Minnesota
Department of Labor and Industry

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St. Paul, Minnesota 55155
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March 19, 1990

The Honorable Kenneth Peterson, Commissioner
Department of Labor and Industry
443 Lafayette Road
St. Paul, MN 55155

Dear Commissioner Peterson:

This is to transmit the report of the Advisory Committee regarding proposed rules and regulations concerning M.S. 177.41-44.

Following its establishment in November, 1989, the Labor Standards Advisory Committee met 12 times to date. Typically, our meetings extended from 8:30 a.m. to 12:00 p.m.; some meetings, however, continued into the afternoon. Eight of the nine Committee members were usually present, and excused or absent members were always afforded full opportunity to present his/her respective viewpoint and to record a vote subsequently. Moreover, most meetings were attended by Maryanne Hruby, Director of the Legislative Commission to Review Administrative Rules; representatives from the Minnesota Department of Transportation, and various individuals from the industry (Attachment A lists the full guest attendance record). All were invited to and participated in the ensuing discussion.

During the course of its deliberations, the Advisory Committee reviewed the tapes of legislative proceedings regarding the enactment of M.S. 177.41-44. In addition, some 50 plus documents were presented to the Committee.

Early in our deliberations the Committee determined that a substantial portion of its task could be accomplished by clearly defining various concepts strategic or requisite to the implementation of the statute. These concepts include the following: "commercial establishment", "independent truck owner (independent contractor)", "mineral aggregate", "substantially-in-place", "stockpile", "trucking broker", "site-of-work" and "work under the contract".

Moreover, the Committee strongly recommends to the Minnesota Department of Transportation and the Minnesota Department of Labor and Industry that the following educational and procedural steps be implemented at the conclusion of the rulemaking procedure:

1. Appropriate training should be provided to the Minnesota Department personnel enforcing the statute. The desired result here would be uniform enforcement of the predetermined wage law.

2. The prime contractor and all subcontractors should classify all personnel who perform work under the contract, such that they are either employees, subcontractors, independent truck owners or material suppliers.

3. Appropriate educational programs should be implemented to fully and completely inform the contractors, material suppliers, independent truck owners and others in the industry as to what the law requires on payment of prevailing rates to independent truck owners.

4. The Department should create a joint DOT and DLI Taskforce to examine the split rulemaking and enforcement functions as they now exist and to recommend needed administrative and legislative changes. These may include:

   1) Transfering the enforcement function to DLI;
   2) Providing limited rulemaking authority to DOT; or,
   3) Deciding that no changes are appropriate except better cooperation between the two agencies.

Notwithstanding the diverse membership of the Committee, we reached a consensus regarding several of the concepts. To be sure, significant differences of view are present. These are indicated by the submission of both "majority" and "minority" formulations side by side for your consideration along with their respective recorded votes.

Throughout, the Advisory Committee sought to assure full expression of all points of view and to maintain a complete record of its proceedings. All of the meetings were taped, some were transcribed by a reporter until it became too laborious, and all meeting minutes were fully reviewed and adopted unanimously.

The lack of elaboration of rationale by the majority in our report was governed by a desire of brevity. The entire record of the Committee's deliberations and discussions are fully recorded in the tapes and minutes and/or handouts in detail. However, to assure full expression for minority views on various issues, those members may insert additional comments which are so identified.

Because of pending litigation, the Committee was unable to obtain full and complete answers to several questions of applicability from either DLI or DOT.

Should you desire further elaboration or assistance, we will be pleased to meet with you. We hope our endeavors prove useful in the development of equitable and enforceable rules and regulations.

In conclusion, it is our belief that equity and efficacy will be served best if the preliminary draft rules, once determined by the Department, are discussed with the Committee prior to publication.

Respectfully yours,

Paul Bailey

Paul Bailey
Drivers Local 221
Minneapolis

Marlys Boehlke

Marlys Boehlke
Owner/Operator
Cedar

see attached letter

Colleen Donovan
Donovan Contracting
St. Cloud

John Ericson
Sa- A.G. Inc.
Apple Valley

George Mattson (Co-Chair)
Shafer Contracting ~~Inc.~~ Co., Inc.
Shafer

Abe Rosenthal
Minnesota Transport Services Assoc.
St. Paul

Robert H. Rowles

Robert Rowles
Owner/Operator
Minneapolis

George is in London for three weeks

George Seltzer (Co-Chair)
Professor Emeritus
Minneapolis

see attached letter

Diane Vinge
L & D Trucking, Women's Business Enterprise Inc.
Shakopee

ATTACHMENT A

GUEST ATTENDANCE RECORD

Maryanne Hruby, Director of the Legislative Commission to Review Administrative Rules (LCRAR)

Geno Jacobs, Jacobs Trucking Inc.

