Date: 20170719
Docket: CI 16-01-02831
(Winnipeg Centre)
Indexed as: Construction and Specialized Workers' Union, Local 1258 v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 222
Cited as: 2017 MBQB 140

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: *The Arbitration Act*, C.C.S.M. c. A120

BETWEEN:

CONSTRUCTION AND SPECIALIZED WORKERS' UNION, LOCAL 1258,	)	Counsel:
	)	
applicant,	)	Scott J. Hoeppner for the applicant
	)	
- and -	)	
	)	Mark H. Toews
OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL 222,	)	for the respondent
	)	
respondent.	)	JUDGMENT DELIVERED: July 19, 2017

KROFT J.

I. INTRODUCTION

[1] On April 29, 2016, an arbitrator determined that concrete finishing work for Manitoba Hydro's Keewatinohk Converter Station in northern Manitoba belonged to the respondent union and not to the applicant union. The applicant asks me to set aside the arbitrator's decision on the grounds of a reasonable

apprehension of bias. Alternatively, the applicant seeks leave to appeal the decision.

[2] For the reasons that follow, I am dismissing the application.

II. FACTS

[3] The applicant and the respondent are unions whose members include concrete finishers. Both unions are members of the Allied Hydro Council of Manitoba (Allied Council) and, as such, are parties to an agreement between the Hydro Projects Management Association and the Allied Council known as the Burntwood/Nelson Agreement (BNA). The BNA governs the employment terms for the members of the signatory unions who perform work falling within the scope of the BNA. That includes work on the Keewatinohk Converter Station.

[4] The applicant and the respondent also are members of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). As members of the AFL-CIO, they are subject to a dispute resolution mechanism, the terms of which are set out in a document called "Plan for the Settlement of Jurisdictional Disputes in the Construction Industry Including Procedural Rules and Regulations" (Plan). Having exhausted the dispute resolution process under the BNA, the applicant availed itself of the Plan. The arbitration in this case occurred under the "Resolution of Jurisdictional Disputes" portion of the Plan (page 21) (Article V).

[5] Sections 3 to 7 of Article V of the Plan provide, among other things:

- A party may give notice to arbitrate.
- Where that occurs, the administrator shall send to the parties a list of impartial arbitrators knowledgeable about the construction industry.
- The parties will have three days in which to cross off the name of one arbitrator to which it objects and to rank the remaining names. The administrator shall notify the parties of the arbitrator selected.
- The arbitrator shall set and hold a hearing within seven days.
- The decision of the arbitrator shall issue within three days. The decision shall be final and binding.

[6] Section 8 of Article V of the Plan provides (in part):

> Sec. 8. In rendering his decision, the Arbitrator shall determine:
>
> (a) First whether a previous agreement of record or applicable agreement, including a disclaimer agreement, between the National or International Unions to the dispute governs;
>
> (b) Only if the Arbitrator finds that the dispute is not covered by an appropriate or applicable agreement of record or agreement between the crafts to the dispute, he shall then consider the established trade practice in the industry and prevailing practice in the locality. Where there is a previous decision of record governing the case, the Arbitrator shall give equal weight to such decision of record, unless the prevailing practice in the locality in the past ten years favors one craft. In that case, the Arbitrator shall base his decision on the prevailing practice in the locality. Except, that if the Arbitrator finds that a craft has improperly obtained the prevailing practice in the locality […], the Arbitrator shall rely on the decision of record and established trade practice in the industry rather than the prevailing practice in the locality; …

[7] It is common ground that for the purpose of interpreting Section 8, there is no "applicable agreement of record or agreement between the crafts" or "decision of record governing the case". Likewise, there has been no finding that a party "improperly obtained the prevailing practice in the locality". Sections 3 to 8 of Article V of the Plan are reproduced and attached to these reasons as Schedule "A".

[8] The arbitration was heard on April 26, 2016. As previously noted, the arbitrator rendered his decision on April 29, 2016, awarding the concrete finishing work at the Keewatinohk Converter Station to the respondent. A copy of the decision is attached to these reasons as Schedule "B". For ease of reference, I numbered the paragraphs.

[9] On July 4, 2016, the applicant filed this application.

[10] In respect of the allegation of bias, Victor DaSilva, the applicant's business manager, describes in his affidavit sworn August 18, 2016, what he characterizes as an "existing relationship" between the arbitrator and the respondent's business development manager, David Martin, which relationship Mr. DaSilva says was not known to the applicant.

