

ARBITRATION PROCEEDINGS

AAA Case No. 15 300 00020 04

In the Matter of the Arbitration Between

ELEVATOR TECHNOLOGIES, LLC

- and -

INTERNATIONAL UNION OF ELEVATOR

CONSTRUCTORS, AFL-CIO

Subject: Grievance 002/62-4

SFA ¶¶ AND 11

MA Articles IV, IV(A)& VIII(A)

Dana Edward Eischen, Arbitrator

Appearances

For the Union: O'Donoghue & O'Donoghue, LLP

by Robert P. Curley, Esq.

Robert Matisoff, Esq.

For the Employer: Downs Rachlin Martin, PLLC
by Timothy E. Copeland, Jr., Esq.

Also Present

For the Union: James Chapman, Jr., Assistant to the General President
Robert Kimmerle, Business Agent-Local 62
Ronald J. Koerbel, Regional Director

For the Employer: James Cosby, President
Christopher Duke, Vice President
James Walker, Labor Relations Consultant

PROCEEDINGS

The Parties selected me to hear this grievance arising under the terms of their 2002-2007 Collective Bargaining Agreement ("Agreement"). A hearing was held at Syracuse, New York on August 17 and November 19, 2004, at which both Parties were represented by Counsel and afforded full opportunity to present oral and documentary evidence in support of their positions. The proceeding was recorded and transcribed and the record was closed with the submission and exchange of post-hearing briefs at the end of January 2005. The Parties graciously granted my request for an extension of time limits to render the Award.

ISSUES

The parties were unable to agree on a joint submission of issue(s) for determination in this matter. However, they mutually accepted the Arbitrator's suggestion to frame the issue as follows:

- 1) Did the Company violate the Collective Bargaining Agreement, as claimed in Grievance Number 002/62-4?

- 2) If so, what should be the remedy?

Note: Grievance No. 002/62-4, dated March 20, 2003, reads, in pertinent part:

Statement of Grievance: "Elevator Interiors employees were beginning to install new skins to the existing hoistway bucks. Elevator Interiors is a nonunion company owned by Elevator Technologys [sic] which is a union shop. Which is double breasting."

Remedy Requested: Pay lost of wages & benefits for a Local 62 mechanic and apprentice for five 8 hr. days.

[At the arbitration hearing, the Parties jointly stipulated that the arbitral disposition of Grievance Number 002/62-4 will also determine the outcome of several other identically worded unresolved grievances, including Grievance Nos. 002/62-5, 002/62-6, 002/62-8 and 002/62-9].

PERTINENT CONTRACT PROVISIONS

SHORT FORM AGREEMENT

WHEREAS, [Elevator Technologies] is desirous of employing Elevator Constructor Mechanics, Helpers and Apprentices; and

WHEREAS, the Union and its Local Unions have qualified and skilled Elevator Constructor Mechanics, Helpers and Apprentices;

NOW THEREFORE, it is mutually agreed as follows:

- ¶ 1. That the Employer and the Union mutually agree to be bound by the terms and conditions of the Master Agreement between Thyssen Krupp Elevator and the International Union of Elevator Constructors (including any attached Appendices and Letters), effective July 9, 2002 and terminating at midnight on July 8, 2007 (hereinafter referred to as the "Master Agreement"), a copy of which is attached and made a part hereof the same as if they were parties thereto; and the said Employer and the Union herewith adopt the said Master Agreement along with this Agreement as and for their collective bargaining agreement; and that all Elevator Constructor Mechanics, Helpers and Apprentices (herein referred to sometimes as "Mechanics ... Helpers" and "Apprentices") hired by the said Employer are to be employed according to the terms and conditions of said Master Agreement and this Agreement.
- ¶ 2. The Union claims and the Employer acknowledges and agrees that the Union has supplied proof that a majority of its Elevator Constructor Mechanics, Elevator Constructor Helpers and Elevator Constructor Apprentices have authorized the Union to represent them in collective bargaining with the Employer. The Employer recognizes the Union as the exclusive Section 9(a) bargaining representative of all Elevator Constructor Mechanics, Helpers and Apprentices in his employ engaged in the installation, repair, maintenance, modernization and servicing of all equipment and other work referred to in Articles IV and IV(A) of said Master Agreement. The Employer recognizes the Union and its Local Unions as a first source of manpower and will, therefore, use the Local Union as a first source when in need of manpower in accordance with the provisions of Article XXII of said Master Agreement.
- ¶ 11. In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any on-site work of the type covered by this Agreement, under its own name or under the name of another; as a Corporation, Company Partnership, or any other business entity, including a joint venture, wherein the Employer, through its officers, directors, partners, or stockholders, exercises either directly or indirectly, management control, or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.
- (a) All charges of violations of this Section shall be considered as a dispute under this Agreement and shall be processed in accordance with procedures which parallel those for the handling of grievances and the final and binding resolution of disputes, as provided in Article XV of the Master Agreement. Remedies for violations of this Section shall include requiring an employer to (1) pay to affected employees covered by this Agreement, including registered applicants for employment, the equivalent of wages lost by such employees as a result of the violations, and (2) pay into the joint trust funds specified in this Agreement any delinquent contributions to such funds including interest and liquidated damages which have resulted from the violations. The Union shall enforce a decision issued pursuant to the grievance and arbitration process only through arbitral, judicial, or governmental (for example, the National Labor Relations Board) channels. The Union shall not strike to enforce a decision, award, or order issued hereunder in relation to proceedings alleging a violation of this Section. This Section shall not be interpreted to make remedies it specifies unavailable to the Union for violations of other provisions of this Agreement.

