

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6188

Petition of On Target Utility Services for a)	Hearing at
Determination of Excavator's Compliance with)	Montpelier, Vermont
Vermont's Dig Safe Law and Rules)	October 11, 2000

Order entered: 5/9/2001

PRESENT: John P. Bentley, Esq.

APPEARANCES: Mark F. Werle, Esq.
Ryan Smith & Carbine, Ltd.
for On Target Utility Services

Thomas Hayes, Esq.
Eaton & Hayes
for J. A. McDonald

I. INTRODUCTION

This case concerns an incident that occurred in August of 1998 during construction next to U.S. Route 2 near Waterbury, Vermont. It is undisputed that a dig-safe call was made by the excavation contractor, J. A. McDonald, Inc. ("McDonald"), and that the location of underground equipment was marked by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont's ("Bell Atlantic") locating and marking contractor, On Target Utility Services ("On Target" or "Petitioner"). Heavy rains after the marking caused a small landslide and flooding of the area that had been marked. Efforts by McDonald to clear a blocked culvert resulted in damage to Bell Atlantic's buried plant, a fiber-optic cable.

On Target originally filed a petition asking the Board to determine liability between itself, McDonald, and Bell Atlantic. Issues of fact included whether On Target properly marked the correct location, whether McDonald should have made an emergency call to Dig Safe System, Inc. ("Dig Safe"), and whether McDonald should have reported the damage that had occurred to

Bell Atlantic's plant to Bell Atlantic. Additional damage is alleged to have occurred to customers of Bell Atlantic who were without phone service because of the break in the cable resulting from the dig-in.

After a prehearing conference, I issued an Order directing the parties to brief the issue of the Public Service Board's authority to adjudicate damage claims, especially where, as here, some claims were made by the utility's customers. Subsequently, the petitioner asked that the scope of the case be limited to a single issue: whether or not the excavator, McDonald, complied with the provisions of Vermont's Underground Utility Damage Prevention law, 30 V.S.A. §§ 7001–7008, and Public Service Board Rules adopted thereunder, P.S.B. Rule 3.800 *et seq.* The petitioner also asked that the title of the docket be amended to reflect the limited scope. Both of the other parties in interest, Bell Atlantic and McDonald, joined in Petitioner's requests which were granted.

Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board.

II. FINDINGS

1. The dig-in occurred on August 12, 1998, on the south side of U.S. Route 2 in Moretown, Vermont. Tr. at 18.
2. McDonald was performing excavation work as part of creating a new landfill cell for WSI. Tr. at 18.
3. Mr. Trottier, who was at the time of the incident McDonald's project manager and supervisor, made a call to the Dig-Safe system on August 3, 1998. A record of the call appears as Petitioner's Exhibit 1. According to Mr. Trottier, Petitioner's exhibit 1 is a job ticket produced by the Dig-Safe system. Tr. at 19.
4. Exhibit 1 shows that the work was described as on the south side of Route 2, one mile long, six feet deep, next to the road. Petitioner's exh. 1.
5. On Target marked and flagged a copper telephone cable in the work area, but did not mark or flag a fiber optic cable that lay between the copper cable and the edge of the roadway.

The copper cable and the fiber optic cable run parallel to each other and to the edge of the roadway for a substantial distance on either side of the location of the dig-in. McDonald exh. A.

6. On the night of August 11 and the morning of August 12, the area received heavy rainfall. Runoff of the rain moved the erosion control devices, hay bales and silt fencing, as well as a substantial amount of soil, sufficient to block a culvert that runs beneath Route 2. Tr. at 25–27.

7. At the time Mr. Trottier arrived at the scene, the water held back by the blocked culvert had reached the white line at the margin of Route 2, and was approximately 3½ feet above the bottom of the culvert. Tr. at 29.

8. McDonald had three excavators at the Moretown site on August 12: two Caterpillar excavators with buckets of 1½ or 1¾ cubic yard capacity, and a Kobelco¹ excavator with a bucket of ¾ or 1 cubic yard capacity. Tr. at 24, 33.