Fred Rucki, Rucki Trucking Inc.

Don Boehlke, ITO

Dan Gustafson, President AFL-CIO

George Hawkins, Associated Builders and Contractors (ABC)

Betty Geyer, ITO Rodgers Trucking

Eugene Brethorst, Drivers Local 221

Donald Dean, Associated General Contractors (AGC)

David Radziej, Associated General Contractors (AGC)

Michael Daub, Attorney

Shafer Contracting Co., Inc.

SHAFER, MINNESOTA 55074

March 14, 1990

Commissioner Kenneth Peterson
Department of Labor and Industry
443 Lafayette Road
St. Paul, Minnesota 55155

Dear Commissioner Peterson:

As one of the chairmen of the advisory committee, I feel compelled to answer some of the allegations raised by Diane Vinge and Colleen Donovan in their recent letters.

A complete examination of the record of the committee's work will show the following:

1) All issues were fully examined, debated and exhaustively discussed. Only after individual opinions were repeated more than two or three times would the chair attempt to move the discussion along. Several meetings that were scheduled to last all day were completed early when there was no further comment from any committee members. It should also be noted that all issues suggested by any member, by staff or by visitors were considered, reviewed and disposed of.

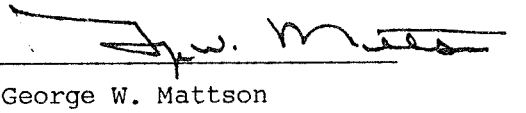
2) The committee members and staff approached their advisory role in a thorough and thoughtful manner. Only after two of the members who were involved in the initial litigation failed to convince others of the wisdom of their position, did we have suggestions that somehow the majority opinion was not sound or valid. All members in the initial meetings attempted to form a consensus and make compromises to reach a unanimous position. In most cases, except for two members, this approach was successful. The record will show that Diane Vinge and Colleen Donovan nominated me as chairman because of their opinion that I was fair and impartial. No objection to the composition of the committee was made by any member or their attorneys or any visitors until the final meeting when it was clear that the majority opinion was going to be clearly and accurately presented as such without any blurring or dilution of the final result.

3) It was apparent that several of the committee members who were parties to litigation with the DLI and Minn/DOT were going to take an adversarial and confrontational position to committee staff. This was not helpful to our mission and did not foster the mutual respect and cooperation which is so essential in the work of a committee such as ours. My only comment is that staff did much better than could be expected considering the situation they were confronted with. The taped records will provide numerous examples of the confrontational behavior I have referred to.

I think all who served on the committee should have a sense of pride in the contribution they made. Let the committee record speak for itself. I urge you to ignore the after-the-fact interpretations, allegations and summaries that those who did not prevail are urging upon you.

Yours very truly,

SHAFER CONTRACTING CO., INC.

By: 

George W. Mattson

GWM:so

I. PROPOSED DEFINITION:

COMMERCIAL ESTABLISHMENT

1. The operator owns the land or has a long-term lease;

2. The operator's records indicate that a substantial volume of its annual sales from that location are for other than MNDOT highway contracts;

3. The operator is primarily a material supplier rather than a contractor or subcontractor;

4. The operator did not set up at the location primarily to serve **MNDOT** highway contract work;

5. The operator advertises the availability of material for sale and has facilities available at all time for effecting sales; and

6. In the case of commercial pits that provide mineral aggregates, operators customarily maintain a basic delivery fleet.

II. VOTE:

Paul Bailey - yes
Marlys Boehlke - yes
John Ericson - yes
George Mattson - yes
Abe Rosenthal - yes
Robert Rowles - yes
George Seltzer - yes

Colleen Donovan - no
Diane Vinge - no

III. MINORITY REPORT:

Diane Vinge: "The definition of commercial establishments as voted by the majority is in direct conflict with the U.S. Department of Labor's definition."

Colleen Donovan: "George Mattson feels it is unconstitutional and not right his drivers hauling gravel etc., have to be paid prevailing wage, if drivers from "commercial establishments" are not also covered. However, it does not upset him when his drivers that haul steel, culverts and equipment are covered under prevailing wage and that if he hires and owner operator or independent trucking company those drivers would not be covered under prevailing wage as stated by Mr. Steve Buffington, Attorney General Office, during a Committee meeting on 1-4-90.

Refer to document numbers: 7, 20, 21."