- (b) If, as a result of violations of this Section, it is necessary for the Union and/or the trustees of the joint trust funds to institute court action to enforce an award rendered in accordance with this Section, or to defend an action which seeks to vacate such award, the Employer shall pay any accountants' and attorneys' fees incurred by the Union and/or fund trustees, plus costs of the litigation, which have resulted from the bringing of such court action.

MASTER AGREEMENT

ARTICLE IV Work Jurisdiction

¶ 1. It is agreed by the parties to this Agreement that all work specified in Article IV shall be performed exclusively by Elevator Constructor Mechanics, Elevator Constructor Helpers and Elevator Constructor Apprentices in the employ of the Company.

¶ 2. ...

(v) Landing door entrances.

¶ 3. ...

(a) Nothing contained in Article IV shall preclude the Company from preassembling and prefabricating the following:

(9) Landing door entrance assemblies which will be limited to struts, sills, headers, frames and associated hardware for installation purposes: door header including tracks, hangers, and all relating devices (adjusting and aligning to be done in the field).

¶ 9 No restrictions shall be imposed as to methods, tools, or equipment used.

¶ 11

- (a) All differences and disputes concerning Article IV or Article IV(A) shall be settled in accordance with the grievance procedures in Article XV.

ARTICLE IV (A) Systems, Modular and Industrial Structures

¶ 2. The work to be done by Elevator Constructors is as follows:

- (o) Landing door entrances.

ARTICLE VIII(A) Modernization Work

¶ 1. Modernization work is hereby defined as any and all work performed on apparatus enumerated in Article IV and Article IV(A) in any existing or occupied building, to bring equipment up to date, including general repairs which are a part of a modernization job. Modernization work shall be exclusively performed by Elevator Constructor Mechanics, Elevator Constructor Helpers and Elevator Constructor Apprentices.

ARTICLE XV Arbitration

¶ 1 Any difference or dispute regarding the application and construction of this Agreement, shall be referred to as a "grievance" and shall be resolved under the following procedure. Both, parties commit to making an earnest effort to resolve differences in accordance with the procedure outlined below:

¶ 5. Impartial Arbitration. If the grievance is not settled by the National Arbitration Committee, the Union or the Employer, within fifteen (15) working days of the Employer's (or Union's) disposition as outlined in Paragraph 4, may appeal the grievance to impartial arbitration. Such appeal shall take the form of a letter to the Director of Labor Relations (or the General President, IUEC).

¶ 6. The parties shall mutually agree upon the selection of an impartial arbitrator, if, within fifteen (15) days the parties are unable to agree on the person to be selected as arbitrator, the parties shall jointly request to submit the matter to arbitration conducted in accordance with the Labor

Arbitration Rules and Procedures of the American Arbitration Association and by an arbitrator who is a member of the National Academy of Arbitrators.

The arbitrator shall render his decision immediately upon the close of the record if the parties mutually agree otherwise the decision shall be rendered within thirty (30) days of the close of the record or the receipt of the briefs if the parties desire to file briefs. In an arbitration, either party may rely upon Articles in the Agreement other than those set forth in the original grievance form. The decision of the impartial arbitrator shall be final and binding on all parties.

- ¶ 7. It is understood that the arbitrator does not have the authority to add to, subtract from or modify in any way the provisions of this Agreement.

BACKGROUND

Thyssen Krupp, KONE, Schindler, Otis, Fujitec, Elevator Contractors of America, Mitsubishi Elevator/Escalator Division, AMTECH Elevator Services, American Elevator Co., Inc., and North American Elevator Services are large multi-national elevator construction corporations. For many decades these employers were parties to a series of multiemployer nationwide collective bargaining agreement, the so-called "Standard Agreement", negotiated between National Elevator Industry, Inc. ("NEII") and the International Union of Elevator Constructors, ("IUEC" or "Union"). For the term July 9, 2002-July 8, 2007, however, each of these employers signed individual but identical collective bargaining agreements, the so-called "Master Agreement", negotiated by the IUEC for and on behalf of its affiliated local unions, including Local 62 in Syracuse, New York. So far as the record shows, the language in Article IV Work Jurisdiction 2(v) and Article VIII-A Modernization Work of the 2002-2007 Master Agreement ("MA"), at issue in the present case, had been in the former NEII/IUEC Standard Agreements since the 1990's and was carried forward without material changes in the 2002-2007 MA.

Elevator Technologies, LLC ("El-Tech" or "Company"), a smaller employer engaged in the business of elevator construction, maintenance, modernization, rehabilitation and renovation, is based in Syracuse, New York. El-Tech and the IUEC Local 62 are parties to a so-called "Short Form Agreement" ("SFA"), dated June 2, 2000. That SFA incorporates, by reference and attachment, the Thyssen Krupp Elevator/IUEC version of the MA for the term July 9, 2002-July 8, 2007 but also contains SFA Paragraph 11, *supra*. El-Tech is a Limited Liability Corporation, formed in 1998 by its two principals and sole shareholders: James Cosby (President and 51% shareholder) and Christopher Duke (Vice-President and 49% shareholder). Prior to starting El-Tech in 1996, Duke and Cosby were for many years IUEC Local 62 members working for Otis Elevator as elevator constructors, under the terms of prevailing Standard Agreements. During that earlier period, Cosby had been the President of IUEC Local 62 for 6 years and also served as its Business Manager from 1984 to 1987.