9. The culvert was within the area marked by On Target. The markings of the copper cable were several feet away from the end of the culvert. McDonald exh. A.

10. No one called Dig-Safe on behalf of McDonald to notify them of the culvert-clearing operation on August 12. Tr. at 37.

11. In the course of clearing the culvert, the excavator dug up and broke a wire about the size of a man's little finger. This wire was not located in the alignment of the copper cable that had been marked; the copper cable was not dug up. Tr. at 46, 48; McDonald exh. A.

12. Mr. Trottier believed that, if the water rose higher and began to flow across Route 2, there was a likelihood that the road would be washed out. Tr. at 45–46.

13. No one notified Bell Atlantic of the break in the fiber optic cable, because it was not known what type of cable it was that was broken. Tr. at 46.

14. The Underground Facility Incident Report, part of McDonald exhibit A, states that the dig-in occurred at 6:10 AM and that Bell Atlantic was notified at 7:46 AM. Since Mr. Trottier testified that no one on the scene made a call about the cable break, Bell Atlantic must have been able to detect the break with its own monitoring equipment. This is reinforced by Mr. Trottier's

1. Spelled "Cabelco" in the transcript.

recollection of a statement by a Bell Atlantic employee that they knew of the break and its location within minutes of its occurrence. Tr. 46, 54; McDonald exh. A.

15. In photos taken after the flood water had been drained away, the markings for the copper cable are still plain and intact. McDonald exhs. B and C.

16. In the report entitled "Alleged Violation of the Vermont Damage Prevention Law," a part of McDonald exhibit A, the reason given that the incident was a violation of the Vermont Underground Utility Damage Prevention Law is "Other: Marking was incomplete by locating company—Contractor did not request an emergency relocate, or notify Bell Atlantic." It is unclear whether this form is created by On Target or by Bell Atlantic, but it appears to be separate from the three previous pages that are numbered pages of an On Target report. McDonald exh. A.

III. DISCUSSION AND CONCLUSIONS

Motion to Dismiss

The Petitioner appeared at the technical hearing in this case without a witness. Counsel for the Respondent, McDonald, moved to dismiss the petition for lack of a prima facie case in support of the petition. Since the Respondent had appeared with more than one witness, at least one of whom had traveled from New Hampshire to testify, I took the motion under advisement rather than risk requiring witnesses to return.

Counsel for On Target seemed to believe that the hearing was not part of a litigated proceeding, but was some sort of problem-solving function by the Board. He was incorrect; however, On Target did present direct testimony through McDonald's supervisor of the works, Mr. Trottier, who had first-hand knowledge of the events of August 12, 1998. Mr. Trottier had submitted prefiled testimony on behalf of McDonald that gave a shorter version of the events that he related in direct testimony. The facts in this docket are not in dispute; there would be nothing gained to require On Target to show the absence of a phone call on August 12 when Mr. Trottier, who was there, could testify that no phone call was made and present the evidence necessary to establish a direct case. It is not unfair that On Target was able to make its case through Mr. Trottier's testimony. The motion to dismiss is denied.

The Petitioner, On Target, has explicitly limited the relief it seeks in this case to a determination of whether or not McDonald complied with the Dig Safe statute, 30 V.S.A. Chapter 86, and the Board's Rule adopted thereunder, Rule 3.8.² The Petitioner argues that McDonald failed to comply in four different respects:

1. McDonald failed to give notice of the damage, as required by 30 V.S.A. § 7007;
2. McDonald failed to take reasonable precautions to protect underground facilities, as required by 30 V.S.A. § 7006b and Rule 3.804;
3. McDonald failed to call for remarking of the facilities, as required by 30 V.S.A. § 7006a; and
4. McDonald failed to give notice of the excavation of the culvert, as required by 30 V.S.A. § 7004 and Rule 3.804.

