

**PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES
IN THE CONSTRUCTION INDUSTRY**

.....
In the matter of Arbitration between:

**Operative Plasterers' and Cement Masons' International
Association**

And

Laborers' International Union of North America

And

Inland Concrete Constructors

OPINION AND DECISION

RE: Plan Case No. CA 10/1306 - Jurisdictional Dispute

Before: Arbitrator Tony A. Kelly

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An arbitration hearing regarding this jurisdictional dispute was held on November 5, 2009, at the offices of the Plan Administrator at 900 7th Street, N.W., Suite 1000, Washington, D.C., in accordance with the Procedural Rules of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("the Plan").

Appearances

**Operative Plasterers' and Cement Masons' International
Association**

**Rob R. Mason
Director of Jurisdiction**

Laborers' International Union of North America

**Gregory A. Davis
Assistant Director, Construction Dept.**

Inland Concrete Constructors

**Mitch Lowe
Director of Administration**

**Will McGuire
Student Observer
George Mason University**

Stipulation

All parties are stipulated to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry.

Issue

This hearing is regarding a jurisdictional dispute between the Operative Plasterers' and Cement Masons' International Union (OPCMIA) and the Laborers' International Union of North America (LIUNA) over the finishing of concrete, including but not limited to setting of screeds or forms, dry packing, bushhammering and caulking and patching of concrete at the Los Angeles Valley Student Center at 5800 Fulton Avenue, Glen Valley, California. This project is covered by the Los Angeles Community College District (LACCD) Project Labor Agreement (PLA) to which the parties to this dispute are signatory. Inland Concrete Constructors has assigned the work in dispute to employees represented by the LIUNA.

Discussions and Positions of the Parties

The written presentations and oral arguments made by the representing parties were thoroughly and comprehensively prepared. Summaries of these positions are as follows:

OPCMIA

The OPCMIA described the work in dispute as finishing of concrete, including but not limited to, setting of screeds and forms, dry packing, bush hammering, and caulking and patching of concrete. The OPCMIA bases its position on established trade practice in the industry and the prevailing practice in the locality, and three (3) Decisions of Record.

Bush Hammering

It is the position of the OPCMIA that there is an applicable Decision of Record with respect to bush hammering that governs this aspect of the work in dispute. This decision of Record, dated September 23, 1990, entitled "Bush Hammering of Concrete Base Foundation"¹ states:

Bush hammering of concrete comes within the jurisdiction of Cement Finishers.

Setting of screeds or forms

It is the position of the OPCMIA that there is an applicable Decision of Record pertaining to setting of screeds in concrete/cement construction that governs this aspect of the work in dispute. This Decision of Record, dated March 17, 1920, entitled "Setting of Screed in Cement Construction and Form Work"² states:

This decision is that the setting of screed in connection with the finishing of concrete floors is considered as Cement Finishers work.

¹ Decision is on page 137 of the "Green Book," 2002 edition

² Decision is on page 136 of the "Green Book," 2002 edition

Finishing of concrete including but not limited to dry packing, caulking and patching of concrete
It is the position of the OPCMIA that there is an applicable Decision of Record with respect to the dry packing, caulking and patching of concrete that governs this aspect of the work in dispute. This Decision of Record, dated August 2, 1920, entitled "Defects in Concrete Caused by Leakage, Bulging, Sagging, etc., Through Defective or Shifting Forms"³ states:

(Subject of dispute between the Operative Plasterers' and Cement Finishers' International Association and the International Hod Carriers, Building and Common Laborers' Union)

When finishing tools are not used or required, the work shall be done by the laborer.

The filling of voids and other work requiring patching, when finishing tools are used and required, shall be done by the cement finishers.

The OPCMIA offered numerous arbitration and Board decisions regarding this disputed work which awarded the bush hammering, setting of screeds and dry packing, caulking and patching of concrete to the OPCMIA, as well as contractor letters of assignment, work referrals and manhour reports in support of their claims.

