

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between:

KONE, INC.

and

INTERNATIONAL UNION OF ELEVATOR

CONSTRUCTORS

Grievance of the Company:

Work Jurisdiction,

Installation of

Balustrade Brackets

AAA Case No. 33 300 00336 02

Before M. David Vaughn, Arbitrator

OPINION AND AWARD

This proceeding takes place pursuant to Article XV of the collective bargaining agreement ("the Agreement") in effect from July 9, 2002 to July 8, 2007¹ between the KONE, Inc. (the "Company")² and the International Union of Elevator Constructors (the "Union" or "IUEC") (collectively, the Company and the Union

are the "Parties" to the proceeding) to resolve a grievance filed by the Company dated March 6, 2002. The grievance protests the alleged countermanding of the Company's instructions to its bargaining unit employees by the Union's Local Business Representative and the Representative's direction to those employees that they remove and reinstall/realign balustrade brackets from a model ECO 3000 escalator. The Parties were unable to resolve the grievance through the steps of the negotiated grievance process; and the Company invoked arbitration. From a list provided by the American Arbitration Association ("AAA") and in accordance with its rules and the procedures of the Parties, I was selected to arbitrate the dispute.

A hearing was conducted on May 1, 2003 at Orlando, Florida at which the Company was represented by Peter Robb, Esq. of the law firm of Downs Rachin Martin PLLC and the Union by Robert Matisoff, Esq. of the law firm of O'Donoghue & O'Donoghue. The Parties stipulated at the outset of the hearing that the matter is properly in arbitration and before me.

¹ The grievance at issue arose under the predecessor Agreement. The Parties stipulated that the governing language is unchanged from the prior Agreement to the 2002-2007 Agreement.

² The Company is the successor to Montgomery Kone and Montgomery Elevator Company. The Company and its predecessors are/were parties to collective bargaining agreements; however, prior to the Agreement at issue herein, the Company and its predecessors were members of the National Elevator Industry, Inc. ("NEII") a multi-employer association which negotiated collective bargaining agreements with the IUEC on behalf of its members, including the Company's predecessors.

In the hearing, the Parties were each afforded full opportunity to present testimony, documentary and other evidence and to cross-examine witnesses and challenge documents and other evidence offered by the other. For the Company testified Installation Development Manager Barry McClintock and Director Employee and Labor Relations Joseph Sefula. For the Union testified Local 4 Business Manager Michael Langer, Union General President Dana Brigham, and Business Agent for Local 139 Albert Mitchell. Joint Exhibits 1-2, Union Exhibits 1-7, and Company Exhibits 1-7 were offered and received into the record. All

witnesses were sworn. A verbatim transcript was prepared which, by agreement of the Parties, constitutes the official record of the hearing. At the conclusion of the hearing, the Parties elected to submit written post-hearing briefs.

By a Motion filed on June 26, 2003, the Union requested postponement of the filing of briefs, the production of certain information by the Employer in connection with post-hearing events, and the reopening of the hearing for the taking of additional evidence. By a filing dated June 27, 2003, the Employer opposed the Union's Motion in all respects. The Union replied to the Opposition on June 30, 2003. The pleadings were forwarded to me by AAA and were received on July 3 and July 8, 2003. On July 8, 2003, I issued a Decision and Order directing the Company to furnish the Union a narrative and other information contained on the standard PONC reporting form describing the installation of balustrade brackets and that a sealed copy of the same information be transmitted to me.³ I declined the Union's request for broader disclosure of documents. I also allowed the Union to request reopening of the hearing based on a conclusion by it that the information disclosed is directly relevant to the issues before me. Following receipt of the Order, the Union elected not to reopen the hearing.

³ The sealed envelope has not been opened and the contents thereof have not been considered

The Parties consulted and agreed on a new date to submit post-hearing briefs. On July 17, 2003, upon receipt of the last post-hearing brief, the record of proceeding closed.

The Opinion and Award is based on the record herein and consideration of the arguments of the Parties. It interprets and applies the Agreement.

ISSUES FOR DETERMINATION

The Parties did not agree on a statement of the issues. Based on the proposed statements of the issues and the record, I find that the issues for determination are:

Did the Union violate the applicable Agreement by countermanding the Company instructions and directing bargaining unit members to remove, reinstall and align balustrade brackets on ECO-3000 escalators; and/or by refusing to accept as authorized by the Agreement Company shipment of balustrade brackets and/or other brackets on ECO-3000 escalators held and/or positioned in place by drive pins and bump stops? If so, what shall be the remedy?

RELEVANT PROVISIONS OF THE APPLICABLE AGREEMENT

ARTICLE II - Recognition Clause

Par. 2. The Union recognizes that it is the responsibility of the Company in the interest of the purchaser, the Company and its employees to maintain the highest degree of operating efficiency and to continue technical development to obtain better quality, reliability, and cost of its product provided, however, that this provision is not intended to affect the work jurisdiction specified in Article IV and other Articles of the Agreement.

ARTICLE IV - Work Jurisdiction

Par. 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.

Par. 2.

(c) It is understood and agreed that the preassembly of all escalators, moving stairways and link belt carriers that may be done in the factory shall include the following:

1. Truss or truss sections with tracks, drive units, machines, handrail drive sheaves, drive chains, skirts on the incline sections but not curved sections, step chains and steps installed and permanently aligned.
2. Balustrade brackets may be shipped attached but not aligned.
3. Setting of all controllers and all wiring and conduit for the controller.

All other work on escalators, moving stairways and link belt carriers shall be performed in the field by Elevator Constructor Mechanics, Helpers and Apprentices either before or after the truss or truss sections are joined and/or hoisted and placed in permanent position. This includes any and all work not done in the factory.