I. PROPOSED DEFINITION:

INDEPENDENT TRUCK OWNER (INDEPENDENT CONTRACTOR)

Part 1. Definition. An Independent Truck Owner (Independent Contractor) for the purpose of M.S. 177.44 is any individual, partnership, or corporation who owns or holds a vehicle as defined in part 2 under a bona fide lease and who contracts that vehicle together with driver services to an entity which holds itself out to and provides construction services. An Independent Truck Owner may realize a profit and loss based upon the manner in which work is performed.

Part 2. Independent Truck Owner (Independent Contractor). In the construction industry, an owner-operator of a vehicle that is licensed and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulatory agency is an independent contractor, not an employee, while performing services in the operation of his or her truck, if each of the following factors are substantially present:

A. The individual owns the equipment or holds it under a bona fide lease arrangements;
B. The individual is responsible for the maintenance of the equipment;
C. The individual bears the principal burden of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road;
D. The individual operates the equipment;
E. The individual generally determines the details and means of performing the services in conformance with regulatory requirements, operating procedures, and specifications of the entity he/she contracts with;
F. The individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.

II. VOTE:

Marlys Boehlke - yes
Colleen Donovan - yes
John Ericson - yes
George Mattson - yes
Abe Rosenthal - yes
Robert Rowles - yes
George Seltzer - yes
Diane Vinge - yes

Paul Bailey - abstain

III. MINORITY REPORT:

Paul Bailey abstained. Bailey advised he did not wish to be tied with anything that defines ITO, because he does not feel the Committee's definition was accurate. He felt that the definition did not give contractors the right to negotiate their own rates.

Diane Vinge: "The reason I voted yes on this definition was because there was supporting documentation given by the staff and other members of the Committee.

Refer to document numbers: 12, 14, 15."

Colleen Donovan: "I was in complete agreement with the Committee on this definition since we did have several documents we could reference our definition to that had already been addressed by the law's (both State and Federal).

Refer to document numbers: 11, 12, 14, and 15."

I. PROPOSED DEFINITION:

MINERAL AGGREGATE

Mineral aggregate is an inert solid material of mineral composition, such as sand, gravel, crushed stone, crushed rock, screenings, slag, and rip rap or rock fragments or granulated material with similar characteristics, recycled concrete and bituminous materials used in place of or in addition to any of the above-described mineral aggregates, specified or selected by the MNDOT, Highway Standard Specification Handbook, 1988 edition, as approved by the Commissioner of Transportation on June 9, 1988, but not concrete, ready-mix concrete, bituminous concrete, asphalt, mastic, mortar, plaster, macadam and other similar processed or manufactured materials and products except as specified above for recycled products. Mineral aggregate does not include other material such as clay, topsoil, fill dirt, silt, boulders, wall stone, loam, gumbo, loess, peat, muck, hardpan or other similar soils or mixed earth.

II. VOTE:

Paul Bailey - yes
Marlys Boehlke - yes
John Ericson - yes
George Mattson - yes
Abe Rosenthal - yes
Robert Rowles - yes
George Seltzer - yes

Colleen Donovan - no
Diane Vinge - no

III. MINORITY REPORT:

Colleen Donovan: "Since this Committee was appointed to review the intent of the 1973 statute and the wording of it under the Committees definition they are looking at the industry and how it operates in the 1990's and including it in the 1973 law. The problem I see with this is that under some of the Committees other definitions they would not include or look at what is happening in the industry in the 1990's and stated that it was not part of the 1973 laws.

Diane Vinge: " 1) recycled concrete and bituminous were not comtemplated in the Statute in 1973 and likewise should not be now; 2) Diane heard no reasonable reason as to why we should allow expansion of the 1973 Statute to include recycled concrete and bituminous and at the same time ignore the question of coverage when hauling concrete and bituminous <u>before</u> it is recycled?

Refer to document numbers: 17,18."

I. PROPOSED DEFINITION:

SUBSTANTIALLY-IN-PLACE

Mineral aggregate from commercial establishments is deposited substantially-in-place directly or through spreaders from the transporting vehicle if it is 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.

II. VOTE:

Paul Bailey - yes
Marlys Boehlke - yes
George Mattson - yes
Abe Rosenthal - yes
Robert Rowles - yes
George Seltzer - yes

Colleen Donovan - no
John Ericson - no
Diane Vinge - no

III. MINORITY REPORT:

John Ericson voted no. In his explanation he refers to a letter dated December 21, 1982 from U.S. Department of Labor to James Frey of Port Clinton, Ohio. The letter states: "where a construction contractor purchases materials from a bona fide materialman operating from a facility which is not set up to exclusively serve a particular construction project, and these materials are subsequently delivered to the construction site by an independent trucking firm, such purchase of the materials and the drivers involved are not covered by the Davis-Bacon labor standards provisions. It is immaterial whether the independent trucking firm is hired by the materialman or the prime contractor. Consequently, the drivers in question would not be subject to the Davis-Bacon labor standards requirements during the time they are hauling stone from commercial quarries to the construction site.