The OPCMIA advised that the wages on this project are paid for those classifications in compliance with the prevailing wage rates pursuant to the California Labor Code by the Department of Industrial Relations (DIR) and argued that the LACOD PLA obligates the signatory parties to comply with trade classifications recognized by the DIR when assigning work. He stated that the California State DIR does not recognize the Laborers' classifications for concrete work and offered a copy of a Notice Regarding Advisory Scope of Work for the California Laborers' General Prevailing Wage Determinations from the DIR, Office of the Director, that stated, "The classifications and type of work listed (below), as identified in the Laborers 2008-2009 Master Labor Agreement... shall not be applied or used on public works projects for the associated type of work," which included:

Group 1

Concrete Curb and Gutter Laborer

Expansion Joint Caulking by any method (including preparation and clean-up)

Laborer Concrete

Group 2

Grout Man (including forming, pouring, handling, mixing, finishing and cleanup of all types of grout)

Group 3

Bush Hammer

Group 4

Concrete Handworking by any method or means

The OPCMIA further alleged that the LIUNA has an exclusive agreement with Inland Concrete Constructors, which precludes them from recognizing other unions in performing their work. To support this allegation, the OPCMIA offered a letter, dated June 14, 2009, from LIUNA Local No. 1184, which states, "Inland Concrete has been signatory to a collective bargaining agreement with this Local and the Southern California District Council of Laborers since 1980. Pursuant to Section 8(a) of the NLRA, the

³ Decision is on page 121 of the "Green Book," 2002 edition

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Laborers Union is the exclusive bargaining representative for all field construction employees, including all those performing, laborers, carpentry and cement finishing work. They assert that attaining a prevailing practice in the locality under a "vertical agreement" is a violation of Article V, Section 8.b. of the Plan, and that any claim by the LIUNA to the prevailing practice in the locality should be dismissed from consideration.

LIUNA

The LIUNA questioned the work described in the dispute as too broad and general and only involves some bush hammering, finishing and patching of concrete. The LIUNA stated that 95 percent of the work described was completed. Bush hammering and finishing and patching of concrete will be minimal; there will be a topping on the roof that an air conditioner will be placed and some work related to shifting forms on a stair case and pads. There are no screeds involved. It is the position of the LIUNA that the work in dispute has been properly assigned by the contractor to the LIUNA based on established trade practice in the industry and prevailing practice in the locality and two (2) Decisions of Record.

The first Decision of Record entitled "Jurisdiction over Foremen on Interior Concrete Columns, Foundations for Engines and Machinery Beds," dated December 4, 1920,⁴ states:

(Subject of dispute between the Bricklayer, Masons and Plasterers' International Union, International Hod Carriers, Building and Common Laborers' Union and the Operative Plasterers' and Cement Finishers' International Association)

In the matter of the jurisdiction over Foremen on Interior Concrete Columns, Foundations for Engine and Machinery Beds as contested by the Bricklayers, Hod Carriers and Plasterers, it is the decision of the Board that the work shall be done by the Laborers under the supervision of such skilled workmen as the employer may designate.

The second decision dated December 11, 1924, entitled "Foremanship Over Concrete Construction," states:

(Subject of dispute between the Bricklayer, Masons and Plasterers' International Union, International Hod Carriers, Building and Common Laborers' Union and the Operative Plasterers' and Cement Finishers' International Association)

In the matter of dispute over concrete construction, it is decided the work shall be done by laborers under the supervision of such skilled mechanic as the employer may designate.

Setting of screeds and forms

The LIUNA advised there are no screeds in connection with the finishing of cement floors; the floors have been completed and there is no further work in connection with this dispute.

Bush Hammering

The LIUNA stated that in 1930 a bush hammer was used to produce a specific architectural finish by the Terrazzo Workers Union, Bricklayers, Stone Masons, Quarry Workers, Stone Cutters and various other crafts as a tool of the trade. The LIUNA contends that the 1930 Decision on Bush Hammering that was awarded to the OPCMIA was related to architectural finishes and not general concrete work.