At the time this dispute arose, El-Tech employed some thirteen (13) IUEC members in the performance of elevator construction, modernization and service and repair work, including elevator mechanics Thomas Grover and Patrick Rommevaux. Service work usually is performed under service contracts with customers to maintain and repair existing equipment, whereas elevator construction and/or modernization work typically is performed on a one-time basis for a building owner, pursuant to a performance contract. A modernization or rehabilitation contract usually involves upgrading and updating operational and other major components of an elevator, such as controllers, doors and door operators. Sometimes the modernization work also includes upgrading the so-called "landing door entrance", which consists of four structural components: one header, two jams and a sill [witnesses also used the terms "door bucks" and "door frame" to describe the entrance, and the term "transom" to refer to the header].

Virtually every elevator has a "landing door entrance" or portal surrounding the entrance/egress opening on each floor which allows passenger entry to and exit from the elevator. The record shows that for many years the great majority of landing door entrance installation work has been performed by IUEC-represented employees, notwithstanding a turn-of-the-century "Green Book" jurisdictional decision by the American Federation of Labor which assigned the work of installing elevator landing door entrance framework in new construction to the Ironworker craft. Former NEII Executive Director and chief negotiator testimony without contradiction that the Parties added the words of ¶ 2 (v), "landing door entrances", to Article IV Work Jurisdiction and Article IV-A Systems, Modular and Industrial Structures in the 1992-1997 Standard Agreement for the express purpose of codifying that long-standing mutually recognized past practice. [The record does not contain any such bargaining history evidence concerning the genesis of MA Article VIII-A Modernization Work, nor was Mr. Walker familiar with the provisions of the Short Form Agreement, specifically ¶ 11].

Following the negotiation of Article IV ¶ 2(v) in the 1992-95 SA, NEII employers assigned the work of installing landing door entrances solely to elevator constructors covered by the IUEC Standard Agreement. The record shows that the transom, jams and sill, which comprise a landing door entrances when bolted together and installed by IUEC-represented mechanics, typically are fabricated off-site of 15 or 16 gauge pre-formed structural steel. In that connection, it is noted that MA Article IV, ¶3(a)(9) provides: "*Nothing contained in Article IV shall preclude the Company from preassembling and prefabricating the following:... Landing door entrance assemblies which will be limited to struts, sills, headers, frames and associated hardware for installation purposes...*". Whether prefabricated at a shop or purpose-built at the site, the landing door entrance framework, consisting of a transom on the top with two parallel side columns ("jams") used to support the transom and a sill at the bottom of the elevator entrance, becomes a solid part of the elevator hoist way. The building walls, which may be made of masonry, drywall or other materials, are then built in around the entrance frame. At that point in the construction process, the entrance frame becomes part of the building structure and in order to remove the entrance frame, it would be necessary to demolish part of the building wall.

Landing door frames typically come to the job site with a base paint already applied to the structural steel. On older elevators, the landing door entrances, doors and cab interiors frequently were simply painted following installation. On newer installations and during modernization/rehabilitation upgrades, however, elevator cabs, doors and entrances more often are "clad" with some form of decorative/protective "skin" of sleet goods which coordinates with or matches the doors; ranging from Formica laminates to specialty materials like marble or laminated glass to the seemingly ubiquitous stainless steel panels. Thus, elevator

modernization/rehabilitation projects frequently include updating the landing door entrance by "cladding" the existing elevator door frame ("door bucks") *i.e.*, applying a protective/decorative covering to the header and jams with industrial strength adhesives.

It is also noted that Mr. Walker testified about a negotiated resolution of a 1999 Article IV Work Jurisdiction dispute between the parties over the practice of some NEII employers of subcontracting such "elevator cab interior work" to non-IUEC Agreement cab installation companies under new construction and modernization contracts. That dispute was settled when IUEC agreed to order its affiliated locals to cease work stoppages in return for NEII's issuance of the following October 15, 1999 letter (and *attachment*):

To- All NEII Employers

Subject: Elevator Cab Interiors

NEII and the IUEC have agreed to resolve their differences regarding the practice of some companies that subcontract cab interior work. The substance of the resolution is contained in the attached document which I ask you to distribute to those persons within your company that are responsible for the sale of your new and modernized elevator products, as well as those who may have the responsibility for vending or subcontracting some of the work which you accept by contract.

Please caution those who have such responsibilities that the IUEC will be diligent in pursuit of the work which we have agreed to assign to their members. If the IUEC believes that we are deliberately subverting the terms of the attached resolution by inducing others to exclude cab interior work when it should be included in the contract for elevator work, the IUEC will pursue every means available to stop such activity.

In exchange for our good faith agreement, the IUEC has pledged that they will not encourage or induce any local union to engage in a work stoppage when elevator cab interiors are not included in the contract for elevator work because the owner or general contractor has excluded this work for appropriate reasons. The IUEC has also agreed to withdraw its request for documents where elevator cab work has been subcontracted in the past.

Sincerely,

S/E. James Walker, Jr.