When an independent trucking firm undertakes to perform for a contractor a specific part of the requirements of the prime construction contract, such as, in this case, the removal of excavated materials from the construction project, such a firm is considered a subcontractor within the meaning of the Davis-Bacon labor standards provision and its employees would be subject to the contract labor standards requirements for the time so spent."

In essence, Ericson believes that the delivery of the material is "incidental to the sale," which supports what the courts in Minnesota have ruled in 1989.

Diane Vinge: "Great weight must be given to the federal opinions formalized as they have been formally addressed by the Solicitor of Labor and were done so in order to have the force and affect of law.

These legal opinions were necessary for the federal highway administration (which gives us 90% of our money to build roads in Minnesota) to give answers to compliance questions it receives from contracting agencies such as the Minnesota Department of Transportation. These clear and precise guidelines were also necessary for the federal highway administration to run its' direct federal program (building highways on federal lands).

All legal opinions in regards to the difference between "sub-contractors and materialmen for labor compliance purposes, is established by the Solicitor of Labor pursuant to his authority under reorganization plan no. 14 of 1950.

Conflicts of laws between federal and state provide for priorities of precedence when Solicitor of Labor opinions have been enacted and case law has been decided.

Therefore, it is clear that the examples set forth from the Solicitor of Labor and precedent setting as pursuant to the authority given the Solicitor of Labor in the reorganization plan no. 14 of 1950, and any attempt by the state's in superceeding under the assumption that the more restrictive of the two applies will not withhold a court challenge.

The reason I voted no is because there is not supporting documentation or reasoning as to why the others voted that way. This is in direct conflict with the U.S. Department of Labor's Field Operation Handbook. Solicitor of Labor's opinions and court decisions.

Refer to document numbers: 7, 8, K."

Colleen Donovan: "Refer to document numbers: 8, 20, 21."

I. PROPOSED DEFINITION:

STOCKPILE

A stockpile of mineral aggregate is a quantity of said material placed in a location for temporary storage where it is comtemplated that all, or substantially all, of it will be relocated by loading and hauling it to another place for final use. Material in a stockpile as so defined is not substantially-in-place on a highway right of way.

II. VOTE:

Paul Bailey - yes
Marlys Boehlke - yes
John Ericson - yes
George Mattson - yes
Abe Rosenthal - yes
Robert Rowles - yes
George Seltzer - yes

Colleen Donovan - no
Diane Vinge - no

III. MINORITY REPORT:

Diane Vinge: "A "stockpile" is a quantity of any finished product previously approved by the contracting agency with the required specifications for the project under contract, and placed in a location on the "site of work" (as defined) in anticipation of movement by the "contractor" to another area, to be used at a later date, or not to be used at all.

It is immaterial what types of equipment or performance standards is required or utilized by the "creator and/or hauler" in its' creation of said "stockpile".

Products may or may not be moved again as anticipated by the "contractor".

The "stockpile's" creator and/or hauler is in no way responsible for anticipated movements by the "contractor".

"Contractor" may help to create the "stockpile" with his or her own equipment by assisting the unloading process by means of substantially placing, placing, spreading, spacing etc.

In addition, once the unloading process is completed by the "creator and/or hauler", the "contractor" and "contracting agency" accepts all responsibility that said products are not "substantially-in-place" or in place, until and when anticipated movement by the "contractor" of the product from said "stockpile" is accomplished with the equipment owned and/or operated by the "contractor" responsible for meeting the required specifications pursuant to the "contractor's" obligation under the contract with the contracting agency.

Refer to document: 6A"

Colleen Donovan: "My disagreement with the Committee's definition is that it was not defined what "relocated by loading and hauling" means. With the type of equipment that is used in the construction industry today it could cause confusion. I also do not feel that the work "stockpile" is a part of the statute or that the Department has the authority to define the word "stockpile"."

I. PROPOSED DEFINITION:

TRUCKING BROKER

A trucking broker is a business that contracts for transportation services in the construction industry and which provides administrative and sales services to Independent Truck Owner (Independent Contractor) or other businesses who work through the trucking broker on hauling various types of materials or products, with various types of trucks or equipment. A trucking broker shall pay the Independent Truck Owner (Independent Contractor) no less than the prevailing wage rate as required in section 177.43; and shall certify under oath to the Department of Transportation and the contractor or subcontractors involved in the project that he or she had conformed with the provisions of section 177.42, subd. 6 and 177.44 by paying prevailing wage and by not accepting a rebate from such Independent Truck Owner (Independent Contractor).