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

ARTICLE XIV - Strikes and Lockouts

Par. 1. It is agreed by both parties to this Agreement that so long as the provisions herein contained are conformed to, no strikes or lockouts shall be ordered against either party. It is understood that this Paragraph shall be applied and construed consistent with the provisions of Article IV, Par. 11 concerning Grievance and Arbitration procedure.

FACTUAL BACKGROUND AND FINDINGS

The Parties

The Company is a major manufacturer and installer of escalators and elevators worldwide. It maintains more than 50 offices throughout the United States, including one in Orlando, Florida. The Company operates a factory at Coal Valley, Illinois where it manufactures escalators; the employees at that facility are represented by the International Association of Machinists ("IAM").

The Union is the exclusive representative of a bargaining unit composed of the Company's Elevator Constructor Mechanics, Elevator Constructor Helpers, and Elevator Constructor Apprentices. Employees represented by the Union and employed by the Company install, service, maintain and repair escalators.

The Company's Escalators

Escalators are moving steps which transport people from one floor or level to another. Most escalators, are built around a frame known as a "truss". The truss is mounted to the building and the moving parts of the escalator run within the truss. The handrails and their guide tracks are supported and aligned by glass or stainless steel panels known as "balustrades". Running the length of the escalator, the balustrades are held in place and alignment by "balustrade brackets". Skirts run next to the balustrade to prevent items from being drawn into the moving parts of the escalator. The placement and alignment of the balustrade - by means of precisely positioning the balustrade brackets - are important to the safety and operation of the escalator.

The Company began to manufacture the model ECO-3000 escalator in 2001. The ECO-3000 has come to supercede the model E-5000. The ECO-3000 was designed to meet new tighter tolerances safety standards established by the American National Standards Institute ("ANSI"). Indeed, Mr. McClintock testified that the purpose of the redesign incorporated into the ECO-3000 was to reduce the tolerances between the escalator skirt and the step, thereby reducing the likelihood that items and/or people might be caught. Mr. McClintock, who is

also an engineer, testified that he participated in the design of the ECO-3000, but that 75% of the design was by German engineers.

"Alignment"

Union President Brigham described alignment work as the "bedrock" of the industry. Historically, members of the bargaining unit in the field have aligned the balustrade brackets "in the field", that is, at the site where the installation of the machine is to be made. Alignment consists of measuring, fitting, drilling, and installing the balustrade brackets so that they are held in proper alignment in all three planes. This process ensures the proper placement of the balustrade brackets so that the escalator operates with the least risk of malfunction, wear and/or injury.

Although the process makes use of various machines, tools and devices, the essential work is done by hand. Alignment is an intensive, high-skill process. Only by continued performance of alignment in the field can the skills of bargaining unit employees be maintained so that maintenance, repair and modernization can be properly and efficiently accomplished, he asserted.

The Model ECO-3000 is designed and fabricated at the factory so that the balustrade brackets are held in precise alignment with "drive pins"⁴ and "bump stops"⁵. Mr. McClintock testified that the factory alignment process is extremely precise. Such positive and precision alignment facilitates meeting the increasingly-tight tolerances required of the industry. The Company has made several efforts, both during collective bargaining and outside it, to obtain the right to ship balustrade brackets from the factory aligned. Those efforts are described below. However, Mr. McClintock asserted that, after the brackets are factory installed, they are loosened and shipped, a state of shipment which he described as "attached but not aligned".

⁴ Pins which hold two or more components together, comprised of rolled tapered steel and pounded into holes drilled into each of the components which are smaller than the pin

itself and which hold the components together and in alignment by the outward pressure of the curled steel.

⁵ designed-in physical impediments to rotating motion which assure positive placement of a component by preventing its further rotation or movement along a defined arc or line.

Mr. McClintock testified that he developed the installation methods for the ECO-3000 and prepared a manual for the conduct of that operation. He indicated that he also trained employees to perform the installation. The KONE ECO-3000 Escalator Installation Guide ("Installation Guide") describes two procedures in order to align balustrade brackets".

One procedure described in the installation guide is to "align incline balustrade brackets". According to the Installation Guide, this procedure involves: removing the bolts that hold the "outer balustrade brackets" to the "lower balustrade brackets", positioning the outer balustrade bracket, loosening and tightening the appropriate bolts, forcing the outer balustrade bracket to the appropriate bump stops, visually "checking" that there is no gap, and tightening the bolts.

A second procedure described in the Installation Guide is to "align lower and upper balustrade brackets". This procedure involves: removing the bolts that hold the "outer balustrade bracket" to the "lower balustrade bracket", positioning the outer balustrade bracket, re-tightening bolts, loosening bolts, clamping the "outer balustrade bracket" to the "horizontal balustrade bracket", visually "confirming" the absence of a gap, re-tightening bolts, and repeating the process for "upper end balustrade brackets".

Mr. Langer testified that the lower and upper balustrade brackets are already assembled on the ECO-3000 when it is received in the field. He indicated that the balustrade brackets arrive aligned, noting that they are already attached to the truss by means of drive pins inserted tightly in holes and by means of the brackets being held against bump stops. Bolts installed between the balustrade brackets and the parts to which they are attached provide strength but not additional alignment if the drive pins and bump stops remain in place. Mr. Langer stated that the brackets on the incline are tight and that the applicable measurements are

already in tolerance. He indicated that the measurements from the truss center line were also already done, as confirmed in the field by measurements performed by IUEC Technicians in KONE's employ.