[11] The grounds for that characterization include:

- The arbitrator was formerly the head of the previously mentioned Allied Council, and Mr. Martin was formerly the president of the

Manitoba Building Trades. The Allied Council and the Manitoba Building Trades are partner entities with member unions in common.

- In 1999, while president of the Allied Council, the arbitrator appointed Mr. Martin to the position of secretary-treasurer of the Allied Council. During the period that they were both on the executive board, they negotiated revisions to the BNA.

[12] In reply, in an affidavit sworn May 12, 2017, Mr. Martin states:

- Any relationship he has with the arbitrator would be remote.
- He had no relationship with the arbitrator at the time of the arbitration.
- There is no personal friendship with the arbitrator.
- He was not present at the arbitration.
- He was president of the Manitoba Building Trades and had a business relationship with the arbitrator, but the relationship was not close.
- In respect of the Allied Council, the arbitrator did serve on the BNA renegotiating committee, attending as his time permitted, but negotiations themselves were led by Mr. Martin and a Mr. Frank Thomas. As president of the Allied Council, the arbitrator signed the BNA on October 7, 2005.

- During the period he was secretary-treasurer of the Allied Council, Mr. Martin interacted very little with the arbitrator, and the council itself conducted minimal business.

- The arbitrator retired from the Allied Council in 2005. Mr. Martin has had no direct or indirect business or social involvement with the arbitrator since that time.

- Mr. Martin's role with the Allied Council was known to all affiliated unions, including the applicant.

- The applicant was, or ought to have been aware of Mr. Martin's involvement in renegotiating the BNA because both his signature and the arbitrator's appear throughout the October 7, 2005 agreement.

- No concerns about the arbitrator were raised by any representative of the applicant before or at the arbitration. His appointment was accepted by all parties.

- The arbitrator was appointed pursuant to the Plan. The process contemplates that arbitrators are drawn from the labour community and have been involved with the unions in Western Canada. The arbitrator is one of about three candidates.

- All the arbitrators are familiar to Mr. Martin and, based on his experience, to the other senior members of the unions that are parties to the BNA.

[13] Neither the applicant nor the respondent cross-examined on the affidavits filed in this matter.

III. ANALYSIS

A. Should the arbitrator's decision be set aside for reasonable apprehension of bias?

1. Governing Principles

[14] The applicant and the respondent agree on the applicable legal principles.

[15] An arbitrator shall act impartially. See ***The Arbitration Act***, C.C.S.M. c. A120 (***Act***), section 11(1). See also Section 4 of Article V of the Plan.

[16] A court may set aside an arbitrator's award where there is a reasonable apprehension of bias but not when the applicant had an opportunity to challenge the arbitrator on those grounds before the award was made and did not do so. See sections 13, 45(1)(h), and 45(4) of the ***Act***.

[17] When considering whether a reasonable apprehension of bias exists, the question is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude? The person considering the alleged bias must be reasonable, and the apprehension of bias must be reasonable in the circumstances. Further, the reasonable person must

be an informed person, with knowledge of the circumstances. See ***Wewaykum Indian Band v. Canada***, 2003 SCC 45, [2003] 2 S.C.R. 259 at para. 78; ***Ackroyd Food Services Ltd. v. Canway Inns Ltd.*** (1998), 133 Man. R. (2d) 223 at paras. 24-25 (Q.B.), citing ***Committee for Justice & Liberty v. Canada (National Energy Board)*** (1976), [1978] 1 S.C.R. 369 at 394 (S.C.C.). The grounds for the apprehension must be substantial. See ***Ackroyd Food Services Ltd.*** at para. 25, citing ***Committee for Justice & Liberty*** at pp. 394-95.

2. Applying the Principles to the Facts

a. Opportunity to Challenge

[18] In my opinion, the applicant had an opportunity to challenge the arbitrator prior to the award being made and did not do so. Pursuant to section 45(4) of the ***Act***, the arbitrator's award should not be set aside.

[19] The opportunity issue has at least two components. Did the process preclude the opportunity? Did the absence of knowledge on the part of the applicant preclude the opportunity? There is no evidence to suggest the process denied the applicant an opportunity nor did the applicant advance that position at the hearing. The applicant's evidence and submissions related to the second question.