Executive Director

Subject: Installation of Elevator Cab Interiors

NEII and the IUEC have been discussing the work of installing elevator cab interiors for many months. Effective immediately, NEII will implement the following:

NEII member companies will cease direct subcontracting of the work of installing elevator cab interiors to non-IUEC cab installation companies when cab installation work is included in a contract for new or modernized elevators.

When the work of installing elevator cab interiors is to be subcontracted, NEII employers will seek bids for work that is to be subcontracted from competent contractors that are signatory to a contract with the IUEC.

If the work of installing the cab interiors is not included in the contract for elevator work, NEII members have no contractual obligation for the assignment of this work.

In those special situations where a NEII member believes that the installation of cab interiors cannot be performed by available mechanics and helpers and no competent subcontractor signatory to a contract with the IUEC submits an acceptable bid for the work, a representative of the company will contact a representative of the IUEC for a resolution. Where resolution cannot be reached, the disputed work will continue without delay and the parties will seek a binding resolution, including an appropriate remedy, by requesting impartial arbitration pursuant to Article XV.

According to mutually corroborating testimony from Mr. Walker and James Chapman, Jr., Assistant to the IUEC General President, a direct consequence of the foregoing Letter-Agreement was the addition of a training module titled "Elevator Cab Modernization Refinishing and Floor Covering" to the National Elevator Industry Educational Program ("NEIEP"), a jointly-administered five-year apprenticeship program for Elevator Constructor Mechanics. The NEIEP training materials and curriculum for IUEC elevator constructor apprentices expressly includes tools and techniques for attaching or hanging various protective/decorative coverings to the bare metal core of an elevator cab interior, including wood panels, Formica laminates, metal panels, (specifically brass and stainless steel), glass panels and marble panels, during elevator cab modernization and refinishing jobs.

The record clearly establishes that Elevator Constructors are composite mechanics, with skill sets and apprenticeship training embracing the tools and techniques for performing the "cladding" of bare or painted metal surfaces on escalators, elevator doors, elevator cab interiors and elevator landing door frames with laminates or metal panels using contact adhesives. Nor is there room for doubt in the record that MA-covered, IUEC-represented Elevator Constructor Mechanics of NEII elevator construction/modernization companies have routinely performed such cladding work on doors and/or landing door entrances during elevator rehabilitation/modernization projects since at least 1972; specifically including the application of stainless steel panels to doors and landing door entrances with various contact adhesives. Unrefuted testimony at the arbitration hearing from a myriad of IUEC-represented elevator constructors, employed by various IUEC Agreement signatory employers (including Otis, Schindler and El-Tech), recounts in convincing detail their first-hand experience routinely performing such stainless steel cladding work on elevator landing door frames during rehabilitation or modernization projects for various employers throughout their careers. In that connection, Elevator Constructor Mechanics Thomas Grover, Jr. and Pat Rommevaux, Sr, testified that, until the instant grievance(s) arose, they performed the work of cladding doors and door bucks with prefabricated stainless steel panels by means of epoxy adhesives on various jobs on elevator modernization jobs by El-Tech, including at the Bernardine Apartments and at Syracuse University.

Before Elevator Interiors, Inc. ("El-Interiors") was purchased by Messrs Cosby and Duke and re-incorporated, with themselves as sole shareholders, El-Interiors had been a fabrication shop from which Otis Elevator, Schindler Elevator, Thyssen Krupp and El-Tech all purchased specialty cab interiors and other prefabricated elevator components (including stainless steel cladding for landing door entrances), for installation by their IUEC-represented employees. [It is noted that El-Interiors, under its previous ownership, was the vendor from which El-Tech purchased the prefabricated stainless steel panels which El-Tech employee Rommevaux used to clad doors and landing door entrances on the Bernardine Apartment rehabilitation project]. After purchasing Elevator Interiors, Cosby and Duke continued to operate that company primarily as a shop for designing and fabricating elevator cab interiors and pre-formed decorative/protective panels for cladding elevator cabs and entrance ways by various elevator construction/modernization companies, including Otis and El-Tech.

The instant grievance(s) allege that El-Tech violated the rights of its IUEC-represented employees under the SFA and the MA when it permitted or assigned non-union employees of El-Interiors, a Corporation wholly-owned and controlled by Messrs. Duke and Cosby, to apply prefabricated 14-gauge stainless steel panels, with industrial strength epoxy resin, to existing elevator entrance door frames, *i.e* "skin the bucks", during an elevator rehabilitation project involving five (5) Syracuse Housing Authority ("SHA") facilities. It is not disputed that IUEC-represented employees of El-Tech were used to perform the work of rehabilitating the operating components of the old elevators at the Syracuse Housing Authority. Nor is it disputed that two (2) non-Union employees of El-Interiors (one of whom is Cosby 's son) were used to perform the work of attaching pre-formed 14-gauge stainless steel panels, by means of a proprietary spray-on contact adhesive, to the landing door entrance frames on those same elevators.