⁴ Decision of page 123 of the "Green Book," 2002 edition

To support this premise, the LIUNA offered a 1980 letter⁵ by J.A. Jones Construction specific to "chipping and bush hammering" and was written to clarify their work assignment of February 21, 1980, and "to end the bickering in the field between the laborers and cement finishers."

The letter states, in part, "The letter was written to restore to the cement finishers the portion of the work they have been performing since the inception of this project. The letter did not intend to assign all of the chipping or bush hammering to one trade or the other. The intention of J.A. Jones is to allow the cement finishers to perform their normal chipping or bush hammering for cosmetic preparation of the surface exposed concrete which usually appears in the areas of form ties of all types, at form edges where forms change direction or where the form's surface may have been defective, or, where some foreign materials may have gotten trapped between the concrete and the form. Certain chipping or bush hammering of honeycombing where only the surface needs touching is the work of the cement finishers. It also is the intention of J.A. Jones that laborers continue to do the chipping for the removal of honeycombing or other defects in concrete needing intensive repairs, to cut and chip for keyways or alterations as may become necessary"

Further, the letter states, "It is noted that that Article 9, paragraph 9.2 places no restriction on which tools each trade may or may not use and that J.A. Jones will decide each tool workers will use in the performance of their duties. As an example, a laborer or a cement finisher may use an air tool such as a chipping gun or a grinder providing that he is performing work within his jurisdiction."

The LIUNA contends that the bush hammering in this dispute is not an "architectural finish" but a "process of concrete construction" and that the Decisions of Record of December 4, 1920 and December 11, 1924, award the work to the LIUNA.

With respect to the September 23, 1930, Decision of Record, "Bush Hammering of Concrete Base Foundation," the LIUNA referenced an arbitration decision by Arbitrator Robert McCormick⁶ who found that the Decision⁷ submitted by the Cement Mechanics is a very broad claim. McCormick goes on to say this Decision ignores the Decisions of Record, dated December 4, 1920, titled "Jurisdiction Over Foreman on Interior Concrete Columns, Foundations for Engine and Machinery Beds" and December 11, 1924, "Foremanship Over Concrete Construction," which states, "In the matter of dispute over concrete construction, it is decided the work shall be done by laborers under the supervision of such skilled mechanics as the employer may designate." McCormick found "no factual reason to change the contractor's assignment" (to the Laborers).

The LIUNA entered various Joint Board and National Maintenance Agreement (NMA) decisions which awarded "scarifying of concrete" with bush hammers, needle guns or any other process to the LIUNA.⁸

Finishing of concrete including but not limited to dry packing, caulking and patching of concrete

The LIUNA presented Board decisions and a Plan Decision (Canada) that involving patching of concrete, grouting, repairing of concrete that were favorable to the LIUNA.

⁵ Letter dated May 5, 1980, from Mae Young, Project Superintendent, J.A. Jones Construction Company to Laborers' International Union of North America, Local 561, Evansville, IN, re work being performed at Rockport, Units 1&2

⁶ Case Number: NMAPC AI-140-07, decision rendered by Permanent Robert P. McCormick on February 4, 2007

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Letters of Assignment from contractors working in the locality were submitted reflecting of bush hammering, setting of screed, finishing of concrete, dry packing and patching of concrete to members of the LIUNA. Also, manhour reports were submitted reflecting work activities of Laborers through the area and California

Inland Concrete Constructors

The contractor advised the company has been in business for 15 years and has had a collective bargaining relationship exclusively with the LIUNA. They self-perform most of their work and place and finish concrete with steady work crews of Laborers. This is the way that they are able to stay competitive and compete with non-union contractors. The company performs work throughout California and the OPOMA has not challenged them. Only on projects with a PLA have they heard from OPOMA.