[20] In his affidavit, Mr. DaSilva states that it was not until after the arbitration that the applicant learned of the involvements of Mr. Martin and the arbitrator in the various union councils. However, the evidence as a whole does not support

that claim. Significantly, the BNA is signed by Mr. Martin and the arbitrator on behalf of the Allied Council. See Mr. DaSilva's affidavit, Exhibit "B", p. 83. The applicant is not only a member of the Allied Council but also a party to the BNA, interested in and operating by its terms. It is the evidence of Mr. Martin that as secretary-treasurer of the Allied Council, he was visible and actively participated in the renegotiation of the BNA. I agree with the respondent's submission that it is more probable than not that, prior to the arbitration, at least the leadership and senior members of the applicant were aware of the involvements of Mr. Martin and the arbitrator. Further, while Mr. DaSilva purports to attest to the knowledge of the applicant as a whole, it is not readily apparent from his affidavit the extent to which inquiries were made of the membership, senior or otherwise. In contrast, Mr. Martin's evidence is first-hand, specifically addressing his interactions with the arbitrator over the years.

[21] In the context of the opportunity argument, the applicant's brief refers to subsections 11(2) and (3) of the ***Act***, which require an arbitrator to disclose circumstances that may give rise to a reasonable apprehension of bias. The applicant submits the arbitrator did not do so. It is not clear to me whether, in addition to the opportunity argument, the applicant is suggesting the omission per se is a separate ground for setting aside the award. Having made that observation, it is my opinion in the circumstances of this case that the answer matters not, given the very same question arises under section 45(5) of the ***Act***. At the end of the day, the issue remains whether or not there was a reasonable

apprehension of bias so as to justify setting aside the award. See ***Ackroyd Food Services Ltd.*** at para. 22.

b. <u>Reasonable Apprehension of Bias</u>

[22] If I am incorrect in respect of the applicant's opportunity argument, it is my opinion that the evidence as a whole does not support a finding of reasonable apprehension of bias on the part of the arbitrator.

[23] The test for reasonable apprehension of bias supposes an informed reasonable person, with knowledge of the circumstances. That person would know that the arbitrator was selected by the parties pursuant to the Plan. It is the unchallenged evidence of Mr. Martin that the Plan contemplates that arbitrators will be selected from the labour community and will have been involved with the construction union community in Western Canada. It is clear from the wording of Article V of the Plan that the arbitrator is to be experienced. The arbitrator was one of only about three qualified candidates. I agree with the respondent's submission that the reasonable person would know and accept that a consequence of being experienced (and therefore qualified to be an arbitrator) will be some familiarity on the part of the arbitrator with other leading individuals in the labour community, including Mr. Martin. The Plan does not contemplate a complete stranger.

[24] The applicant alleges an "existing relationship" between the arbitrator and Mr. Martin sufficient to give rise to a reasonable apprehension of bias. When the

applicant's evidence, summarized in paragraph 11 of these reasons, is considered through the lens of the reasonable informed person, it cannot be said that the grounds are sufficiently substantial to justify that apprehension. This is especially so when considered in conjunction with the respondent's evidence, summarized in paragraph 12 of these reasons, including that Mr. Martin had no direct or indirect business or social interaction with the arbitrator since late 2005, more than 10 years before the arbitration. The facts of this case are very different from those in ***Szilard v. Szasz*** (1954), [1955] S.C.R. 3 (S.C.C.), relied upon by the applicant where, unbeknownst to one party in an arbitration, the arbitrator was invested in real estate with the other party.

B. Should the applicant be granted leave to appeal?

[25] As an alternative to its allegation of bias, the applicant requests that it be granted leave to appeal the arbitrator's decision itself. Again, there is no real disagreement between the parties about the governing principles.

1. Governing Principles

[26] Section 44(2) of the ***Act*** permits leave to appeal to be granted provided the question is a question of law and the court is satisfied that:

- the importance of the matters to the parties justifies an appeal; and
- determination of the legal question will significantly affect the rights of the parties.

[27] In addition to the section 44(2) factors, there must be an arguable case for the appeal on the facts. The onus on the applicant to establish an arguable case is not a heavy one. See ***Manitoba Teachers' Society v. North***, 2005 MBQB 292, 20 C.P.C. (6th) 119 at para. 25.

[28] In its brief, the respondent also identified a number of court-recognized purposes of arbitration (in contrast to a lawsuit) including: cost reduction, more prompt adjudication, flexibility, privacy, and the ability to engage decision makers knowledgeable about the subject matter of the dispute. See ***Hopkins v. Ventura Custom Homes Ltd.***, 2013 MBCA 67, 363 D.L.R. (4th) 670 at para. 13.