Mr. Langer asserted that the ECO-3000 as received in the field does not comply with the Work Jurisdiction provisions of the Agreement. In order to comply, he asserted, every piece should come to the field separately. In addition, Mr. Langer asserted that drilling the holes, installing the pins, measuring, and aligning the brackets should all be performed by the bargaining unit members in the field. If the balustrade brackets as shipped from the factory "aligned", instead of merely "attached", the factory alignment must be negated and the alignment made in the field without use of the factory-installed drive pins, he maintained.

The Orlando Incident

In February of 2002, Mr. McClintock was present in Orlando, Florida (the jurisdiction of the Union's Local 139) to provide training in connection with the installation of ECO-3000 escalators at a department store in a mall. Mr. McClintock testified that partway through the installation of the escalator, Mr. Mitchell appeared at the job site and that a disagreement ensued regarding whether the balustrade brackets had been "aligned" - in addition to being "attached" - at the factory. Mr. Mitchell alleged that the brackets had been aligned at the factory and arrived at the job site in such condition, which he alleged to be a violation of the Agreement. Work continued during the day while Mr. Mitchell consulted his national office.

The following day, Mr. Mitchell advised Mr. McClintock that the balustrade brackets had to be removed and replaced in the field and at the job site in order to comply with the Agreement. He indicated that the work could continue on the escalator that was already underway, apparently using the justification of training, but he advised Mr. Mitchell that on subsequent installations, the brackets would have to be removed, reinstalled and realigned.

Mr. McClintock acknowledged that he did not witness Mr. Mitchell countermand any orders to bargaining unit personnel while he was present on the first and second days of the installation. He testified that he had to leave prior to the

beginning of work in on the second escalator and had no knowledge of what transpired. KONE's job site supervisor, Mr. Ben Beier, is no longer with the Company and did not testify at the hearing nor give any written statement other than the unsigned grievance dated March 6, 2002, which asserts

"The Local Business Representative countermanded the company's instructions and directed employees to remove and reinstall the ECO 3000 escalator balustrade brackets, which were shipped attached but not aligned."

The Company requested, by way of remedy, that the Union

"Reimburse KONE for all cost associated with removing and reinstalling the balustrade brackets. Cease and desist from removing and reinstalling the balustrade brackets."

Mr. McClintock acknowledged that the balustrade brackets on the second Orlando ECO-3000 were removed, reinstalled and realigned. He described the discussion with the Company as routine and characterized the resolution of the dispute as a normal job site accommodation and agreement. Mr. McClintock denied having countermanded any instruction from the Company. It does not appear that the Company treated the incident as a refusal by any of its employees to comply with Company instructions. The Company did not instruct employees to "obey, the grieve" its instructions; and it did not, insofar as the record establishes, discipline any employees in connection with the incident.

Subsequent handling of the Balustrade Brackets

The record indicates that subsequent to this incident, bargaining unit members routinely remove the balustrade brackets and related nuts and bolts, collect them in a common area, and then replace them in accordance with the pre-existing procedure for alignment. Mr. McClintock testified that he has observed such procedures at work sites in Boston, the District of Columbia, Las Vegas, Chicago, and Charlotte since the incident in Orlando.

Bargaining History

The evidence establishes that prior to 1967, the collective bargaining agreement between the NEII and the Union did not permit any pre-assembly of escalators. In 1967, those parties amended Article IV - Work Jurisdiction to permit the use of the escalator truss as a shipping container for certain escalator components. The apparent purpose was to allow safe and efficient transport of the components. The components that were attached to the truss at the factory had to be removed and aligned in the field. In 1987, the current language of Article IV was negotiated to allow the shipment of balustrade brackets "attached, but not aligned". Other relevant language in Article IV remained unchanged.

The E-5000 Settlement Agreement

Both Messrs. Brigham and Langer testified that in 1998, the Company's predecessor attempted to combine the support and alignment for the balustrade in one bracket on the E-5000 escalator. He indicated that the Union objected. Following discussions, the Parties entered into a January 13, 1998 settlement agreement whereby the Company's predecessor agreed to redesign the brackets in question and the Parties agreed to allow the factory installation of the redesigned brackets, but then the removal and field reinstallation of the brackets. Tr. 122-123, 127-128, 130, 167-168; UX 6.

Company Efforts to Obtain Union Consent to Factory Pre-Assembly

In connection with developing a methodology for alignment with the IUEC, the Company made a presentation in October 2001. The presentation was not part of the formal negotiations, but may have been in preparation for them. The October 2001 presentation described the claimed benefits of pre-assembly. The presentation pages also compared two "proposals". The "initial" proposal provided for the assembly and installation of balustrade brackets at the factory; the "revised" proposal provided for factory installation, but not alignment, of balustrade brackets, with field alignment required. Both proposals originated with the Company. Mr. McClintock acknowledged that neither proposals was accepted

by the Union. The presentation was not made as part of collective bargaining, although the proposals were different in application from the terms of the Agreement.

On April 26, 2002, prior to the commencement of negotiations for a new collective bargaining agreement but in anticipation of bargaining, the Company presented yet another proposal to the Union; it would have added the words "balustrade brackets or clamps" to the items for which pre-assembly was permitted pursuant to Article IV, Par. 2(c)1. The Union did not agree to the proposal.

Negotiations for the 2002 Agreement

The Parties subsequently negotiated a new Agreement which became effective July 9, 2002. None of the proposed changes to Article IV were included in the current Agreement; and the relevant language remains and it has been since 1987. President Brigham denied that any discussion of the station of balustrade brackets took place as a result of proposals from the Union.

Prior Arbitration Awards

The Parties, or their predecessors, have arbitrated the meaning of the work jurisdiction provisions of the then-current collective bargaining agreement on several occasions over the years.

