

## **ARBITRATOR'S OPINION AND AWARD**

In the Matter of Arbitration Between:

OTIS ELEVATOR COMPANY

and

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS

Local 4

January 7, 2005

AAA Case No. 11 300 01634 04

Grievance: Installation of Plunger/Cylinder

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Employer: Peter B. Robb, Esq.

Timothy E. Copeland Jr., Esq.

The Union: Paul F. Kelly, Esq.

Statement of the Award: The grievance is denied.

## INTRODUCTION

This case came to arbitration as a result of the following Order from the United States District Court, District of Massachusetts, issued on June 17, 2004:

Upon review of Plaintiff's Motion for Preliminary Injunction [#16] and Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction [#18], this Court hereby finds that: (1) a collective bargaining agreement is in effect; (2) the collective bargaining agreement contains a no-strike cause; (3) the dispute over the installation of the plunger/cylinder mechanism is covered by the grievance and arbitration provision of the collective bargaining agreement; (4) the Parties have alleged breaches of the collective bargaining agreement by each other; and (5) ordinary principles of equity warrant relief. It is, therefore, ordered that, pending the outcome of arbitration over the plunger/cylinder dispute:

1. Defendant Local 4, its officers, agents, representatives, members, employees, and attorneys, and all other persons in active concert or participation with them having notice from any source or in any manner of this Order be and hereby are enjoined and restrained from calling, causing, inducing, encouraging, authorizing, conducting, continuing in or engaging in any strike, concerted work stoppage, concerted work slow-down, sit-down, or refusal to work, or any other act in coercion or interference with Plaintiff's normal operations;
2. Plaintiff's bond shall remain in force and effect for the period that this Order is in effect;
3. The Parties are to arbitrate the dispute over the installation or the plunger/cylinder mechanism pursuant to the Expedited Labor Arbitration Procedures of the American Arbitration Association; and

4. Plaintiff, its officers, agents, employees, and attorneys are restrained from imposing discipline on Defendant Local 4's members over contract disputes between Plaintiff and Defendant Local 4 and from applying to this court for further equitable relief unless it has first offered to Defendant Local 4 the opportunity to arbitrate the underlying dispute pursuant to the Expedited Labor Arbitration Procedures of the American Arbitration Association.

IT IS SO ORDERED. [J. X. #4.]

The Union<sup>1</sup> subsequently filed the following grievance:

Otis has refused to continue the agreement regarding cylinders placed in the hole or hoistway with a crane. The agreement by both parties is as follows: It was agreed to remove the cover of the casing use a Crane to set the cylinder in the ground for safety and to prevent damage to the PVC Liner by resting it on the casing. It was also agreed that when the construction team was assigned to the job, rigging would be set up and the cylinder would be removed from the ground, the casing cut and the cylinder lowered back into the hole. On May 7<sup>th</sup> Otis Elevator stated that they will not remove them from the ground after they have been placed in the wellhole. [J.X. #2.]

and requested as remedy:

Continue honoring both parts of the agreement. Pay 8 team hours on the following jobs: Mashpee MA, Falmouth ME, Exeter NH. \$39.395 is mechanics wage. \$27.58 is 70% apprentice wage and \$10.90 benefits each. One team hour equals \$88.775. One team hour (\$88.775) times eight hours (8) equals (\$710.20). Total amount for three jobs equals \$2, 130.80. [J.X. #2.]

The Company denied the grievance as being untimely and on the merits.

The undersigned arbitrator was selected pursuant to the AAA rules and hearings were conducted on September 9, October 18, and October 19, 2004. Both parties were represented by counsel, witnesses were sworn and a transcript was made of the proceedings. Both parties filed post-hearing briefs which were transmitted by the AAA with a due date of January 10, 2005 to render the award.

**STIPULATED ISSUE**

At the arbitration hearing the parties stipulated to the following issue:

Whether the Company violated Article IV and past practice consistent with the contract by using a crane to install plunger/cylinder mechanisms in the wellholes in the Local 4's jurisdiction? If so, what shall be the remedy?

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<sup>1</sup> As used herein "the Union" refers to Local 4 of the IUEC. The instant grievance was filed solely by Local 4 which represents IUEC members in Maine, New Hampshire except for two counties, and eastern Massachusetts. Where the international Union is referenced IUEC will be used.