2. Application of Principles

a. Question of Law?

[29] The applicant submits that the arbitrator erred at law when applying Section 8(b) of Article V of the Plan by:

(1) failing to answer the question submitted to him;

(2) basing his decision on the wrong test; and

(3) failing to consider the applicant's evidence of the "prevailing practice in the locality" criterion and any evidence regarding the "established trade practice in the industry" criterion.

[30] Section 8(b) of Article V of the Plan is reproduced in paragraph 6 of these reasons.

[31] In its brief, the respondent is silent in respect of whether the proposed questions are questions of law. I will assume, for the purposes of this application, that the respondent concedes the point. Notwithstanding the concession, the Court itself must be satisfied that the questions constitute questions of law.

[32] In support of its assertion that the questions constitute questions of law, the applicant relies on the following cases: ***Healthcare Employees' Benefit Plan (Trustees of) v. Terhoch***, 2015 MBQB 56 at para. 29; ***Rolling River School Division v. Rolling River Teachers' Association of the Manitoba Teachers' Society et al.***, 2010 MBCA 32, 251 Man. R. (2d) 231 at paras. 36-41; ***Evans v. Teamsters Local Union No. 31***, 2008 SCC 20, [2008] 1 S.C.R. 661 at paras. 47, 55; ***Badenhorst v. Great-West Life Assurance Co.***, 2013 MBCA 5, 358 D.L.R. (4th) 522 at para. 50; ***Richmond Six Ltd. et al. v. Winnipeg City Assessor et al.***, 2009 MBCA 58, 240 Man. R. (2d) 80 at paras. 16-18. I have reviewed these decisions and conclude that the questions as articulated in paragraph 29 of these reasons are questions of law and the applicant is entitled to pursue its leave application. I turn now to the factors identified in paragraphs 26 and 27 of these reasons. I will first deal with the "arguable case" factor.

b. Arguable Case

(1) Failing to Answer the Question Submitted

[33] The considerations to be taken into account by the arbitrator when awarding work are set out in Section 8(b) of Article V of the Plan. The first portion of that section directs that absent relevant existing agreements between the parties, the arbitrator is to consider the "established trade practice in the industry" (Industry Factor) and the "prevailing practice in the locality" (Locality Factor). As noted earlier, there are no such agreements.

[34] I asked the parties to confirm whether, in this fact scenario, the term "industry" should be interpreted to mean province wide (or beyond) and the term "locality", to mean work in northern Manitoba on Manitoba Hydro projects. Counsel for the respondent gave that confirmation. Counsel for the applicant did not disagree but expressed some reservation as to whether the definitions were that straightforward, leaving the matter to me. Upon review of the Plan, the arbitrator's decision, and the evidence, I accept the interpretation confirmed by the respondent. The briefs are silent on the point.

[35] Counsel for the respondent invited me to conclude that Section 8(b) of Article V of the Plan directs the arbitrator to defer in all case to the Locality Factor. In so doing, he relied on the second, third and fourth sentences in that section. I do not agree with the respondent on this point.

[36] The second, third and fourth sentences speak specifically to where a previous decision affecting the parties exists and not more generally. As the parties agree that no such decision (or agreements) exist in this case, I find that the arbitrator was to consider both the Industry Factors and the Locality Factors taking into account the submissions of the parties.

[37] Did the arbitrator apply those factors? The applicant submits there is an arguable case that he did not. It focuses on the wording of paragraph 16 of the decision where the arbitrator concludes, "considering *the established trade practice in the prevailing locality* (Manitoba Hydro Sites covered by the BNA), particularly over the past 10 plus years, the concrete work in question is the work of the [respondent]" (emphasis added). It is the applicant's position that the arbitrator's reference to "the established trade practice in the prevailing locality" is a reformulation of the Industry and Locality Factors and, as such, the arbitrator answered a fundamentally different question than the one prescribed by the Plan.

[38] I have concluded that this is not an arguable position when paragraph 16 is considered in the context of the entirety of the arbitrator's decision. Paragraph 16 cannot be read in isolation. Moreover, the decision must be reviewed, recognizing the arbitrator is not a legal draftsperson.