The record shows that El-Tech bid for and was awarded the contract for modernizing and rehabilitating the SHA elevators using its IUEC-represented employees and El-Interiors later separately bid and was awarded the contract for cladding the landing door entrances (transoms and side-columns) with stainless steel, using two (2) non-Union employees. Apparently, the refinishing of these landing door entrances was not included in the scope of the elevator

modernization work which SHA initially contracted with El-Tech to perform. According to testimony from Messrs. Duke and Cosbey, sometime after El-Tech employees were engaged in the initially contracted elevator rehabilitation project, SHA changed its mind about its original plans to simply repaint the existing entrance door landings and sought bids for cladding the entrance ways with stainless steel. At that time, as Elevator Interiors, Cosbey and Duke successfully bid and contracted with SHA to perform that elevator entrance way cladding work.

At or about the time this dispute arose, IUEC had been engaged in an unsuccessful effort to have Cosbey and Duke voluntarily recognize Local 62 as the exclusive bargaining representative for the two (2) full time employees of Elevator Interiors. On that basis, El-Tech maintains that the instant grievance(s) and a concurrent audit of its accounts initiated by IUEC constitute retribution for not acceding to the Union's request for bargaining rights at Elevator Interiors. In any event, the instant grievance and several identical grievances were timely filed and processed through the grievance machinery without resolution until appeal to me for final and binding determination in arbitration under Article XV of the MA.

POSITIONS OF THE PARTIES

The Union

In the Union's view, this is a straightforward case that can be resolved by application of specific, written provisions of the parties' Agreement(s). The pending grievances challenge the actions of James Cosbey and Chris Duke, the President and Vice President, respectively, and the sole shareholders of Elevator Technologies (an IUEC Agreement-signatory company) in assigning stainless steel "cladding" work on elevator door entrances to non-union employees employed by Elevator Interiors-- a non-union company owned and controlled by Cosbey and Duke. By assigning the stainless steel cladding work available at the various Syracuse Housing project work sites to employees of Elevator Interiors, rather than Elevator Technologies, the principals of Elevator Technologies violated the terms of the agreements they entered with the IUEC.

The Union argues that the work is clearly covered by the jurisdictional clause of the Industry's Master Agreement, to which Elevator Technologies is bound under the terms of the particular "Short Form" Agreement signed with the Union by the Company. Moreover, under the express provision of Paragraph 11 in the Short Form Agreement, the Union maintains that when such work is performed - whether under the signatory Company's own name or under the name of the related company - it is supposed to be performed by the terms and conditions of the Union's Agreement(s).

The evidence establishes that the Union's position on this issue is not only correct, but also straightforward. First, Article IV, Paragraph 2(v) specifically covers the installation of the landing door entrances. That provision does not limit the work to brand new or the original buck. It applies equally well to modernization jobs where the original buck is reskinned. Thus, it is bargaining unit work by virtue of the

literal language of the agreement. Moreover, even with respect to replacement skins, there is overwhelming evidence in the record that such work is regarded and performed as bargaining unit work. Indeed, Elevator Technologies' representatives conceded its IUEC employees did this exact same work until the time it purchased Elevator Interiors. Several union members, including two Elevator Technologies employees, testified they have done this same work for other companies, as well as Elevator Technologies itself. Regardless of how the work was put out for bid or the contracts awarded Elevator Technologies and its principals have agreed by virtue of Paragraph 11 of the Short Form Agreement that when this work is to be performed, it will be done under the terms of the Master Agreement.

Accordingly, the IUEC urges the arbitrator to find Cosby and Duke's assignment of the field installation of the stainless steel bucks to the landing door entrances at the five Syracuse Housing elevator modernization projects to non-union employees violated the Master Agreement's work jurisdictions terms set forth in Article IV and VIII and the specific restrictions set forth in the Short Form Agreement which James Cosby executed on behalf of Elevator Technologies. Consequently, the affected bargaining unit employees are entitled to compensation for the lost wages associated with the failure to assign them the stainless steel cladding work at the Syracuse Housing Projects, in accordance with the terms of that Agreement. We ask the Arbitrator to retain jurisdiction in the event the parties are unable themselves to determine the amount of any lost wages and benefits due.

The Employer

By the end of the hearing, the Union had all but abandoned its argument that industry practice supported its position, and instead pinned its hopes on Master Agreement Article IV, par. 2(v). However, plain contract language and undisputed evidence of bargaining history establish that the words "landing door entrances" are too slender a reed on which to rest the Union's claim to the work of applying architectural finishes to existing entrances. Under the plain meaning of Master Agreement Article IV, the work of applying architectural finishes to existing entrances - regardless of the material used - is not awarded to the IUEC.

The Union failed to carry its burden with respect to any element of its claim. Applying architectural finishes to existing elevator entrances has never been considered work "of the type covered by" the parties' Agreement. Evidence from both parties established that such work is usually performed by non-IUEC personnel even when it is controlled by an IUEC signatory. Forced to concede that finishes as varied as paint and marble have never been viewed as covered by the Agreement, the Union was left to argue that stainless steel is somehow different under the Agreement. The Union's numerous attempts to characterize the application of stainless steel finishes to existing entrance frames as somehow affecting the operation of the elevator failed when witnesses familiar with Elevator Interiors' product established that it is applied without requiring any access to the elevator hoistway or manipulation of elevator components. There is no principled interpretation of the Agreement or Master Agreement under which the work of applying stainless steel to existing entrances is "of the type covered by the Agreement," but applying any other type of finish to the same entrances is not.