## **BACKGROUND**

Since the early 1900s the Company has had a collective bargaining relationship with the IUEC. For a period of time the Company was a party to a series of five-year, industry-wide collective bargaining agreements negotiated by the National Elevator Industry, Inc. (NEII), known as the standard agreement. In 1987 Otis withdrew from industry-wide bargaining and negotiated its own agreement with the IUEC. In 2002 other companies also withdrew from NEII for collective bargaining purposes. The language in dispute here, contained in the July 9, 2002-July 8, 2007-Otis-IUEC agreement, has not been altered from the language contained in the standard agreement.

A variety of unions are involved at any construction site and each of their collective bargaining agreements contains work jurisdiction language. Cranes are generally operated by Operating Engineers employed by contractors and covered by their own collective bargaining agreements. The Otis-IUEC contract contains a detailed work jurisdiction clause in Article IV.

The Company constructs and installs, modernizes and maintains elevators, escalators and other similar devices. Among the types of elevators are traction elevators, which use a series of wire cables attached to sheaves and counterweights, and hydraulic elevators, which use a fluid-driven plunger contained inside a cylinder.

For so-called "holed" hydraulic elevators, the plunger/cylinder mechanism, commonly referred to as a jack, goes in a wellhole dug beneath the building. The wellhole is dug before construction, as deep as the jack is long plus three feet. To prevent the wellhole from collapsing and to keep out water and debris, a steel casing is placed in the wellhole and a cap is placed on top. In some cases,

such as where there is a risk of snow or water building up, the steel casing extends above the pit floor.

Depending on the height of the building, the jack may be one-piece or multiple pieces. Each section of a multiple-piece jack is hoisted into the hoistway and connected by Elevator Constructors. Some one-piece jacks are so long that it is physically impossible to get them into the hoistway to lower into the wellhole except through use of a crane to lower the jack from the top. On occasion the jack is delivered before the hoistway structure has been built.

The instant dispute involves only holed, one-piece jacks.

One-piece jacks encased in PVC liners are delivered to the site by special trucks. They range in length and weight depending on the number of stops or stories. Elevator Constructor Mechanics, Helpers and Apprentices unload the jacks from the delivery trucks, performing all hooking and rigging and signaling the crane operator.

There is often a passage of time between the delivery of the jack and its actual installation. Jacks left on the ground would be at risk of damage. Therefore, when the jacks are delivered they were placed directly in the hoistway and secured or directly into the wellhole which is then recapped.

The construction crew doing the installation may be different from the crew that unloaded the jack. To complete the installation the Elevator Constructors must remove the cap from the wellhole, cut the casing flush with the floor, and plumb the jack, among other work.

The method of plumbing taught in the apprenticeship program uses a "Spider Bob" suspended above the top of the cylinder and lowered all the way down the cylinder, i.e., plumb over distance. Thus use of a Spider Bob requires that the plunger be entirely removed. (UX #1, pg. 9-12.) Company witnesses described alternative methods of plumbing that can be done with the plunger in place, i.e., using machinist levels on four or five different planes and a target board with a light that reflects through a hole in the plunger showing a halo on the floor.

Prior to 2001-2002 jacks were shipped from the factory with rubber shipping rings to hold the plunger in place and prevented scratches or other damage to this precision-machined part. During the installation process the shipping rings had to be removed, which meant that the plunger in a jack already in the wellhole had to be completely taken out of the hole. The manufacturer now ships the jacks with shipping rings that slide and become part of the permanent stop ring.

The skills to do this and associated work, including all hoisting and rigging, are taught in the National Elevator Industry Educational Program (NEIEP). Since 1996 Massachusetts has regulated the apprenticeship program and licensed Elevator Constructors. Equipment used includes beam clamps, devises, slings, and chain falls of various capacities. There are different types of chain falls and spur geared chain falls are available in capacities from 500 lbs to 12-15 tons. (UX #17, pgs. 14-15.)

The events leading to the above-quoted court Order took place in the spring of 2004 and are not substantially in dispute. The Business Manager for Local 4, who had assumed that position in October 2003, testified that he learned from discussions with members in the field that the Company had directed them to not pull the jack out of the wellhole after it had been set in the wellhole by a crane. He had discussions with the Company's Branch Manager, who is based in Portland, Maine, about the performance of this work.

Company and Union witnesses testified about the May 2004-events consistent with their written correspondence set forth below, which reveal much of the essence of this dispute.