In *NEII and IUEC*, Eli Rock, Arb. (1974), Otis Elevator Company began welding at the factory certain components that had previously been bolted in the field. The Union challenged the charge as violating its work jurisdiction. Arbitrator Rock sustained the grievance. He noted that Article II includes the Union's pledge to support the operating efficiency of the Company. He concluded, however, that the work involved was not factory work within the meaning of the work jurisdiction Article. Arbitrator Rock acknowledged that performance of the work in the field might be more tedious and expensive, but that was not sufficient under the facts of the case to overcome the contractual work jurisdiction language and the

negotiating history which required a holding for the Union. The pre-1957 language before the Arbitrator was different and more restrictive than the language at issue in this proceeding, but the principle that alleged efficiency does not trump applicable work jurisdiction rules.

NEII and IUEC, Bert Luskin, Arb. (1975), involved the Union's protest of factory addition of "spot discs" on the truss of a new type of escalator. Arbitrator Luskin found that the spot discs were designed to assist employees in the field in leveling and locating parts for the installation of the trusses. He concluded that the spot discs "performed an alignment function that should be performed by [employees] in the field"; he held the affixing of the spot discs by other than bargaining unit employees to violate the jurisdictional rights of the bargaining unit. The pre-1957 language before the Arbitrator was different and more restrictive than the language at issue in this proceeding. However, the principle that factory usurpation of the contractually-protected alignment function through design change is not permitted survives.

Elcor Elevator Services Corp. and IUEC, Local 122, David P. Jones, Arb. (1991) interpreted the post-1987 contractual language as it was used by parties in Canada. Arbitrator Jones found that decisions under the previous contractual language were not "helpful" because the wording of the applicable collective bargaining agreements was "considerably different". He found that use of the word "include" in Article 4.02.03 (the provision corresponding to Article IV, Par. 2(c)) which described the scope of factory pre-assembly allowed was "expansive and illustrative, not definitive and limiting." Arbitrator Jones noted the language of Article 4.02.03 "All other work on escalators . . . shall be performed in the field. . . . This includes any and all work not done in the factory" and he opined that, in order to construe this language so as to give meaning to both of the sentences, the purpose of the sentence "All other work on escalators . . . shall be performed in the field. . . ." indicated:

- (1) work not done in the factory shall be done in the field, (2) by Elevator Constructor Mechanics, and (3) before or after the truss sections are joined, hoisted and placed into permanent position. Such a construction does not indicate how one determines what work must be performed in the field, compared to the pre-assembly which can take place in the factory: nothing in the second or third sentences directly relates to that question.

Arbitrator Jones also noted that the language of Article 4.03.03 stated that "Work to be done in the field shall include . . . handrails" which apparently were a subject included in the grievance. Arbitrator Jones found that the language of Article 4.02.03 did not support the Union's assertion that pre-assembly of components other than those enumerated in subparagraphs 1, 2, and 3 was prohibited. While the components enumerated in subparagraphs 1, 2, and 3 include "balustrade brackets", that specific component does not appear to be at issue before Arbitrator Jones; instead, the Jones grievance challenged pre-assembly of the hand rail, comb plates, floor plates, and skirting. The Jones Award does not speak directly to the attachment/alignment issue.

In *Montgomery Kone Elevator Company Ltd. and IUEC, Local 82*, Dalton Larson, Arb. (1992), the arbitrator also interpreted the post-1987 contractual language as it was used by parties in Canada. With respect to the attachment of balustrade brackets, Arbitrator Larson found the evidence before him demonstrated that more than half of the brackets in question required "adjustment" but the rest were "sufficiently in line" that the balustrade could be inserted "without any adjustment whatsoever". He found further that the negotiators contemplated that "some, if not all, of the brackets might fit into place by virtue of the design and would require little or no adjustment". Arbitrator Larson held that the word "aligned" could "not have been intended to turn on whether the brackets line up in a technical sense" and that "alignment must be taken really only to refer to the process of tightening up the bolts that attach the brackets to the truss" and that alignment "does not refer to the factual state of being aligned".

In *NEII Thyssen-Dover Elevator Company Kone, Inc. and IUEC*, David Peterson, Arb. (2000) found that the assembly of additional beams attached below the steel platforms of elevator machines are not part of the "generic definition of the term bedplate" - a term with a specific definition in the elevator industry. Arbitrator Peterson found that "the assembly of such additional beams in the field [and] the drilling of the beams for the attachment of deflector sheaves" was work belonging to the bargaining unit. He further found that the pre-attachment of the beams and the pre-drilling of the beams did not constitute allowed factory pre-assembly. The Peterson Award applied the same contractual language that is at issue in this proceeding and utilized the same bargaining history to take an expansive view of the Union's work jurisdiction and a restrictive view as to the extent of factory pre-assembly allowed.

The Grievance

On March 6, 2002, the Company filed a grievance claiming, as indicated that Mr. Mitchell improperly countermanded its instructions and directed its employees to remove and reinstall the ECO 3000 escalator balustrade brackets. The Company asserted that the balustrade brackets were shipped attached, but not aligned, and that the procedure it utilized was not in violation of the agreement. It sought from the Union reimbursement for the costs associated with removing and reinstalling the balustrade brackets and an order that it cease and desist from instructing bargaining unit members to remove and reinstall brackets. The Union denied the Company's grievance. It stated:

"Standard Agreement Art. IV Par 2 Sec 2 balustrade brackets may be shipped attached but not aligned. Past practices have always been everything above cord angle comes [illegible] Sec 1, describes whats fastened and aligned permanently. Many items allowed Fastened (not aligned) to make shipping easier." JX 2.