Since the disputed work was not "of the type covered by the Agreement," as required by "Short Form Agreement" Paragraph 11, the grievance can and should be denied without going any further. Even if that fatal flaw in the Union's case could be set to one side, the Union failed to establish other elements of

Agreement Paragraph 11. Specifically, neither of the purposes cited in Paragraph 11, i.e., to "protect and preserve for the employees covered by this Agreement, all work heretofore performed by them" and "to prevent any device or subterfuge. . .", were established by the Union.

The Union also failed with respect to other elements of its claim. The evidence established that E-Tech did not "have control to bid" the work of installing architectural finishes to entrances at 338 Gifford Street or elsewhere. To the contrary, Syracuse Housing Authority only invited E-Tech to bid on the work of modernizing elevator components and specifically directed it not to bid on any work on entrances. The union produced no evidence of any "device or subterfuge" by E-Tech or any associated party. Finally, the Union produced no evidence supporting its grievance claim for "lost wages & benefits." The grievance should be denied.

Finally, in addition to the Union's failure to establish any breach of any contract violation, there is no basis to award the Union a remedy. Indeed, the Union did not even attempt to introduce evidence supporting the grievance's claim that E-Tech should "[p]ay lost [sic] of wages & benefits for a local 62 mechanic and apprentice for five 8 hr. days." The Union failed to carry its burden with respect to any remedy. Even if the Union established all other elements of its claim (which it did not), the Arbitrator should deny the grievance's requested remedy.

OPINION OF THE IMPARTIAL ARBITRATOR

In jurisdiction of work arbitration it is critically important that the Arbitrator define with as much precision as possible the work in dispute and avoid arbitral overreaching or *dicta* which could raise more disputes than it resolves. In that regard, it is necessary at the outset to clear the record of some red herrings raised by artful advocacy and reaffirm the very narrow scope of the work jurisdiction claim raised by the grievances in this case. Because testimony and argumentation at the arbitration hearing sometimes drifted into several immaterial topics and areas, it is important initially to state that the grievance does not raise and the decision in this case is not intended to address any of the following matters: work assigned by building owners to non-signatory employers; work Elevator Interiors performs in its fabricating shop; work that may be assigned at a job site by other employers to carpenters, electricians, masons or ironworkers. It is also outside the reach of this grievance and Award whether the IUEC wants Elevator Interiors, the non-Union company, to recognize IUEC as the representative of its shop employees; whether it is cheaper for a signatory employer to use less expensive hourly workers to perform the labor required under its elevator modernization contracts and whether the IUEC or the National Elevator Industry Benefit Plans seek to audit Elevator Technologies.

Finally, contrary to the Employer's primary argument, I conclude that this case is not about "applying architectural finishes-- regardless of the material, tools or techniques used" to landing door entrances. In the final analysis, it is immaterial whether there might arguably be exotic marble finishes, unique historical bronze finishes, elaborate wood cabinetry or electrostatic painted finishes for elevators and elevator landing entrances which require unique tools, equipment, training and skills possessed by other trades, because this particular case is not about

such matters. Rather, from start to finish, this case is only about the application of generic stainless steel cladding to existing elevator landing entrances during an elevator modernization project. The record establishes that such stainless steel cladding is as ubiquitous in landing door entrance modernization as stainless steel doors are for modern elevators and further that most Elevator Constructor Mechanics possess the skills and experience needed to apply such surfaces.

Review of on-property grievance handling documents as well as pre-arbitration correspondence from El-Tech Counsel to IUEC Counsel reinforces my conclusion that a very narrow scope of work jurisdiction claim is presented for determination in this case. After the Union protested the assignment to El-Interior employees of the stainless steel cladding work on the SHA rehabilitation projects, El-Tech Vice President Duke notified Local 62 Business Manager Robert Kimmerle, by letter dated January 2003, as follows (emphasis added):

RE: Applying Architectural Finishes to Exterior Entrances

Recently a project was awarded Elevator Interiors Inc., Syracuse, New York to provide a new finish to existing hoistway entrances. **The scope of work is limited to adhering 14-gauge stainless steel cladding to the columns and transom. The present determination by the IUEC is that this work is included in the contract agreement.**

Past work experiences throughout Central New York over the last 20-years would indicate otherwise. Architectural finishes such as painting/stripping, applying of marble, applying of tile, applying of wood or Veneer, have all occurred without issues. In fact on several new installations within Syracuse, New York this work has been performed by outside contractors while the elevator constructor was on site. The applying of stainless steel cladding with an epoxy is an architectural finish, which does not require any access to the hoistway or top of elevator. The stainless steel finish does not add to the structural integrity or change any operating safety standards.

I am requesting documentation of contract references and past grievances for the architectural finish work described above. If Elevator Technologies can be provided reasonable documentation prior to this work being performed, the installation by others will be reconsidered. This work is being delayed until February 1,2003 to provide a reasonable time for response. I believe the best interest of both the IUEC and Elevator Technologies can be satisfied with this information.

In May 2003, after the initial grievance was filed, Mr. Duke issued a formal response which read as follows:

RE: Grievance Response

IUEC Grievance #2002/62-4 has been issued to Elevator Technologies for work performed by Elevator Interiors Incorporated. **The work in question was cladding hoistway entrances which had been installed 30 years prior.**

Elevator Interiors Inc. is not owned by Elevator Technologies. Elevator Interiors is a Delaware Corporation established in 2003. Owners, Chris Duke and James Cosbey purchased the assets of a non-union cab manufacturing and installation company, operating in Central New York. Elevator interiors, Inc. currently manufactures material for all local elevator contractors, however does not install cab interior finishes. (hoistway entrance exterior finishes excluded).

