

SC90963

IN THE SUPREME COURT OF MISSOURI

UTILITY SERVICE CO., INC.,

Plaintiff - Respondent,

v.

THE DEPARTMENT OF LABOR AND INDUSTRIAL
RELATIONS, and THE LABOR AND INDUSTRIAL
RELATIONS COMMISSION OF MISSOURI,

Defendants - Appellants.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Richard G. Callahan

SUBSTITUTE REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

ARGUMENT 4

 I. The Term “Construction” in the Prevailing Wage Act Must
 be Applied Broadly to the Public Works Project in This
 Case, While the Exclusion for “Repair” is Narrowly
 Construed.4

 A. Requiring a Change or Increase in the “Size, Type
 or Extent” of the Existing Facilities is a
 Misapplication of the Law.8

 B. The Contract Work in This Case is “Construction”
 Work and Not Minor “Repair”10

 II. “Existing Facilities” Must Be Construed So As to Ensure
 the Broadest Possible Application of the Act.14

CONCLUSION..... 16

CERTIFICATE OF SERVICE..... 17

CERTIFICATION OF COMPLIANCE 18

TABLE OF AUTHORITIES

CASES

City of Joplin v. Indus. Comm’n of Mo.,

329 S.W.2d 687 (Mo. banc 1959) 4

LeFevre v. Stubbs,

642 S.W.2d 103 (Mo. banc 1982) 5

Long v. Interstate Ready-Mix,

83 S.W.3d 571 (Mo. App. W.D. 2002)..... 4, 14

St. Louis County v. B.A.P., Inc.,

25 S.W.3d 629 (Mo. App. E.D. 2000)..... 15

State Dep’t of Labor and Indus. Relations, Div. of Labor

Standards v. Bd. of Public Utilities of the City of Springfield,

910 S.W.2d 737 (Mo. App. S.D. 1995) 9, 10, 12, 15

STATUTORY AUTHORITY

§ 290.020..... 4

§ 290.210(4) 14

STATEMENT OF FACTS

In response to the statement of facts in the opening brief of the Department of Labor and Industrial Relations and the Labor and Industrial Relations Commission (“Department”), Respondent Utility Service Co., Inc. (“Utility Service”) argues that the Department “omits the most critical undisputed material facts.” Resp’t Br., p. 2. This is not the case. And although it is not typically productive to correct a respondent’s statement of facts in a reply brief, the assertions at issue are essential and must be corrected for the Court.

Utility Service claims that the Department did not dispute (and therefore admitted) “that ‘the existing facility under this Contract is the 250,000 gallon elevated water storage tower which includes the water tank.’” Resp’t Br., p. 2. It is this statement, with the qualification “*under this Contract,*” that the Department responded to in the trial court with the following statement: “Defendants are without sufficient information to either admit or deny this statement of fact, but, for purposes of determining the motions for summary judgment, they will not dispute it.” L.F. 94.

The Department never conceded that the water storage tank constituted the “existing facilities” under the statute. L.F. 111-12 (stating in the Department’s summary judgment motion that even “plaintiff recognizes, ‘existing facilities’ as defined in the Prevailing Wage Law is something less than

the overall thing being constructed or worked on”). In fact, in support of summary judgment, the Department submitted an affidavit stating that “existing facilities” included the “replacement of constituent parts.” L.F. 139.

Utility Service further asserts in its statement of facts that the Department did not dispute that the Contract provides for the “care and maintenance” of the water storage tank. Resp’t Br., p. 2. Once again, it is true that the Department did not dispute that the *Contract* provides for the “care and maintenance” of the water storage tank. L.F. 95. In fact, the statement “care and maintenance” is a direct quote from the Contract itself. L.F. 47. This is not a concession that the work at issue is merely minor repair not subject to prevailing wages since that is the whole point of this case. The Department has argued over and over again that the work at issue is not minor repair but instead “construction work” as defined in the statute and subject to prevailing wages. L.F. 108-09.

Finally, in a footnote Utility Service alleges that the Department stated an “inaccurate fact” regarding the cost of the facility at issue. Resp’t Br., p. 2. Utility Service argues that the parties’ stipulation was not part of the statement of facts of either party, no factual finding was made by the trial court, and it is hearsay. Resp’t Br., p. 2. However, this stipulation was made a part of the summary judgment record at the specific request of the trial court, which “considered the value of the elevated water tank at issue to be relevant.” L.F.

144. And in the supplemental briefing requested by the trial court, Utility Service made no such arguments, but instead stated “the parties have stipulated that the cost to construct a similarly situated facility is reported to be \$475,000.” L.F. 151; *see also* L.F. 152 (Utility Service also argued that “the costs under this Contract are significantly less than the cost to construct a *similar facility*.”).