II. VOTE:

Paul Bailey - yes
George Mattson - yes
Abe Rosenthal - yes
Robert Rowles - yes
George Seltzer - yes
Marlys Boehlke - abstain
Colleen Donovan - no
John Ericson - no
Diane Vinge - no

III. MINORITY REPORT:

Diane Vinge:

1. "The rule 5200.1105 and its' minimum rate already includes an allowance for the expenses of running the business. The prevailing wage rate for employees does not provide for such an allowance.

2. An Independent Truck Owner (Independent Contractor) by definition in Minn. Rules Parts 5224.0290, 5224.0010, 5224.0320 and the advisory committees arbitrated definition, is one who is self employed and pays his or her own business expenses.

3. Any attempt by the State to regulate the Independent Truck Owner (Independent Contractor)'s ability to pay his or her own business expenses infringes on his or her ability to comply with the above mentioned rules and to be truly independent.

4. Under the definition set forth, an Independent Truck Owner (Independent Contractor) who pay any business expenses i.e., fuel, repairs, supplies, insurance etc., he or she would loose their status as an Independent Contractor and would likewise be subject to the penalties listed in Minn. Stat. 177.42 subd. 6.

Refer to document numbers: 24, 24A, 24B-page 5-paragraph 2, 24B-page 3-paragraph 6."

Colleen Donovan: "I do not feel that the Committee is correct on their definition. The Committee originally stated to define what a "truck broker" is and not how they should run their business. Also my reason for voting no, was that in the Committee's definition it did not address when a business becomes a "truck broker". The Committee also addressed statute 177.43 in which that part of the statute does not address the subject at hand, that was addressed in the Department's rulemaking. The proposed rule hearing is talking about 177.44 highway contracts.

In document 24B Minnesota Department of Labor letter, I agree with Ms. Johnson's statements on page 3-paragraph 6 (independent contractor) and on page 5-paragraph 2 (broker fees).

I also feel the Department has already addressed this issue in the rule 5200.1105.

Refer to document numbers: 24B, 24C."

I. PROPOSED DEFINITION:

SITE-OF-WORK

The D-B Act provides that every covered contract shall contain a stipulation that the contractor or subcontractor shall pay all mechanics and laborers "employed directly upon the site of the work" at wage rates not less than those stated in the advertised specifications. The Related Acts which provide for Federal construction assistance contain no reference to "site of the work". However, Reg 5.5.(a)(1)(i) prescribes a contract clause which in effect extends the "site of the work" concept to the related statutes. The United States Housing Act of 1937 and the Housing Act of 1949, however, specifically require payment of not less than the wage rates prescribed to all mechanics and laborers employed in that there is no "site of the work" concept with respect to the United States Housing Act of 1937 or the Housing Act of 1949. (It should be noted that the OT requirements of OWHSSA apply to all laborers and mechanics performing contract work, regardless of the site of their employment. See FOH 15g03.)

The D-B Act limits coverage to laborers or mechanics employed on the "site of work" but does not define this term. The "site of work" definition stated below shall be followed by WH in all D-B and DBRA investigations:

(1) The "site of work" is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (2) below, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the "site" because of proximity. For example, if a small office building is being erected, the "site of work" will normally include no more than the building itself and its grounds and other land or structures "down the block" or "across the street" which the contractor or subcontractor used in the course of his performance on the particular contract. In the case of larger contracts, such as for airports or dams, the "site of the work" is necessarily more extensive and includes the whole area in which the contract construction activity will take place.

(2) Except as provided in paragraph (3) below, fabrication plants, "mobile factories", batch plants, borrow pits, job headquarters, tool yards, etc., are part of the "site of work" provided they are dedicated exclusively or nearly so to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them. A judgment must be made on all the facts and circumstances of the particular case and the views of the contracting officer should be taken into account.

(3) Not included in the "site of work" are permanent home offices, branch plant establishments, fabrication plants, and tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. This is so even though mechanics and laborers working at such an establishment may repair or maintain machinery used in contract performance, or make doors, windows, frames, or forms

called for by the contract while continuing normal commercial work. Regardless of the activities performed at such establishments, the wage determination does not apply because they do not constitute the "site of work". In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site are not included in the "site of work". Such permanent, previously established facilities are not a part of the "site of work", even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract. (See Reg 5.2(1) and FOH 15e15.) On the other hand, if mechanics or laborers working at such establishments that are not a part of the "site of work" are required to go to a place which is the "site of work" to perform activities on the contract there, the WD is applicable for the actual time so spent at the site of work, not including travel.