[39] I make the following observations in respect of the arbitrator's decision:

- In paragraphs 5 and 6, the arbitrator describes the evidence presented by the respondent's representative. Reference is made to the work performed by the respondent on numerous Manitoba Hydro projects covered under the BNA and the degree to which the respondent's members performed concrete finishing.

- In paragraphs 7 to 10, the arbitrator describes the evidence presented by the applicant's representative. He refers to both the industry and the locality observing that the majority of the applicant's work related to projects in the Province of Manitoba under a provincial collective agreement, not the BNA.

- In paragraphs 13 and 14, the arbitrator essentially summarizes the evidence as presented, concluding that the respondent had performed more work specific to the BNA than the applicant.

- In paragraph 15, the arbitrator indicates that he considered "the matter of trade practice and prevailing practice in the area". He then writes:

> There was considerable detail shown by the [respondent] that concrete finishing work has predominately been the work performed by the [respondent] on Northern Manitoba hydro sites covered by BNA. On this matter of *established trade practice and prevailing practice* the [applicant] had furnished insufficient evidence to support his position in this case. [Emphasis added.]

[40] When the arbitrator's decision as a whole is considered, it is my opinion that the arbitrator heard and considered the evidence that was presented to him by the applicant and the respondent as to their work experience in the locality and industry as those terms are described in paragraph 34 of these reasons. He then came to a conclusion. The fact that he ruled in favour of the party with more experience in the locality does not mean he did not consider the Industry Factors.

[41] In the first sentence of paragraph 15 of the decision, the arbitrator makes specific mention of considering "trade practice" and "prevailing practice". Although he does not include the terms "industry" and "locality", in my opinion his terminology is sufficiently close to the phrases "established practice in the industry" and "prevailing practice in the locality" for me to conclude that the arbitrator is referring to the Industry and Locality Factors. My opinion is the same in respect of his use of the phrases "established trade practice" and "prevailing practice" in the last sentence of paragraph 15. There is no blending of the two.

[42] Returning then to the applicant's submission that the arbitrator failed to consider the question put to him, while the wording of paragraph 16 is not ideal, when considered in the context of the evidence described in the decision and the wording of paragraph 15, it appears to me that in reaching his conclusion the arbitrator took both Industry and Locality Factors into account. In other words, the applicant has not established an arguable case that the arbitrator considered

the wrong question. The actual weight the arbitrator chose in his discretion to give the factors is not a matter for review on this application.

[43] In reaching my conclusion, I am mindful of paragraph 3 of the decision where the arbitrator states that the parties' representatives agreed that they "were relying on the prevailing practice in the locality". In its affidavit material, the respondent confirms this agreement. The applicant denies any such agreement. The difficulty with the applicant's position is that not only did the arbitrator record the agreement in his decision, that record is consistent with Mr. DaSilva's own letter dated May 5, 2016 (only nine days after the arbitration hearing) to the Plan's administrator (Exhibit "L" to Mr. DaSilva's affidavit), requesting an appeal of the arbitrator's decision. In the third paragraph of that letter, Mr. DaSilva writes (in part):

> 1) All parties have acknowledged there is no agreement of record covering this dispute nor is there an applicable decision of record. Thus *this dispute is to be determined based on prevailing practice for the last 10 years in its locality*,… [Emphasis added.]

[44] Notwithstanding that agreement, I already have determined that even if the arbitrator, in his discretion, ultimately put more weight on local experience, he did not ignore Industry Factors. Both Industry and Locality Factors were considered.

(2) <u>Basing Decision on Wrong Test</u>

[45] Although this ground of appeal is conceptually distinct from the first ground, practically speaking the considerations are not. For the reasons

expressed in paragraphs 33 to 44, the applicant has not established an arguable case that the arbitrator applied the wrong test.

(3) Failing to Consider Evidence

[46] The applicant submits that the arbitrator failed to consider the applicant's evidence of the "prevailing practice in the locality" criterion and any evidence regarding the "established trade practice in the industry" criterion.

[47] A review of paragraphs 7 to 15 of the arbitrator's decision does not support this position. Those paragraphs suggest that the arbitrator considered evidence of Industry Factors, most certainly as they related to the applicant, and that he considered Locality Factors which, in the case of the applicant, he found in paragraph 15 to be insufficient.

[48] The applicant has not demonstrated an arguable case in respect of this third ground of appeal.

c. Importance to the Parties

d. Significant Effect on Rights

[49] As I already have found that the applicant has not established an arguable case, it is not necessary to address these two aspects of the test for leave to appeal.