ARGUMENT

I. The Term “Construction” in the Prevailing Wage Act Must be Applied Broadly to the Public Works Project in This Case, While the Exclusion for “Repair” is Narrowly Construed.

Utility Service has it all backwards in its analysis. According to Utility Service, “the critical question is whether the repair work would change the size, type, or extent of the existing facility.” Resp’t Br., p. 10; *see also id.* p. 16 (stating that “all of the work was maintenance because it did not change the size, type, or extent of the water storage tower and tank”). This is not the controlling test under the Prevailing Wage Act; instead, it is merely one way (among many) in which the narrow exclusion from prevailing wages *does not* apply. In accordance with long-standing rules of statutory construction, the broadly construed definition of “construction” should be the controlling analysis. And as such, supports reversal in favor of the Department.

The Prevailing Wage Act is a remedial statute requiring the payment of prevailing wages for workers on public works projects. *See* § 290.020; *City of Joplin v. Indus. Comm’n of Mo.*, 329 S.W.2d 687, 693-94 (Mo. banc 1959); *see also Long v. Interstate Ready-Mix*, 83 S.W.3d 571 (Mo. App. W.D. 2002) (“Due to the remedial nature of the Prevailing Wage Act, we must interpret it broadly so as to accomplish the greatest public good.”). As a remedial statute, the terms of the Act are to be broadly interpreted so as to accomplish the greatest public

good. *See LeFevre v. Stubbs*, 642 S.W.2d 103 (Mo. banc 1982); *see also Long*, 83 S.W.3d 571.

Utility Service acknowledges the remedial nature of the Act and the need to interpret it broadly, as did the trial court, but neither attempted to broadly interpret the Act. Resp't Br., p. 9; L.F. 160. Instead, both gave way to an expansive reading of an exclusion for "repair." Exceptions or exclusions in a remedial law must be narrowly construed. *LeFevre v. Stubbs*, 642 S.W.2d 103 (Mo. banc 1982). The term "repair" in this case is just such an exception. Yet, instead of narrowly construing the exception, both Utility Service and the trial court make it the centerpiece of their analysis and broadly construe the exception for "repair."

For example, the trial court concluded that "'repair' will not be deemed construction work unless it is one that changes or increases the size, type or extent of the existing facility and thereby is a 'major repair' which falls within the statutory definition of construction." L.F. 162. This conclusion turns statutory construction on its head because it purports to narrow the definition of "construction" (which is suppose to be broadly construed) with a broadly construed definition of "repair" (which is suppose to be narrowly construed). The court of appeals also took this approach holding that prevailing wages do not apply if the public works project does not "call for any new construction . . . and

the work does not change the size, type or extent of the existing facilities.”

Order at 12 (per curiam).

The statutory terms should actually be construed as follows:

Broadly Construe:	Narrowly Construe:
<ul style="list-style-type: none">• Construction;• Reconstruction;• Improvement;• Enlargement;• Alteration;• Painting;• Decorating;• Major repair;• Replacement of existing facilities;and• Repair that changes or increases the size, type or extent of existing facilities.	<ul style="list-style-type: none">• Repair.

If the Court is to give the proper construction to the Act and its terms, then any exclusionary term must be narrowly construed. The only exclusionary terms here is “repair.” Thus, the question is what is a narrow construction of

“repair.” The answer is simple – a minor repair. This construction of the exclusion for “repair” is not only consistent with a narrow construction of the term “repair,” but it is also consistent with a broad construction of “major repair,” one of the terms expressly covered by the Act and therefore subject to broad construction.

Moreover, a narrow construction of “repair” is further supported by the express limitation in the statute that the repair – to qualify for the exclusion – cannot change or increase in any way the “size, type or extent” of the existing facilities. In fact, improvements, enlargements, or alterations of any kind are also covered under the Act and must be broadly construed.

Although the term “repair” is not defined in the statute and the dictionary provides little assistance, the types of factors that may be appropriate in considering whether something is a minor repair include:

1. Does the work involve lower costs and smaller items or a larger project that is more expensive?
2. Is the work more routine or concerns day-to-day items instead of a significant and infrequent project?
3. Is the work typically done by regular employees, or are the people working on the project hired specifically for the project on a contract?

4. Does the work require a low level of expertise or specialization, or is it more sophisticated and unique?

Although these are not the only factors that may be considered in assessing whether work constitutes a minor repair, they would provide much needed clarity. *See* Brief of *Amicus Curiae* MASA, p. 6 (stating that school districts are left “without clear guidance on what the law actually requires”).

A. Requiring a Change or Increase in the “Size, Type or Extent” of the Existing Facilities is a Misapplication of the Law.