Once the limits of "site of work" have been determined, the wage determination is applicable only to those mechanics and laborers employed by a contractor or subcontractor within such limits (that is, upon the site of the work).

II. VOTE:

Paul Bailey - yes
Marlys Boehlke - yes
Colleen Donovan - yes
John Ericson - yes
George Mattson - yes
Abe Rosenthal - yes
Robert Rowles - yes
George Seltzer - yes
Diane Vinge - yes

III. MINORITY REPORT:

Diane Vinge: "The "site of work" is the physical place or places where the construction called for in the contract is performed by employees of prime contractors, who's construction related activities are approved by the contracting agency and will remain when all such construction related activities are completed.

Not included are permanent home offices, branch plants, fabrication plants, and tool yeards of a contractor, subcontractor, commercial supplier or materialmen whose continuance in operation are determined wholly without regard to a particular state funded contract.

Commercial suppliers or materialmen who are established before the opening of bids and not on the "site of work" as described above are not included in the "site of work".

"Site of work" would extend to a commercial supplier or materialmen of any product that dedicates its' operation exclusively to the prime contractors performance and completion of said contract and disregards any attempts to solicit directly to the public either before the opening of bids or after the contract's completion.

In instances where workers are performing not on the "site of work" and are required to go to a place which is the "site of work" to perform activities, the worker should be compensated for the actual time so spent at the "site of work" not including travel time.

Drivers of commercial establishments and materialmen irregardless of who they are being payed by (prime, subcontractor, pit, etc.) who drive onto the project site and dump their products in a manner consistent with the type of construction related equipment it is utilizing and who perform no other "work on site" would not be considered performing on the "site of work".

However, if the same persons were required to perform "work on site", for example, if a driver leaves his or her delivery equipment to assist manually in the unloading etc., this would make an otherwise "independent trucking firm or material supplier" a construction contractor on this project for the time so spent related to the "work on site" activities. Stockpiled materials on the "site of work" that is accepted from the commercial establishment, materialmen or agents thereof by the prime contractor is found to be on the "site of work" and all placement of the materials by the prime contractors employees would be covered activities. This would be the same for the commercial establishment or materialmen and their agents if they perform any other construction related activities other than the delivery function.

Refer to document numbers: my handout not numbered, 7, 8, V, 24B."

Colleen Donovan: "I voted in favor of the definition as defined in the U.S. Department of Labor, Employment, Standards Administration, Wage and Hour Division, Washington D.C., 20210, Field Operations Handbook, dated 6-1-87 page #7, 15B04 - site of work - Definition 15B04, (A), (B 1, 2, 3,), (C).

This Handbook was attached to documents 7, and 8.

Federal Labor has been involved with prevailing wages since the 1930's. I feel that they have the expertize, and are best qualified to address all issues concerning prevailing wage with both legal staff, N.L.R.B., and the courts."

I. PROPOSED DEFINITION:

WORK UNDER THE CONTRACT

The prevailing wage rate which includes the rental rates for truck hire must be paid for "work under the contract". "Work under the contract" is hereby defined as follows: Except for the exceptions in M.S. 177.43 Subd. 2, and 177.44 Subd. 2, "work under the contract" means all construction activities and work conducted pursuant to an agreement between MNDOT and the prime contractor, regardless of whether the construction activity or work is performed by the prime contractor, subcontractors, brokers, independent contractors or employees."

II. VOTE:

Paul Bailey - yes
Marlys Boehlke - yes
George Mattson - yes
Abe Rosenthal - yes
Robert Rowles - yes
George Seltzer - yes
John Ericson - no
Diane Vinge - abstain

III. MINORITY REPORT:

Diane Vinge: "The definition of "work under the contract" was derived through a process of elimination by the members that voted in the majority. In that there was no discussion or debate as to how it was considered in the past and how the new definition would affect MN DOT's current interpretation.

I asked Leo Korth from MN DOT what he considered to be "work under the contract" and did not receive an answer.

Refer to document numbers: 7, 8, as it refers to "site of work", 6A, 6B1."

Colleen Donovan: "Work under the contract" on state highways is to provide for construction and completion of the project in every detail as described in the plans, proposals and specifications as set forth by MN DOT.

Refer to document numbers: 7, 8 as it refers to "site of work", 6A, 6B1."

Prevailing Wage Rule
Draft

5200.1106 Coverage of prevailing wage law under M.S. § 177.43 and 177.44.

Subp. 1. In general. For the purpose of M. S. § 177.44, the prevailing wage rate which includes truck rental rates must be paid for work under the contract.

