE COURT:

John W. Roethe, Judge

Copies to:

Attorney Dennis White
Asst. Atty. General William Ramey
Attorney Matthew Robbins

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