These are addressed in turn below.

Notice of Damage

"When any underground utility facility is damaged during excavation activities, the excavator shall immediately notify the affected company." 30 V.S.A. § 7007. However, this presupposes that the excavator knows that what he has dug up is utility property, and that he knows to whom it belongs. The evidence in this case is that the cable that was dug up was not identified as belonging to Bell Atlantic until Bell Atlantic employees showed up to repair it. Moreover, On Target had not marked the cable. Lack of knowledge may not be enough, but the excavator here believed he knew where the cable was, and in fact did avoid the cable that had been marked. There is no reason to believe that the legislature intended § 7007 to be so stringently applied as to require a finding of a violation without actual knowledge that utility plant has been damaged. Even were the Board to hold that the contractor should be held to the knowledge that a "reasonable contractor" should have had, there is no showing that McDonald's employees on the scene should or could have known what the cable was. I conclude that

2. See the Petitioner's Brief filed March 4, 1999.

McDonald has not failed to comply with 30 V.S.A. § 7007.

Reasonable Precautions

"Any person engaged in excavating activities in the approximate location of underground utility facilities marked pursuant to section 7006 of this title shall take reasonable precautions to avoid damage to underground utility facilities, including but not limited to any substantial weakening of the structural or lateral support of such facilities or penetration, severance or destruction of such facilities." 30 V.S.A. § 7006b. "The excavator shall thereafter use due care to ensure that the underground plant of utilities in the area of said excavation is not damaged." PSB Rule 3.804(A). The testimony is clear that the supervisor, Mr. Trottier, as well as the equipment operator, were aware of the markings in place for the copper cable and used due care to avoid it, and in fact there is no claim that any damage occurred to that cable. The Petitioner seems to argue that, even when underground facilities have been marked, an excavator must exercise extra care when working in an area indicated to be free of underground facilities. This goes beyond the level of "reasonable precautions" or "due care," and I conclude that McDonald has not failed to comply with 30 V.S.A. § 7006b or Rule 3.804.

Remarking the Facilities

"In the event said markings are obliterated, destroyed or removed, the person engaged in excavation activities shall notify the system referred to in section 7002 of this title that re-marking is needed." 30 V.S.A. 7006a. The markings of the copper cable were not obliterated, destroyed, or removed; they are clearly visible in exhibits McDonald B and C, after the flooding had subsided. The paint marks on the grass were, no doubt, obscured by the muddy water, but the orange flags would have been visible. Further, this did not occur in a featureless field; the marked cable was between the edge of the paved road and a concrete telephone marker, visible in McDonald B and in the sketch on "Page 3 of 3" of McDonald A. Mr. Trottier's testimony is clear that he had a very good sense of the location of the markings for the copper cable, and the marked cable was untouched in the excavation. Beyond that, the situation McDonald faced was a flood that was threatening to cover and perhaps damage Route 2; there was no time for a marking

crew to be summoned, nor could they have located cables and marked them under a foot of muddy water. Finally, since the only cable On Target marked was the copper cable, a remarking, even one floating on the water's surface, would not have marked the fiber optic cable. I conclude that the circumstance referred to in § 7006a did not obtain, and that McDonald therefore did not violate that section.

Notice of Excavation

"No person or company shall engage in excavation activities, except in an emergency, without first giving notice as required by this section." 30 V.S.A. § 7004. "In the event of a situation which poses a threat to life, health, property, continued utility service, or the operation of a major industrial plant or public facility, excavation may begin as soon as notice thereof is given to the damage prevention system. Such notice must be given by telephone. If the threat is of such an immediate nature that the delay caused by notifying the damage prevention system would itself increase the threat, excavation may begin at once." PSB Rule 3.804. Mr. Trottier testified that he feared that, unless action were taken immediately, the water would wash out Route 2. I conclude that U.S. Route 2 is a major public facility within the meaning of Rule 3.804. I further conclude that even if the culvert excavation could be considered to be outside the designated area, the circumstances amounted to an emergency within the meaning of § 7004 and Rule 3.804, and that McDonald did not, therefore, violate those provisions.