The grievance remained denied through the steps of the negotiated grievance procedure. This proceeding followed.

POSITIONS OF THE PARTIES

The positions of the Parties were set forth at the hearing and in their post-hearing briefs. They are summarized as follows:

The Company argues that the Union violated the Agreement by directing its bargaining unit members to disassemble and realign the balustrade brackets on escalators that were being installed.

KONE contends that the evidence establishes that the balustrade brackets are attached at the factory, but not aligned; it maintains that the balustrade brackets on the ECO 3000 are aligned in the field, notwithstanding the use by the factory of aligning equipment, the drilling for and installation of drive pins to hold the brackets in place and the use of bump stops in the design. In support of this

argument, it cites the time-consuming process described in both testimony and the Installation Guide. The Company rejects the anticipated Union arguments that the installations of drive pins and/or bump stops constitute alignment. It argues that neither the bracket supporting the balustrade at the bottom nor the bracket incline have any pins or dowels, although it acknowledges that the multi-purpose bracket at the top of the escalator does have pins. As to the use of bump stops, the Company asserts that the term was never defined. In addition it contends that certain bolting operations - which it opines might constitute bump stops - are a necessary part of field alignment. Moreover, the Company asserts that in the E-5000 settlement agreement, the Union accepted bolting as sufficient field alignment.

The Company contends that the prior arbitration decisions support its position. It argues that the Rock Award is narrow, confined to certain elevator components installed at two sites; it challenges that Union's anticipated assertion that the Rock Award gave "pre-eminence" to Article IV because it recognized that simply bolting components in the field met the alignment requirements. KONE generally distinguishes the Luskin Award as based on elevator, not escalator, components and as a decision where Arbitrator Luskin found for the Union on some points and the Company on other points.

The Company contends that the Larson Award is directly on point and supports its claim herein. It points out that Arbitrator Larson applies the same language that is at issue in this proceeding to reach a conclusion that the employer's action aligning balustrade brackets at the factory was not a violation of the Union's work jurisdiction.

The Company rejects the Union's anticipated argument that the Company agreed to the procedure engaged in by the bargaining unit involving the disassembly and re-attachment of the balustrade brackets. It maintains that the Union refused to allow the ECO-3000 balustrade brackets to be shipped and installed pursuant to the Company's direction. It denies ever acquiescing to the Union's interpretation of the language.

The Company urges that its grievance be sustained. It requests that I declare the balustrade brackets on the ECO-3000 as designed, installed and shipped by the company, are "attached", but not "aligned" within the meaning of Article IV, Par. 2(c) so long as they are shipped affixed by bolts to be tightened in the field. The

Company further requests that I find that the Union violated the Agreement by its directions/suggestions to its members to disassemble the balustrade brackets and reattach them. As to remedy, the Company requests that the Union be ordered to make the Company whole for losses, cease and desist from its directions/suggestions to its members to disassemble the balustrade brackets and reattach them, and instruct employees not to continue such actions; and that the Union be ordered to refrain from taking actions inconsistent with the Company's ability to attach balustrade brackets in the factory.

The Union argues that it did not violate the Agreement when it directed its bargaining unit members to disassemble and realign balustrade brackets on escalators as they were being installed. It contends, instead, that the Company violated the Agreement by its use of factory-aligned balustrade brackets.

IUEC maintains that factory installation of the drive pins violated Article IV of the Agreement. It asserts that the balustrade brackets were not attached by bolts and that installation of the drive pins permanently aligned the brackets. The Union points out that nomenclature of the Installation Guide indicates that the drive pins (which are factory-installed) permanently align the balustrade brackets. IUEC notes that when the Company previously attempted to combine support and alignment for the balustrade with other functions in one bracket on the E-5000, the Union objected and the result was the January 13, 1998 settlement agreement wherein, the Union asserts, the Company agreed to allow field drilling and installation of drive pins. The Union also cites the Peterson Award, contending that the Award held, in part, that permanently joining elevator components in the factory which had traditionally been installed separately violated the Agreement.

The Union contends that factory installation of bump stops also violates Article IV of the Agreement. It maintains that the evidence establishes that such stops serve to align the outer balustrade brackets. IUEC also notes the Installation Guide's indication that alignment of the incline brackets is accomplished by forcing the outer bracket to the bump stops on the multipurpose bracket and then tightening the bolts. The Union argues that the bump stops are like in function to the "spot discs" which were found by Arbitrator Luskin to impermissibly eliminate or reduce the Union's traditional alignment work.

IUEC maintains that the Company's violations of the Agreement are neither justified nor privileged. It contends that while the use of drive pins and bump

stops might be more efficient, less costly, or result in better escalator quality or reliability, the language of Article II, Par. 2 of the Agreement makes clear that such considerations do not trump the work jurisdiction provisions of Article IV. The Union argues that the use of bump stops and drive pins is not merely the product of more precise fabrication methods, but instead is a design decision which in turn deprives bargain unit of the alignment work which the Agreement reserves to them.

The Union asserts that the Company is attempting to gain through arbitration what it failed to achieve in negotiation. It argues that if KONE desires to align balustrade brackets in the factory, it must obtain that right at the bargaining table. IUEC notes that the Company has repeatedly attempted to obtain precisely this right in negotiations and in presentations outside of formal negotiations since the applicable language was introduced but has failed; it argues that if the Company believed that it had the right to take the action at issue, then it would not have continued to make proposals to the Union which would have given it that right. The Union also points out that the Company never asserted that it had the right to take the action at issue in consequence of the arbitration decisions issued in Canada.