Upon notification hoistway entrance cladding was IUEC Contract work, by the local union representative, the project was voluntarily delayed requesting additional information. The information provided by the IUEC as clarification referenced the work practices of a signatory cab company only. No information regarding the exterior finishes of hoistway entrance was provided. The IUEC informed Elevator Technologies additional information was not available.

1. Elevator Technologies does not have corporate ownership of Elevator Interiors Inc. such as to constitute Double Breasting.
2. Elevator Technologies has not been provided supporting information describing hoistway entrance cladding; veneered, and painted architectural finishes as work specified in the contract agreement. Past work practices have allowed outside contractors to perform finish work.

Elevator Technologies continues to request documentation as to verify architectural finishes as Elevator Constructors Work. The double breasting grievance should not be in question prior to work determination.

In the final analysis, this case involves nothing more and nothing less than a dispute about whether Elevator Technologies LLC, an IUEC-Agreement signatory company, by the actions of its sole shareholders and chief officer/managers James Cosbey and Christopher Duke, violated ¶¶ 1 and 11 of the Elevator Technologies/IUEC Short Form Agreement [which incorporates the Thyssen Krupp version of the 2002-2007 Master Agreement, including MA Articles IV, IV(A) and VIII(A)] by assigning the work of "cladding" existing elevator door entrances with preformed stainless steel panels to employees of Elevator Interiors, Inc., a non-Union corporation wholly-owned, controlled and managed by the same James Cosbey and Christopher Duke.

Since the merits issue presented for determination is one of contract interpretation, the Union has the overall burden of proving, by a preponderance of record evidence, that the cited Agreement clauses were violated in the facts and circumstances presented on this record. See *Certainfeed Corp.*, 88 L.A. 995, 998 (Nicholas, 1987); *Entex, Inc.*, 73 L.A. 330, 333 (Fox, 1979); *Porter, Inc.*, 73 L.A. 56, 58 (Jason, 1979); *City of Cincinnati*, 69 L.A. 682, 685 (Bell, 1977).

The mutual intent of contracting parties is the Alpha and the Omega for the arbitrator of disputes over the interpretation and application of their contract language. Reasoning that understandable contract language means what it says, labor-management arbitrators and courts alike start with the premise that such intent can best be ascertained from the plain words used in the Collective Bargaining Agreement, despite the contentions of one of the parties that something other than the apparent meaning was intended. See *Independent School Dist. No. 47*, 86 LA 97,103 (Gallagher, 1985). As the Arbitrator appointed by the Parties to serve primarily as their "contract reader", it is axiomatic that I can neither ignore clear-cut contractual language nor legislate new language; since to do so would usurp the role of the labor organization and employer. *Clean Coverall Supply Company*, 47 LA 272, 277 (Fred Whitney, 1966). See also, *Continental Oil Company*, 69 LA 399, 404 (Wann, 1977) and *Andrew Williams Meat Company*, 8 LA 518, 524 (Chaney, 1947).

Even when the parties to an agreement disagree on what their contract language means, an arbitrator who finds the language to be unambiguous will enforce its plain meaning. *Safeway Stores*, 85 LA 472,476(1985) (Thorp); *Metropolitan Warehouse*, 76 LA 14,17-18(1981) (Darrow). The following decisions, *Ohio Chemical & Surgical Equipment Co.*, 49 LA 377, 380-391, (Solomon, 1967) and *Heela Mining Co.*, 81 LA 193,194(LaCugna, 1983), are just two examples of thousands of reported arbitral determinations which follow these principles:

It is a basic and fundamental concept in the arbitration process that an Arbitrator's function in interpreting and applying contract language is to first ascertain and then enforce the intention of the parties as reflected by the language of the pertinent provisions involved. As a necessary and essential corollary, if the language being construed is clear and unambiguous, such language is in itself the best evidence of the intention of the parties.... An arbitrator may not and should not thereafter resort to the application of "equitable" principles to be cloud the other wise clear intentions reflected by the meaningful language adopted. He has no choice but to apply and enforce the provision as written.

It is axiomatic in labor arbitration that clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probable intent, and to putative intent, always governs. Clear language is the arbitrator's lodestar, his guiding light. He can neither ignore it, nor modify it; on the contrary, he must give it its full force and effect.

See also *Weil-McClain*, 86 LA 784, 786 (Cox, 1986); *Houston Publishers Ass'n.* 83 LA 767, 776 (Milentz, 1984) and other cases at Elkouri & How Arbitration Works, 4th ed., p. 348-349 (1985).