The contractor stated that this project is not large, with only about \$5000 of concrete work remaining, which includes a topping slab, and pan-filled stairs; not more than 3-4 days work. No screeds are involved on the project.

Application of Plan Criteria

Based on the authority vested under the Plan, Article V, Section 8 (as amended March 15, 2006) provides the following criteria for making the award:

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 raking, 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 high-ranked criteria were not deemed applicable. The Arbitrator's decision shall only apply to the job in dispute.

Opinion and Decision

In accordance with the criteria set forth above, this arbitrator has determined that there is no previous agreement of record or applicable agreement, including a disclaimer between the National or International Unions to the dispute.

Therefore, this dispute shall be resolved on the basis of criteria 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 each 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 verbal 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.*

After carefully reviewing the testimony and evidence presented in this dispute, both the OPCMA and the LIUNA demonstrated that they have performed the work in dispute within the locality of the project and nationally. Also, both parties presented Decisions of Record to support their claims to the disputed work; however, neither the OPCMA nor the LIUNA substantiated that the prevailing practice in the locality over the past 10 years favored them.

Therefore, in accordance with the criteria set forth under Article V, Section 8 b) of the Plan, I find that the work involving bush hammering of concrete is covered by the September 23, 1930 Decision of Record, which states, "The bush hammering of concrete comes within the jurisdiction of the Cement Finishers," and should be assigned to the OPCMA. This Arbitrator rejects the premise of the LIUNA that this Decision of Record is related only to "architectural finishes and not general concrete work." If this, in fact, is the case, then a formal clarification should be made by the responsible parties.

Testimony revealed that there were no screeds to be set on the project by this contractor; therefore, this is considered a moot issue in this dispute.

With respect to "finishing of concrete, including but not limited to dry packing, caulking and patching of concrete," it is apparent from the testimony provided that there is no "dry packing or caulking" presently involved with this contractor on the project, thus these issues are also considered moot in this dispute. However, as far as the "finishing and patching of concrete" is concerned, it is the opinion of this Arbitrator that the Decision of Record, rendered August 2, 1920, is applicable: "When finishing tools are not used or required, the work shall be done by the laborer. The filling of voids and other work requiring patching, where finishing tools are used and required, shall be done by the cement finisher," and should be assigned to the respective craft accordingly.

With respect to the LIUNA's contention that the December 4, 1920, Decision of Record, entitled "Jurisdiction over Foreman on Interior Concrete Columns, Foundations for Engine and Machinery Beds," and the December 11, 1924, Decision of Record, "Foremanship Over Concrete Construction" and the

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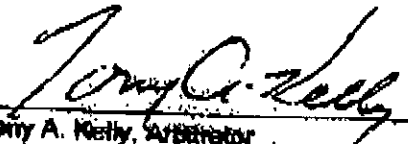
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implication that "...concrete construction work shall be done by the laborer under the supervision of such skilled mechanic as the employer may designate" are applicable in this dispute, is confusing to this Arbitrator. It appears that these Decisions are focused on the subject of "Teamworkship" when the Laborer is performing work, and not the specific work activities that the Laborers are performing. This Arbitrator does not believe that these Decisions were intended to be all-encompassing and entitle the LIUNA to the various work activities relating to concrete construction, such as bush hammering, patching, finishing of concrete, etc., and supersede other Decisions of Record, which may be applicable. Therefore, it is the position of this Arbitrator that these decisions do not govern in this dispute.

Therefore, it is the decision of this Arbitrator that bush hammering will be performed by the OPCMIA and the finishing and patching of concrete will be performed by either the LIUNA or the OPCMIA, depending on whether finishing tools are used or not, and shall be assigned by the contractor accordingly, at the Los Angeles Valley College Student Center at 5500 Fulton Avenue in Valley Glen, California.

This decision shall apply to this job only.


Tony A. Kelly, Arbitrator

Dated: November 10, 2009