The Union urges that the Canadian decisions issued by Arbitrator Jones and Lawson be disregarded. It maintains that they were issued under a different bargaining relationship and that the agreements at issue therein evolved under those different relationships and have a different history that led to the language at issue here. The Union contends that the Larson Award was simply wrong" in concluding that "alignment" referred only to tightening up bolts; and it asserts that the Larson Award did not take into consideration the Luskin or Rock Awards. IUEC argues, in addition, that the Company did not consider the Larson Award to be controlling because KONE never raised it in negotiations and KONE entered into the January 13, 1998 settlement Agreement. The Union contends that there is no indication in the Larson Award that the brackets on the escalators at issue before Arbitrator Larson were aligned by drive pins and bump stops - rather than precisely crafted components. IUEC argues that it is therefore uncertain that Arbitrator Larson would have arrived at the same conclusion if faced with the situation at issue here, that is: that bolting and unbolting brackets constituted alignment in the field.

Finally, the Union rejects the Company's assertion that Mr. Mitchell countermanded the Company's instruction and directed employees to remove and reinstall brackets. It maintains that the Parties did not come to an "understanding"

that this issue was before me. If I do consider it, however, the Union contends that the Company's claim is not supported on the record. It argues that the evidence establishes that Mr. Mitchell advised Mr. McClintock that the brackets must come off and that Mr. McClintock was not aware of the installation procedure used after he left. The Union contends that the evidence demonstrates that Mr. Mitchell made a job site agreement with Mr. McClintock not to remove the brackets on the first escalator, but to do so on the second. That, contends the Union, does not constitute the countermanding of Company instructions.

The Union urges that the Company violated Article IV of the Agreement by shipping the ECO-3000 escalators from the factory with the balustrade bracket both attached and aligned. It maintains that the Company's grievance should be denied and that the Company should be directed to cease and desist from depriving the bargaining unit of the alignment work which it traditionally performs in the field.

DISCUSSION AND ANALYSIS

Scope of the Grievance, Issues before Me

It is well-established that the party who files a Grievance contends what is to be grieved - and through the terms of the Grievance establishes the scope of the issues in arbitration. Here, the Company grieved the alleged countermanding of its instructions to employees. The Union filed no counter grievance protesting the propriety of the Company's new design, factory assemble and shipping method, but it certainly appears that the Parties by consent broadened the scope of the grievance to include the propriety of the Company's method of installation of the balustrade brackets using precision installation of drive pins and designed-in bump-stops prior to shipment. *See and compare*, in this regard, the Union's statement of the issue ("whether or not the Company shipped the escalators to the job in a way that was consistent with or in violation of Article IV, specifically with regard to the balustrade brackets". T.29) with that of the Company ("... one of the fundamental issues for this arbitration is whether balustrade brackets were shipped attached but not aligned consistent with . . . the contract." T.11).

The Parties did not, however, mutually agree through their handling of the Company Grievance to add the full scope of the issues the Union seeks to arbitrate, *e.g.*, with regard to the propriety of the challenge to certain parts shipped attached which the Union contends are not balustrade brackets at all. See Union's Opening Statement, T.23. I conclude that those additional questions are not before me.

For the reasons that follow, I conclude that the evidence does not support a finding that the Union countermanded any instruction from the Company to leave the balustrade brackets attached and/or not to remove the drive pins or alter the bump stops holding the parts in alignment. Neither am I persuaded that the evidence establishes that the manner in which the Company shipped ECO 3000 escalators with balustrade brackets attached is consistent with the requirements of the Agreement. The Company's grievance must, therefore, be denied.

Relationship of Article II to Article IV

In Article II, Par. 2. Of the Agreement, the Union specifically recognizes the Company's responsibility to "maintain the highest degree of operating efficiency and to continue technical development to obtain better quality, reliability, and cost of its product provided". The plain language of Article II, Par. 2 qualifies this recognition by providing that it is "not intended to affect the work jurisdiction specified in Article IV and other Articles of the Agreement." Thus, the work jurisdiction of the bargaining unit which is provided for in Article IV cannot be negated by real or perceived efficiencies or development in design, manufacture or procedure.

Structure and Scope of Article IV

Article IV of the Agreement defines the work jurisdiction of the bargaining unit broadly. Paragraph 1 of Art. IV states the agreement of the Parties that all work specified in the Article be performed by bargaining unit employees. Paragraph 2 allows certain pre-assembly of escalators in the factory, including, in Subparagraph (c) (3) the right to ship balustrade brackets "attached but not aligned". The clear import of (c) (3) is that balustrade brackets may not be aligned at the factory. Moreover, the further language of Article IV, Par. 2(c) negates any

permission which might be implied to pre-assemble escalator components not specifically listed. It provides that:

All other work on escalators . . . shall be performed in the field by Elevator Constructor Mechanics, Helpers and Apprentices either before or after the truss or truss sections are joined and/or hoisted and placed in permanent position. This includes any and all work not done in the factory.

Thus, if a task relates to the "work on escalators" it is the work of the bargaining unit and is to be performed in the field, unless the task falls within the exceptions listed in Article IV, Par. 2(c)1, 2, or 3 and is not limited by any exception internal to those allowed tasks. In the context of the instant dispute, I hold, therefore, that only if the work performed at the factory constitutes "attachment" but not "alignment" may it be performed at the factory. Otherwise, the work is within the work jurisdiction of the bargaining unit and must be performed in the field.

Complaint that the Union Countermanded Company Instructions in Orlando

In order to sustain the Company's grievance in the first issue presented, the Company was obligated to prove its charge that the Union countermanded instructions which management gave its employees not to remove and reattach the balustrade brackets. The Company has not sustained that burden. Mr. McClintock testified that on the first day Mr. Mitchell came to the job site, he told McClintock that the manner in which the Company had shipped the ECO 3000 escalators from the factory constituted alignment of the balustrade brackets and was in violation of the Agreement.