Moreover, and most importantly, it does not appear that the excavation fell within the situation that § 7004 and Rule 3.804 were intended to address, nor that the culvert-clearing operation required a new call to Dig Safe. On Target points out that the ticket created by Dig Safe, Petitioner's exhibit 1, states that the nature of the work is to "Install all utilities," and argues from this that the culvert work was not covered. However, the ticket also describes the extent of the work as "6 feet deep, side of road" and one mile in extent. Since the markings for the copper cable clearly extended through the area of the culvert, and since the bottom of the culvert was less than six feet below the general surface of the ground, it is difficult to understand the Petitioner's position that work on the culvert was "outside the scope of its August 3, 2000 Dig Safe Work Ticket." The work ticket seems to call for the marking of utility facilities within a three

dimensional volume six feet deep, one mile long, and within the highway right of way. All facilities within that volume should have been marked, and any excavation outside that volume should have required a new call. Petitioner has suggested no law, regulation, or practice of the trade that would require a new Dig Safe call merely because the *reason* for an excavation is not the same as that originally stated. Neither the statute nor our Rule requires that the reason be given for an excavation, only the location. I conclude that McDonald was under no requirement to make a new Dig Safe call to perform work near the culvert, and so for this reason also McDonald did not violate either 30 V.S.A. § 7004 or Rule 3.804.

Conclusion

I conclude that the Respondent, J.A. McDonald, Inc., did not fail to comply with 30 V.S.A. Chapter 86 nor with Rule 3.8 in any respect complained of by the Petitioner.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

IV. RESPONSE TO COMMENTS FILED BY DEPARTMENT OF PUBLIC SERVICE

On April 27, 2001, the Vermont Department of Public Service filed comments upon my Proposal for Decision. While generally in favor of the Proposal, the Department did raise two points. For the reasons set out below, however, neither requires a change in my Proposal.

First, the Department notes that the excavator, McDonald, ought to be held to a "reasonable contractor" standard, and that a reasonable contractor should be able to identify a broken fiber optic cable, or at least should realize that a broken cable next to a highway is likely to be utility plant. However, the Department goes on to recognize that the record is not sufficiently developed to make findings upon what a "reasonable contractor" should have done, and further that the evidence showed that Bell Atlantic became aware of the damage on its own, sooner than it would have if McDonald had made a call. For these reasons the Department does not suggest a change in the decision, so I need not consider any change.

Second, the Department urges that the record does support the conclusion that 30 V.S.A.

Chapter 86 was violated by Bell Atlantic, or by its agent, On Target, when they failed to mark the location of the fiber optic cable. The Department suggests that the Board ought to impose a civil penalty on Bell Atlantic for violating § 7006. However, as noted in the procedural history above, the parties agreed early in this proceeding that the sole issue for consideration would be whether or not the excavator, McDonald, complied with the provisions of Vermont's Underground Utility Damage Prevention law, and Board Rules adopted thereunder. The issues of Bell Atlantic's failure to properly mark its equipment and its relationship with On Target were not raised in this docket, and findings and conclusions on these issues would seem, to me, to be without foundation, and I decline to so modify my proposal.

Dated at Montpelier, Vermont, this 30th day of April, 2001.

s/John P. Bentley
John P. Bentley, Esq.
Hearing Officer

V. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The Findings and Conclusions of the Hearing Officer are adopted.
2. J.A. McDonald, Inc. did not fail to comply with 30 V.S.A. Chapter 86 nor with Rule 3.8.
3. The petition is dismissed.

Dated at Montpelier, Vermont, this 9th day of May, 2001.

<u>s/Michael H. Dworkin</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: May 9, 2001

ATTEST: s/Susan M. Hudson

Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or mail) of any technical errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.