Utility Service engages in a fundamental misapplication of the law, which is: a change or increase in the “size, type or extent” of existing facilities is not a limitation on the term “construction” in the Act, but only a limitation on the exclusion for “repair.” It is impermissible to use a limitation on an exclusion as a limitation on a term that is to be broadly construed. Yet, that is exactly what Utility Service attempts to do. *See also* Substitute Br. of *Amicus Curiae* MML, p. 18 (arguing that since “construction” is to be broadly construed, “it is appropriate to define that term by what it is not: ‘maintenance’”).

Nowhere in the definition of “construction” is there a requirement that there be a change or increase in the “size, type or extent” of the existing facilities. And in fact, quite the contrary is the case. Most of the terms defining “construction” make clear that there is no requirement that there be a change or increase in the “size, type or extent” of the existing facilities. Indeed,

“reconstruction, improvement, . . . alteration, painting and decorating, or major repair” could all be accomplished without changing or increasing the size, type or extent of the existing facilities. Even “replacement” – which is listed as an exception to the maintenance work exclusion – does not require a change or increase in the size, type or extent of the existing facilities. Only “enlargement” seems to require a change or increase in the size, type or extent of the existing facilities, but that is only one type of covered construction. Thus, while “construction” *may* change the size, type or extent of the existing facilities it need not do so in order to fall within the Act and require prevailing wages.

In short, the trial court and Utility Service created a false test, and then applied the false test to reach their desired result. To aid their false test, the trial court and Utility Service fragmented a quotation from *State Dep’t of Labor and Indus. Relations, Div. of Labor Standards v. Bd. of Public Utilities of the City of Springfield*, 910 S.W.2d 737 (Mo. App. S.D. 1995) (*City Utilities*). They state that the test to be applied when determining whether work is maintenance work or construction work is not “the magnitude of the repair; rather, it is whether a change or increase in the size, type, or extent of the existing facility is wrought by the repair.” Resp’t Br., p. 13; L.F. 162 (quoting in part *City Utilities*, 910 S.W.2d at 744). However, this fragment of the actual quote leaves out the very essential beginning. *City Utilities* actually holds that: “Thus, the test to be

applied for ‘*maintenance work*’ is not the magnitude of the repair; rather, it is” *City Utilities*, 910 S.W.2d at 744 (emphasis added).

The actual quotation and holding in *City Utilities* is dramatically different than that represented by Utility Service and the trial court, and certainly does not require that “construction” result in a change or increase in the size, type or extent of the existing facilities. In fact, whether the asbestos abatement contracts in *City Utilities* were subject to the prevailing wage statute was not even at issue and therefore the court did not engage in an analysis of whether the prevailing wage statute applied to the work. *Id.* at 744 n.5 (noting the Department did not appeal “the broad question of whether ‘asbestos abatement contracts are subject to the prevailing wage statute’”).

B. The Contract Work in This Case is “Construction” Work and Not Minor “Repair”.

Consistent with the proper construction of the Act, the trial court should have determined whether the contract work could fit within one of the broadly construed construction terms (*e.g.* construction, reconstruction, improvement, enlargement, alteration, painting, etc.). This Court need not even engage in that analysis now since Utility Service has already conceded in its brief that “construction is indeed a broad concept that covers everything including, as the Department points out, maintenance work.” Resp’t Br., p. 22. This leaves only the narrow exception for repairs – necessarily construed as minor repairs.

The contract work in this case cannot, as a matter of law, be characterized as minor repairs:

- The contract calls for complete repainting of the interior and exterior of the water tank as determined by the thickness, protective condition, and the appearance. L.F. 47 & 155.
- The contract calls for steel replacement, steel parts, expansion joints, water level indicators, sway rod adjustments, manhole covers/gaskets, and other component parts of the tank or tower.” *Id.* (noting steel replacement is necessary “when *severe* pitting or steel loss occurs”).
- The contract calls for “interior renovation” and installation of “an anti-climb device on the access ladder.” *Id.*

Even the annual inspection and biennial cleaning can hardly be described as simple maintenance or a minor repair. *Id.* After all, the cleaning requires complete draining of the water tank, high-pressure equipment with chemical injection as well as the use of relief valves to pump direct and maintain water pressure while the tank is being renovated. L.F. 47-48 & 155-56. Minor repairs are daily tasks not large projects such as these.

It is also impossible to dispute that spending \$115,719.00, or about 24% of the value of a similar new tank,^{1/} constitutes a major repair.^{2/} L.F. 145. Utility Service nevertheless argues that by pointing out the total cost of the project and its large percentage of the value of a similar water tower that the Department is missing the point because “the Department’s argument as to the magnitude has been specifically rejected.” Resp’t Br., p. 26. Actually, the court in *City Utilities* held that “the test to be applied for ‘*maintenance work*’ is not the magnitude of the repair.” *City Utilities*, 910 S.W.2d at 744 (emphasis added). This makes perfect sense because it applies to the exclusion for “maintenance work” which is

^{1/} The relative percentage of the contract cost to the value of the water tower in this case is likely higher than 24% because that percentage is based on the higher value of a newer water tower.