Subp. 2. Definition of "work under a contract" or "work under the contract" "Work under a contract" or "work under the contract" means all construction activities and work conducted pursuant to a contract as defined by subpart 3A, regardless of whether the construction activity or work is performed by the prime contractor, subcontractor, trucking broker, independent contractor, or employee, or agent of any of the foregoing entities, and regardless of which entity or person hires or contracts with another, except that the processing or manufacturing of materials or products, or mere delivery of materials or products by commercial establishments as provided by M. S. § 177.44, subd. 2 and subpart 8, is not "work under the contract." The terms "work under a contract" and "work under the contract" have the same meaning.

Subp. 3. Definition of contract, prime contractor, and contractor. The following terms have the meanings given them for the purpose of this part except where the context clearly indicates that a different meaning is intended.

A. Contract. "Contract" means the written instrument containing the elements of offer, acceptance, and consideration between the prime contractor and the State of Minnesota for the construction of all or a part of 1) a highway pursuant to M. S. § 161.32 and 177.44, or 2) a commercial project pursuant to M. S. § 177.43 and Chapter 16B. The term "contract" shall include project proposals, plans, and specifications, and all requirements for labor, equipment, and materials found in such proposals, plans, and specifications.

B. Prime contractor. "Prime contractor" means an individual or business entity which enters into a contract with the State of Minnesota as defined in paragraph A.

C. Contractor. "Contractor" means an individual or business entity which is engaged in construction or construction service-related activities either directly or indirectly through a contract as defined by paragraph A, or by subcontract with the prime contractor, or by a further subcontract with any other person or business entity performing work under the contract.

Subp. 4. Definition of independent contractor truck owner.

A. An independent contractor truck owner-operator for the purpose of M. S. § 177.43 and 177.44 is an individual or sole stockholder of a corporation who owns or holds a vehicle as defined in paragraph B, below, under bona fide lease and who contracts that vehicle and the owner's services to an entity which holds itself out to and provides

construction services. An independent contractor truck owner-operator may realize a profit or suffer a loss based upon the manner in which work is performed.

B. In the construction industry, a sole owner and operator of a vehicle that is licensed and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulatory agency is an independent contractor, not an employee, while performing services in the operation or his or her truck, only if each of the following factors are substantially present:

(1) The individual or corporation owns the equipment or holds it under a bona fide lease arrangement,

(2) The individual or corporation is responsible for the maintenance of the equipment,

(3) The individual or corporation bears the principal burden of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road, but not including brokerage fees,

(4) The sole owner operates the equipment,

(5) The sole owner generally determines the details and means of performing the services in conformance with regulatory requirements, operating procedures, and specifications of the entity with which the individual or corporation contracts,

(6) The individual or corporation enters into a legally binding agreement that specifies the relationship to be that of an independent contractor and not that of an employee.

Subp. 5. Definition of trucking broker. A "trucking broker" is an individual or business entity that:

(1) Contracts to provide trucking services in the construction industry to users of such services;

(2) Contracts to obtain such services from providers of trucking services;

(3) Dispatches the providers of the services to do work as required by the users of the services;

(4) Receives payment from the users in consideration of the trucking services provided; and

(5) Makes payment to the providers for the services.

Subp 6. Prevailing rate required.

A. A contractor, subcontractor, trucking broker, agent, or any other person contracting to do all or part of the work under a contract must pay the employee laborers, mechanics, and workers no less than the prevailing wage, and must pay independent contractor truck owner-operators no less than the truck rental rate. The prevailing wage and the truck rental rate are as certified under Minnesota Statutes, sections 177.41-177.44 and this part. The contractor, subcontractor, trucking broker, or other person making payment to an employee laborer, mechanic, worker, or independent contractor truck owner-operator may not accept a rebate from any person or entity which has the effect of reducing or otherwise decreasing the value of the remuneration to the employee laborer, mechanic, or worker below the certified prevailing wage rate, or to the independent contractor truck owner-operator below the certified truck rental rate.

B. Independent contractor truck owner-operators are not required to be paid the truck rental rate for:

1. time spent repairing, maintaining, or waiting to repair the independent contractor truck owner-operator's equipment, except that repair, maintenance, or waiting time which is attributable to the fault of the broker, contractor, agent, or employee of the trucking broker or contractor must be included in the hours worked; and

2. time spent correcting work which was not performed in accordance with the contract between the independent contractor truck owner-operator and the contractor or trucking broker.