Where each of the Parties to a collective bargaining agreement has a different understanding of what was intended by certain language, it is generally recognized that the Party whose understanding is in accord with the ordinary meaning of that language should prevail in the absence of misrepresentation, fraud or mistake. See *Hanon & Wilson Company*, (S. Katz 1967), 67-2 Arb ¶ 8583. Accord, *Stewart Hall Company*, 86 LA 370, 372 (Madden, 1985). Under the strict technical application of the so-called plain meaning rule, words must be given their ordinary everyday meaning, without resort to extrinsic evidence. See *Mohawk Rubber Company*, 83 LA 814, 816 (Flannagan, 1984). A less controversial corollary is the principle that words used by the Parties should be given their ordinary and popular meaning in the absence of an indication that they were intended mutually to convey some special meaning. See D. Nolan, Arbitration Law and Practice (1979), N.8 at 168; Walter Jaeger, Williston on Contracts, Section 618 at 705 (4th Ed. 1961). The Restatement (Second) of Contracts is also in accord: "In the absence of some contrary indication, therefore, English words are read as having the meaning given them by general usage, if there is one. This rule is a rule of interpretation in the absence of contrary evidence, not a rule excluding contrary evidence." (Restatement, N. 13 at Section 202, comment e.) A whole host of reported arbitration decisions turn on these fundamental principles. See *Parker White Metal Company*, 86 LA 512, 516 (Ipavec, 1985); *Anaheim Union School District*, 84LA 101, 104 (Chance, 1984); *Arco Pipe Line Company*, 84 LA 907, 901 (Nicholas, 1985) and *Tri-County Metropolitan Transportation District*, 68 LA 1369, 1370 (Tilbury, 1977).

In the first sentence of MA Article VIII(A), *supra*, "modernization work" is expressly defined as "any and all work performed on apparatus enumerated in Article IV and Article IV(A) in any existing or occupied building, to bring equipment up to date, including general repairs which are a part of a modernization job". In the second sentence of Article VIII(A) such "modernization work" is expressly reserved for performance by Elevator Constructor Mechanics, Elevator Constructor Helpers and Elevator Constructor Apprentices. The noun "apparatus"(plural "apparatuses") is defined by the Oxford University Dictionary as "the equipment needed for a particular activity or purpose". Under the Plain Meaning Rule of contract construction, *supra*, landing door entrances are apparatuses specifically enumerated in MA Articles IV ¶ 2(v) and IV(A) ¶2(o).

Application of the fundamental principles of contract construction enumerated, *supra*, to the undisputed facts of record leads to a conclusion that rehabilitation or upgrading of existing elevator landing door entrances, by contact adhesive application of stainless steel protective/decorative cladding, is "modernization work" covered by the first sentence of Article VIII(A) and thereby subject to the requirements of the second sentence of Article VIII(A). It necessarily follows that rehabilitation or upgrading of existing elevator landing door entrances, by contact adhesive application of stainless steel protective/decorative cladding, is "on-site work of the type covered by this Agreement", within the meaning of that quoted term in the second sentence of the Paragraph 11 of the SFA. Moreover, the record in this case persuasively establishes that such stainless steel cladding of landing door entrances is "work heretofore performed" by Agreement-covered employees, within the meaning of that quoted term in the first second sentence of Paragraph 11 of the SFA.

In Paragraph 11 of the SFA, El-Tech (the Employer) and IUEC farther expressed their mutual intent to "protect and preserve" such work for the employees covered by the Agreement and to "prevent any device or subterfuge to avoid the protection and preservation of such work", by the following:

If and when the Employer shall perform any on-site work of the type covered by this Agreement, under its own name or under the name of another; as a Corporation, Company Partnership, or any other business entity, including a joint venture, wherein the Employer, through its officers, directors, partners, or stockholders, exercises either directly or indirectly, management control, or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.

Under the plain words of that quoted provision, Elevator Interiors is "a Corporation, ... wherein Elevator Technologies, through its officers, directors, partners, or stockholders, exercises either directly or indirectly, management control, or majority ownership".

In all of the facts and circumstances of the record in this case, I am compelled to conclude that Elevator Technologies violated the contract rights of its IUEC-represented employees under SFA ¶1 (including MA Articles VIII-A) and SFA ¶11, when it permitted or assigned two (2) non-Union employees of a Elevator Interiors to apply prefabricated 14-gauge stainless steel panels, with industrial strength epoxy resin, to existing elevator entrance door frames, *i.e* "skin the bucks", during an elevator rehabilitation project at Syracuse Housing Authority ("SHA") facilities. The remedy for that proven violation of the Agreement is set forth expressly in the second and third sentences of SFA ¶ 11(a), as follows:

Remedies for violations of this Section shall include requiring an employer to (1) pay to affected employees covered by this Agreement, including registered applicants for employment, the equivalent of wages lost by such employees as a result of the violations, and (2) pay into the joint trust funds specified in this Agreement any delinquent contributions to such funds including interest and liquidated damages which have resulted from the violations.

AWARD OF THE IMPARTIAL ARBITRATOR

- 1) The Company did violate the Collective Bargaining Agreement, as claimed in Grievance Number 002/62-4.

- 2) As remedy for the proven violation; the Company is directed to: (1) pay to affected employees covered by the Agreement, including registered applicants for employment, the equivalent of wages lost by such employees as a result of the violations, and (2) pay into the joint trust funds specified in the Agreement any delinquent contributions to such funds including interest and liquidated damages which have resulted from the violations.

- 3) Jurisdiction is retained for the sole purpose of resolving any disputes which may arise between the Panics regarding the meaning, application or implementation of this Award

Dana Edward Eischen

Signed at Spencer, New York on March 25, 2005

STATE OF NEW YORK

} SS:

COUNTY OF TOMPKINS

On this, the 25th day of March, 2005, I, DANA EDWARD EISCHEN, upon my oath as Arbitrator, do hereby affirm and certify, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the foregoing instrument and I acknowledge that it is my Opinion and Award in the above matter.