IV. CONCLUSION

[50] In the circumstances, I am not setting aside the arbitrator's decision or granting leave to the applicant to appeal therefrom. The application is dismissed in its entirety.

[51] The respondent is entitled to costs from the applicant. If the amount of costs cannot be agreed to, the parties can come back before me.

_____J.

Schedule "A"

ARTICLE V
RESOLUTION OF JURISDICTIONAL DISPUTES

Sec. 3. If the respective National and International Unions of the disputing locals and the directly affected Employer are unable to resolve the dispute, any of the directly affected parties may request arbitration of the dispute, within five (5) days, from the date the matter is referred by the Administrator, by filing a notice to arbitrate with the Administrator, with copies to all directly affected parties. The Administrator will only honor a request to submit the matter to arbitration prior to the expiration of the five (5) day period if the requesting party has demonstrated that the International Representatives have met or attempted to meet with the local parties to resolve the matter or have been through the mediation process set forth in Section 2.

Sec. 4. Upon receipt of said notice, the Administrator shall send to all directly affected parties a list of impartial arbitrators knowledgeable about the construction industry, chosen by the JAC [Joint Administrative Committee].

Sec. 5. The directly affected National and International Unions and the responsible contractor(s) will each have three days in which to cross off the name of one arbitrator to which it objects, number the remaining names to indicate the order of preference and return the list to the Administrator. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on each party's list, and in accordance with the designated order of mutual preference, the Administrator shall notify the parties of the arbitrator selected. If the parties are unable to select an arbitrator, the Administrator shall appoint the arbitrator.

Sec. 6. Upon his selection the Arbitrator, with the assistance of the Administrator, shall set and hold a hearing within seven (7) days. The Administrator shall notify the employer and the appropriate National and International Unions and Employer Associations by facsimile or other electronic means of the place and time chosen for the hearing. Said hearing shall be held in Washington, D.C. or, for a dispute arising in Canada, in Eastern, Central or Western Canada as determined by the Administrator. A failure of any party or parties to attend said hearing without good cause, as determined by the Administrator, shall not delay the hearing of evidence or issuance of a decision by the Arbitrator.

Sec. 7. The Arbitrator shall issue his decision within three (3) days after the case has been closed. The decision of the Arbitrator shall be final and binding on all parties to the dispute.

Sec. 8. In rendering his decision, the Arbitrator shall determine:

(a) First whether a previous agreement of record or applicable agreement, including a disclaimer agreement, between the National or International Unions to the dispute governs;

(b) Only if the Arbitrator finds that the dispute is not covered by an appropriate or applicable agreement of record or agreement between the crafts to the dispute, he shall then consider the established trade practice in the industry and prevailing practice in the locality. Where there is a previous decision of record governing the case, the Arbitrator shall give equal weight to such decision of record, unless the prevailing practice in the locality in the past ten years favors one craft. In that case, the Arbitrator shall base his decision on the prevailing practice in the locality. Except, that if the Arbitrator finds that a craft has improperly obtained the prevailing practice in the locality through raiding, the undercutting of wages or by the use of vertical agreements, the Arbitrator shall rely on the decision of record and established trade practice in the industry rather than the prevailing practice in the locality; and

(c) Only if none of the above criteria is found to exist, the Arbitrator shall then consider that because efficiency, cost or continuity and good management are essential to the well being of the industry, the interests of the consumer or the past practices of the employer shall not be ignored.

The Arbitrator shall set forth the basis for his decision and shall explain his findings regarding the applicability of the above criteria. If lower-ranked criteria are relied upon, the Arbitrator shall explain why the higher-ranked criteria were not deemed applicable. The Arbitrator's decision shall only apply to the job in dispute.

Schedule "B"

This is Exhibit "K" referred to in the affidavit of VICTOR DaSILVA
Sworn before me this 18TH day of AUGUST A.D. 20 16
A BARRISTER AT-LAW ENTITLED TO PRACTICE IN THE PROVINCE OF MANITOBA

ARBITRATORS DECISION

April 29, 2016

Plan Case No. 2016/04/01

PARTIES TO THE DISPUTE:

Labourers International Union of North America, represented by Richard Gordon, International Representative.

Operative Plasters and Cement Masons International Association of the United States and Canada, represented by Richard Wassill, Canadian Vice President

Contractor Representative, Howard Southwell, Labour Relations Manager for Mortenson Construction.