Subp. 7. Definition of "laborer, mechanic, or worker". "Laborer, mechanic, or worker" as used in M. S., chapter 177 and this part includes independent contractor truck owner-operators for the purpose of payment of truck rental rates pursuant to M. S. § 177.41 - 177.44, and part 5200.1105.

Subp. 8. Work not considered to be "under a contract." The prevailing wage rate and truck rental rates are not required to be paid for the following work which is not considered to be work "under a contract."

A. The processing or manufacturing of materials or products, or

B. The delivery of materials or products to a state project by the employees of a commercial establishment, or by others, including independent truck owner-operators, hired by and paid by the commercial establishment as defined in paragraph E below.

C. If a delivery of materials or products to a state project by or for a commercial establishment by persons described in paragraph B above, puts delivered mineral aggregate

"substantially in place", then such deliveries are subject to the provisions of subpart 9, and truck driver employees must be paid the prevailing wage, and independent contractor truck owner-operators must be paid the truck rental rate for such deliveries.

D. Delivery of materials or products by or for a contractor or subcontractor do not fall within the provisions of paragraphs A and B above. A delivery of materials or products by or for a contractor or subcontractor is considered "work under the contract" for which prevailing wages for employees and truck rental rates for independent contractor owner-operators must be paid.

E. Commercial establishments. To qualify as a "commercial establishment" within the meaning of M. S. § 177.43 and 177.44 and this part, a business entity must:

1. Owns the land on which it operates or have a long-term lease;

2. Possess business records indicating that a substantial volume of its annual sales from the location from which deliveries are made are for other than Minnesota Department of Transportation contracts;

3. Show that the business operates primarily as a material supplier rather than a contractor,

4. Show that the business has not, or in the future, will not, set up at the location from which deliveries are made primarily to serve Minnesota Department of Transportation highway contract work;

5. Show that the business advertises the availability of material for sale and has facilities available at all times for effecting sales; and

6. In the case of commercial pits that provide mineral aggregates, the business customarily maintains a basic delivery fleet.

Subp. 9. Delivery substantial in place is work under the contract. Prevailing wages must be paid to laborers, mechanics, and workers and truck rental rates to independent contractor owner-operators employed by or performing work for a commercial establishment who perform work under the contract by delivering mineral aggregate to a state project and depositing that mineral aggregate substantially in place on the state project site, directly or through spreaders, from the transporting vehicle.

A. **Mineral aggregate.** For the purpose of chapter 177 and this part, mineral

aggregate is sand, gravel, or crushed stone or rock suitable for the base of a highway immediately beneath and supporting the bituminous or concrete pavement. It specifically does not include screenings, slag, rip-rap, recycled concrete and bituminous materials, ready-mix concrete, bituminous concrete, asphalt, mastic, mortar, plaster, macadam, and other similar processed or manufactured materials or products. Likewise, it does not include materials such as clay, topsoil, fill dirt, silt, boulders, wall stone, loam, gumbo, loess, peat, muck, hardpan, or other similar soils or mixed earth.

B. **Substantially in place.** For the purpose of M. S. § 177.43 and 177.44, mineral aggregate from commercial establishments is deposited substantially in place, directly or through spreaders, from the transporting vehicle if it is deposited, dumped, placed, spread, or laid on the project site where it will be or is being bladed, spread, scraped, pushed , raked, rolled, compacted, or similarly worked without further hauling. Mineral aggregate which is deposited, dumped, or placed in a stockpile is not substantially in place on a highway right of way. A stockpile of mineral aggregate is a quantity of mineral aggregate placed in a location for temporary storage when all or substantially all of it is to be relocated by loading and hauling it to another place for final use.

Subp. 10. Required records.

A. Each time a contractor or trucking broker enters into an agreement with an independent contractor truck owner-operator to perform work pursuant to Minnesota statutes, chapter 177, the contractor or broker must keep the following records for a period of at least three years following the payment:

1. Name and address and social security number of the independent contractor truck owner,

2. Name and address of the independent contractor truck owner's business [and federal tax identification number],

3. Amount paid to the independent contractor truck owner, including the date and amount of each payment,

4. Time period covered by the agreement between the independent contractor truck owner and the broker or contractor,

5. Numbers of hours the independent contractor truck owner performed work under the contract, not including hours excluded under subpart 6,

6. Type of trucking equipment used for each job by the independent truck owner and the name and address of the individual or business entity which owns the equipment,

7. Type of services performed,

8. Hourly truck rental rate used to calculate the minimum payment due, and

9. An itemization of any deductions from the gross amount payable to the independent contractor truck owner.

All such records must be provided to the state for its inspection and copying upon its request.

PJ/cb