Against Mr. McClintock's assertion to the contrary, Mr. Mitchell informed him that he would have to check with his Union. The record demonstrates that Mr. Mitchell did not instruct, or even request, that the escalator already under assembly be disassembled; and it is not disputed that at least the first escalator was placed in the mall without removal or alignment of the balustrade brackets by bargaining unit members. Indeed, it appears that on the second day, when Mr. Mitchell returned, he specifically so agreed.

It is not disputed that Mr. Mitchell told Mr. McClintock on the second day that it would be necessary that the balustrade brackets on the second and subsequent escalators be removed and reinstalled. However, Mr. McClintock testified that Mr. Mitchell informed him; there is no evidence from Mr. McClintock that he or anyone else in management specifically instructed employees to align the balustrade brackets without disassembling them or that Mr. Mitchell instructed Company employees to proceed in that manner. Indeed, Mr. McClintock acknowledged that he left before the next day's work and that he did not know whether the balustrade brackets were removed and reinstalled before alignment.

The Company's job site manager who filed the grievance would presumably be able to give evidence with respect to what happened, but he was not called by the Company or asked for a statement. The mere fact that he is no longer with the Company does not excuse the Company from making efforts to present him or show his unavailability. The unsigned allegation in a grievance form is insufficient to constitute evidence as to what happened on the job site.

The evidence simply does not establish precisely how the work was performed at Orlando once Mr. McClintock left the job site. It is clear that Mr. Mitchell asserted that the brackets must be removed - and presumably realigned - else the Company's action would be in violation of the Agreement. The evidence does not establish that any instructions were issued or countermanded⁶. To the contrary, Mr. Mitchell characterized the discussion with Mr. McClintock as a typical job site agreement; and although there is no indication that management and the Union specifically came to terms, it appears that the Parties each retained their positions and the Orlando installation continued without further conflict.

⁶ Insofar as the record indicates, at no time during the interaction between Mr. Mitchell and Mr. McClintock in Orlando or at any time subsequent to his departure did any Company official order that the employees align the balustrade brackets in accordance with the Installation Guide, that they cease any removal of the brackets or alignment of the brackets pursuant to traditional methods. Indeed, there is no indication that employees were ever directed to leave the brackets in place when performing alignment. The Company had the authority to so instruct employees and to direct performance of the alignment in accordance with the Installation Guidelines. Employees would have presumptively been required, under the principle "obey, then grieve", to comply with such instructions, even if they had been advised by the Union, and believed, that such instruction would be contrary to the Agreement. To the extent that failure was in response

to a challenge by the Union based on its position that the Company had violated the Agreement by performing alignment work, that tends to indicate that the Company official(s) present accepted partially or completely the Union's position with respect to the violation. At the very least, it undercuts the Company's claim that the Union countermanded its instructions.

Mr. McClintock testified as to other installations in other parts of the country in which bargaining unit members insisted that balustrade brackets shipped attached be removed and reinstalled. Indeed, it does not appear to be disputed that regularly occurs. However, the Company's grievance does not reach situations other than Orlando; and there is, in any event, no indication that when the brackets are removed and reinstalled prior to being aligned, that the procedure followed is in contravention of specific instructions given by management. Thus, other locations and incidents provide no support for the Company's complaint.

From the Company's failure to prove that the Union countermanded its instructions it follows that no economic remedy is due from the Union.

Attachment of the Balustrade Brackets Constitutes Alignment

As to the more general question presented by the Parties - whether the Company's method of installation of the balustrade brackets using precision installation of drive pins and designed-in bump-stops prior to shipment complies with the Agreement - the Company argues that the work performed at the factory constituted mere "attachment" of the balustrade brackets and that the work that still remained to be performed once the "attached" balustrade brackets arrived at the job site constituted "alignment". It points to the Installation Guidelines provision for removing bolts, measuring/positioning a balustrade bracket, and then securing the bracket by means of a tightened bolt, and visually checking the placement of the bracket. This, it would assert, constitutes alignment and, since that work is still performed in the field, leaves the factory-performed work as mere attachment. I am not persuaded.

In the first instance, the Parties have a long course of dealing. They have, through their performance under the series of contracts between them, defined the terms "attachment" and "alignment" of balustrade brackets. The latter task is not merely

mechanical, but includes the step by step process of creating the alignment of the brackets from an unaligned state, utilizing the skills, tools and procedures which have historically been required to accomplish the result.

The Company's assertion that what it does at the factory through the precision positioning of the brackets through the use of precision equipment, the placement of the brackets in precisely the position they will be when finally aligned and then the fixing of the brackets in position through the use of precision drilled holes into which drive pins are inserted and through the use of designed-in bump stops constitutes mere attachment but not alignment turns the definitions of the two terms on their heads.

Despite the length of the list of tasks set forth in the Installation Guidelines which purport to describe the alignment work to be performed, the tasks are merely mechanical, confirming and inspecting an alignment already performed. The tasks described by the Company are not the processes historically constituting alignment; and they do not require the judgment, skill, and experience that aligning connotes, either in its bare meaning or based on the work that constituted alignment with respect to the E-5000 or other earlier model escalators.