^{2/} Utility Service states in a footnote that the parties’ stipulation concerning the costs of a similar water tower is outside the summary judgment record and should not be considered. Resp’t Br., p. 2. The trial court asked for the value of the water tower and supplemental briefing before ruling on summary judgment. Thus, the stipulation is part of the summary judgment record. L.F. 144. And Utility Service conceded that “the parties have stipulated that the cost to construct a *similarly situated facility* is reported to be \$475,000.00.” L.F. 151 (emphasis added).

also subject to the size, type or extent limitation. However, it does not apply to the “major repair” definition of “construction” which has no similar limitation and is to be broadly construed. “Major repair” can certainly be evidenced by the magnitude and cost of the work.

Faced with the plain language and proper construction of the Act, the *amicus curiae* resort to unspecified and unsupported fears of “budget limitations” and “the need to protect public funds.” Substitute Br. of *Amicus Curiae* MML, p. 23-24. They even threaten that if the Court applies the Act in this case, “cities will be reluctant to enter into preventative maintenance contracts” because they are “unaffordable luxuries” and therefore “the incidence of contamination, water shortages, and structural failures will increase.” *Id.* Not only is there no support for these scare tactics, but the very suggestion of “structural failures” supports the notion of a major repair.

The Department certainly recognizes that the proper interpretation of the Act will result in most of the construction work on public works projects being subject to prevailing wages (*i.e.* higher labor costs). But isn't that the point of the Act. The object and policy of the State is not to find a way to keep from paying prevailing wages, but to interpret the Act broadly so that prevailing wages are paid on public works projects.

II. “Existing Facilities” Must Be Construed So As to Ensure the Broadest Possible Application of the Act.

Just like the rest of the Act, “existing facilities” must be construed in a way that supports the application of prevailing wages. *See Long*, 83 S.W.3d at 574; § 290.220, RSMo. Despite the language and policy of the Act, Utility Service argues in this case that the “existing facility” should be construed as the entire water tower and not component parts.^{3/} Resp’t Br., p. 33. Worse still, *amicus curiae* suggests that this Court create a whole new standard whereby the parties’ contract dictates what constitutes a facility. *See* Substitute Br. of *Amicus Curiae* MML, pp. 7-11. Neither argument is supported.

First, Utility Service overlooks a critical part of the statutory language. The exclusion in the Act does not specify “existing facility,” as Utility Service suggests. Resp’t Br., p. 33. Instead, it applies to “existing *facilities*.” § 290.210(4) (emphasis added). The use of the plural “facilities” supports the conclusion that the legislature intended that the Act apply to the repair of

^{3/}Utility Service also argues that the Department did not dispute that the water tower was the existing facility. The Department actually responded that they did not have sufficient information but did not dispute that “The existing facility *under the Contract* is the 250,000 gallon elevated water storage tower which includes the water tank.” L.F. 38 & 94 (emphasis added).

components of a larger structure. Otherwise the legislature would have used repair of the “existing facility” as Utility Service does. Moreover, an interpretation that includes component parts of a larger structure is perfectly consistent with the policy of broadly applying the Act. *See City Utilities*, 910 S.W.2d at 746 (leaving undisturbed the trial court’s finding that component parts of a larger structure are “existing facilities”).

Second, the suggestion by the *amicus curiae* that the parties can dictate by their contract language what constitutes the “existing facilities” is antithetical to both statutory construction and the broad purposes of the Act. This would essentially leave the determination of whether the Act applies and requires prevailing wages to the parties most interested in not paying prevailing wages. This self interested determination is not supported by the law and is really no different than what Utility Service tried to do in this case – submit an affidavit stating that the water tower is the “existing facility.” *St. Louis County v. B.A.P., Inc.*, 25 S.W.3d 629, 631 (Mo. App. E.D. 2000) (Statutory interpretation is a matter of law and not of fact.).

These conjured up legal conclusions should be rejected in favor of the plain language of the statute and the broad application of the Act to accomplish the express policy of the state of Missouri – that employees on public works projects be paid prevailing wages.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Department's initial brief, this Court should reverse the trial court and enter judgment in favor of the Department.

Respectfully submitted,

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The undersigned hereby certifies that one copy of the foregoing brief, and an electronic disk with the brief were mailed, postage prepaid, via United States mail, on October 27, 2010, to:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 3,305 words.

The undersigned further certifies that the labeled disk simultaneously filed and served with the hard copies of the brief has been scanned for viruses and is virus-free.

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