PRESENTATION AND HEARINGS

1 **The Arbitrator began the meeting at 10:30am on April 26, 2016 in the Locheed Room located in the Sheraton Winnipeg Airport, 1999 Wellington Avenue, Winnipeg, MB. Gerald Bentley was the Arbitrator.**

2 **After introductions to all the parties, it was established that all parties to the dispute were stipulated to the Plan.**

3 **Mr. Richard Wassill and Mr. Richard Gordon agreed that their wasn't any record of agreement on the dispute and were relying on the prevailing practice in the locality.**

4 **Mr. Wassill of the Cement Finishers went first as his Union filled the dispute over concrete finishing at the Keewatinohk Converter Station.**

5 **Mr. Wassill said in the 40 plus year history of the BNA, including the construction of concrete dam projects at Gilliam, Limestone, Jen Peg and Leaf Rapids had been performed by the Cement Mason members of the OPCMIA as referred to in Appendix 8 of the Burntwood Nelson Agreement (BNA).**
He also made comment on the historical records pertaining to projects completed before the mid 1980's are unavailable due to the 30-year gap between projects. He also said to the best of his knowledge all Manitoba Hydro sites covered by the Manitoba Allied Hydro Agreement and BNA, the Cement Masons were assigned all the concrete finishing.

6 **He supplied evidence that since construction started in 2005 to date at the Wuskwatim Dam Project and Keeyask that the concrete finishing work that was assigned the cement finishers is on going. He also said the Cement Masons Local**

222 had no Jurisdictional disputes filed by LIUNA Local 1258 on either of these assignments.

7 Mr. Richard Gordon of LIUNA, presented his case in great detail, that mainly related to the work that has been assigned to Local 1258 by their Construction Labour Relations Association (CLRA) Contractors. The majority of his claims related to construction projects in the Province of Manitoba under their Provincial collective agreement.

8 He presented mark-ups and letters from PCL that had assigned the concrete finishing under the BNA. These projects seemed to be smaller and of shorter nature. I have no reason not to believe that the Labourers do the majority of the concrete finishing under their CLR Agreement in the Province of Manitoba?

9 Local 1258 also presented letters from Contactors that have hired their members to do the work in question and are or were working under a letter of agreement that was signed by a few crafts with no mark- up's or pre jobs needed including, Mortenson Construction.

10 Mr. Gordon also presented a letter of agreement number 45 under BNA where they have had added a classifications that covers concrete finishers and red seal concrete finishers dated April 9, 2016.

11 Do Local 1258 believe by adding these classifications to their Appendix that they are entitled to claim another crafts work? I truly hope not?

12 Mr. Southwell of Mortenson Construction did not have a written submission and did not make many comments in why he changed the original assignment from the Cement Masons to the Labourers, except to say that they was not very much room in the camp. In the mark-up it was indicated that approximately. 10 concrete finishers would be needed.

The Facts:

13 In applying the criteria to be followed by the Arbitrator in deciding this case, the parties to the dispute and the Arbitrator agreed that there was no agreement of record or applicable agreement between the two crafts in this case, nor is there an applicable decision of record. In his opening statement the Cement Finisher made reference to how long they have been preforming this work under the BNA. He said in the 40 plus years the Cement Masons have been assigned this work under the BNA, he went on to name some of the projects. He also indicated that since 2005 when Manitoba Hydro began construction on the Wuskwatim Dam Project and the Keeyask Project the Cement Masons were assigned the work of concrete finishing and are continuing to do so.

14 The Labourers based their evidence on the work they do with mainly their CLRA signatory contractors and letters of understanding in the Province of Manitoba. They also pointed out they were assigned concrete finishing by PCL on under BNA projects.

15 This left the Arbitrator to consider the matter of trade practice and prevailing practice in the area. There was considerable detail shown by the Cement Masons that concrete finishing work, has predominately been the work performed by the Cement Finishers on Northern Manitoba hydro sites covered by BNA. On this matter of established trade practice and prevailing practice the Labourers had furnished insufficient evidence to support his position in this case.

THE DECISION:

16 The Arbitrator finds, considering the established trade practice in the prevailing locality (Manitoba Hydro Sites covered by the BNA), particularly over the past 10 plus years, the concrete work in question is the work of the Cement Finisher. The Labour is the losing party.

17 This decision applies to this job only.

Gerald S. Bentley