The record indicates that the ECO-3000 arrives at the job site with "drive pins" installed and "bump stops" designed in. Notwithstanding the Company's assertion that "bump stop" is not specifically defined, the term suggests its meaning and the Parties appear to understand the concept. The evidence establishes that the drive pins and bump stops place the balustrade brackets in alignment and hold them there. Indeed, even when the drive pins are removed and the brackets backed off from the bump stop, the realignment using those aids is, at least by comparison, a ministerial process rather than an exercise of skill - the skilled work has been done at the factory. Thus, the evidence establishes that the drive pins which were installed at the factory, and the bump stops, which were inherent in the design, functionally line up the balustrade brackets.

The Luskin Award and Peterson Award make clear that it is not the end result of having the proper pieces of the structure - escalator or elevator - connected to each other that determines whether work done at the factory was within the bargaining unit's jurisdiction. The analysis looks to the process by which that connection occurred. As indicated, the earlier Awards interpret the language now in Article II, Par. 2 as precluding the Company from unilaterally revising the

meaning of "alignment" simply because it produces an "operating efficiency" or a "better quality, reliability, and cost of its product provided".

Support for this conclusion is found in the Company's allegation that the bargaining unit members disassembled the balustrade brackets, separating the nuts and bolts, and then reinstalled them as they came from the factory, apparently using traditional alignment methods. If the reinstalled brackets were installed in a state that was the same as how they came from the factory - and there is no challenge the fact that the brackets were properly reinstalled - then the brackets as "attached" at the factory were installed in such a way as to be properly "aligned". Testimony of the Union's witnesses indicating that checks of the factory installations confirmed their precise alignment and, when called on the issue in Alexandria, Virginia, the Company declined to allow the alignment of factory-installed brackets to be checked. I conclude that the attachment of the brackets in precise alignment has been sufficiently proven and that such attachment effectively constitutes alignment and thereby violates Article IV, Par. 2(c)2.

Bargaining History Supports Union

The bargaining history indicates that the Company has repeatedly sought to obtain through bargaining the authority to include balustrade brackets among the items that it is allowed to pre-assemble at the factory. Such pre-assembly would perforce include alignment. The Union's rejection of such a proposal - not once, but repeatedly - as late as March of 2002 warrants the inference that the Company knew it lacked the authority under the terms of the Agreement to make such a pre-assembly.

Side agreements with respect to the E5000 and the various job site practices or agreements likewise suggest the Company's lack of conviction that it possesses authority to factory-align the balustrade brackets in the manner at issue in this proceeding.

Prior Awards Do Not Support Company

The Company cites the Jones Award and the Larson Award from the Canadian system in support of its position. In the first instance, the Union argues persuasively that these awards are based on a different bargaining relationship and a different evolution of the relationship from that at issue in the instant grievance. There is no indication that the Agreement shares a common bargaining history or a common set of practices with its Canadian counterpart.

Moreover, the two Canadian awards are dated 1991 and 1992. As noted above, the Company and its predecessors in bargaining have repeatedly attempted, both before and after the issuance of those Awards but without success, to obtain the authority to include balustrade brackets among the items that it is allowed to pre-assemble at the factory. The record documents bargaining efforts occurred in the period 1998 to 2002. Insofar as the record indicates, the Company never relied on or even cited the Canadian Awards to assert it already possessed the rights it sought in bargaining. Thus, the Company's conduct undercuts its argument as to the significance and effect of the Jones Award and Larson Award.

The Jones Award reads expansively the word "includes" in Article II, Par. 2 of the Canadian agreement such that work on components not included in the explicit language of the applicable collective bargaining agreement was not required to be performed in the field. Unlike the Jones Award, the instant case deals with work that is provided for in the Agreement. In the instant case, Article II, Par. 2(c)2 states its own limitation, to wit, the pre-assembly performed at the factory "include[s]" "attach[ment]" but not "align[ment]".

The Larson Award focuses on the notion that tightening the bolts of the balustrade brackets constitutes "alignment". As indicated above, the understood and accepted process by which the Parties have historically aligned the brackets would appear to be the more reasonable focus of the concept of "alignment". Moreover, the Larson Award could not have granted the Company the authority it sought because, as indicated earlier, if it already possessed that authority, it would not have expended so much effort attempting to secure it through negotiation. The Award so reflects.

Conclusion

The Company has chosen to call what it does at the factory "attachment" and to call what the Installation Manual requires to be done in the field as "alignment". But calling alignment attachment does not make it installation; and calling the simple placement or re-placement of already-aligned pieces alignment does not convert the tasks into alignment, as the Parties have understood and utilized the term. Instead, the use of the phrase "attached but not aligned" suggests most strongly that the Parties intended the term attachment specifically not to include alignment. The evidence establishes that the Parties have defined the terms through their long course of dealing and bargaining history. This, I am persuaded, more credibly defines the terms they use than management's after-the-fact efforts.

The conclusion warranted by the evidence is that the "attachment" of balustrade brackets on the ECO 3000 which have been performed at the factory by the Company constitutes "alignment" according to Article IV, Par. 2(c)2 and effectively guts the task of alignment of the brackets which the Agreement reserves to bargaining unit employees in the field. This, I hold, is not consistent with the contractual requirements.

The Company's design and factory alignment may well promote efficiency and safety. However, in light of the broad work jurisdiction of the Union, the right to use those processes in lieu of alignment of the balustrade brackets in the field must be obtained at the bargaining table and not through arbitration.

AWARD

The Company failed to sustain its burden to prove that the Union countermanded management instructions to bargaining unit members to disassemble and realign balustrade brackets on escalators as they were being installed. The Company violated the Agreement by the manner in which it shipped balustrade brackets attached and held and/or positioned in place by drive pins and bump stops, effectively constituting alignment within the meaning of the Agreement. The grievance is denied

Issued at Clarksville, Maryland this 17th day of August, 2003.

M. David Vaughn

Arbitrator