On May 5, 2004, the Branch Manager sent the Business Manager the following letter:

Enclosed please find a copy of the letter concerning two grievances previously filed by Local 4 regarding the use of a crane to hoist and lower plungers and cylinders. As you can see, Otis denied the grievances and, to my knowledge, Local 4 chose not to pursue them further. Also, as you can see, there are no restrictions mentioned on Otis' right to use a crane to hoist and lower plungers and cylinders. It is my understanding that [K. M.] under your directive has instructed our mechanics not to perform this work unless they remove the entire plunger and cylinder from the wellhole after it has already been set by the crane. I can find no basis for Local 4's position in the Otis Elevator Company Agreement, and obviously, given the decision on the previous grievances that I've attached, this directive is based on incorrect information. Otis will proceed with the installation of plungers and cylinders according to its long-standing practice and will not remove the entire plunger and cylinder.

This work is to proceed without interruption. Please direct [K. M.] accordingly. If you have any questions, please feel free to contact me at.... [UX #2, page 1.]

The referenced enclosed letter was dated February 16, 1995, from the Company's then-Director, Labor Relations to the IUEC's then-Assistant to the General President and states:

At our National Arbitration Committee Meeting on February 10, 1995, we discussed Grievance #280 and 281 - Local 4 Boston.

Grievance #280 concerns Otis using a crane to hoist and lower one piece plungers and cylinders into place under the supervision of Elevator Constructors in its employ. They could not be hoisted up the hoistway due to the limited dimensions of the space through which they would have to be moved in relation to their length. Use of the crane is permitted in such cases by Par. 5 of Article IV and the grievance is therefore denied.

Grievance #281 concerns Otis hoisting and lowering one piece plungers and cylinders with a crane before a building was erected at the site. Article IV, Par. 5 permits the use of a crane under the supervision of Elevator Constructors "outside of the structure" (in other words, not up the hoistway) by simply saying, "where heavy material is to be hoisted, etc." This was a case where heavy material (which specifically includes plungers and cylinders) is to be hoisted and therefore not a violation, and the grievance is denied. [UX #2, page 2.]

The Business Manager responded by letter the same day stating:

I received your letter with a copy of [the then-Director, Labor Relations] letter of February 1995. I hope you have access to a copy of the IUEC's response.<sup>2</sup> It so, that should clarify this issue. There is an agreement that was made between the IUEC and Otis Elevator regarding the use of a crane and it was made well after [the then-Director, Labor Relations] letter.

Not only was it agreed to by both parties to remove the cover of the casing, use a crane to set the jack in the ground for safety and prevent damage to the PVC Liner by resting it the casing; but it was also agreed that when the construction team was assigned to the job, rigging would be set up and the jack would be removed from the ground, the casing cut and the jack lowered back into the ground.

Both parts of the above agreement must remain in effect in order for the complete agreement to be honored by either party. As always, Local 4 stands ready to assist you on this or any other important matter. [UX #4.]

On May 7, 2004, the Branch Manager wrote the Business Manager as follows:

I'm writing in response to your letter dated May 5<sup>th</sup>. A search of the Otis' records did not reveal a response by the IUEC to the letter from [the then-Director, Labor Relations] that I previously sent you. [The then-Director, Labor Relations]'s letter summarized the disposition of two grievances filed by Local 4 over the use of cranes to hoist and lower plungers and cylinders that were heard by the NAC. Otis denied both grievances. I do not believe that Local 4 or the IUEC brought either

of those grievances to arbitration, and, accordingly, Otis's dispositions stand.<sup>3</sup> If you have any additional information or documents concerning these grievances, please send them to me so that we consider them in relation to this issue.

Also, there is no agreement between Local 4 and Otis as you described in your May 5<sup>th</sup> letter. Otis's long-standing practice in Local 4 regarding the installation of jacks does not include removing the entire jack from the ground after it has been placed in the wellhole. There is nothing in the Otis Elevator Company Agreement that requires that to occur. However, if you have documentation or other proof of the agreement to which you refer, please send it to me.

The installation of jacks in Local 4's jurisdiction will continue to proceed according to Otis's long-standing practice. Accordingly, jacks will not be removed from the ground after it has been placed in the wellhole. If you have any additional questions or wish to discuss this matter further, please feel free to contact me... [UX #3.]

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<sup>2</sup> Arbitrator's note: On cross examination, the Business Manager said that he believed at the time there had been a written response but now acknowledges he may have been incorrect.

<sup>3</sup> Arbitrator's note: The Union stipulated that grievance #s 280 and 281 had not been taken to arbitration.

On May 10, 2004, the Business Manager wrote the Branch Manager reiterating its position with respect to the alleged agreement as follows:

I received your fax where you state that there is no agreement between Local 4 and Otis as I described in my May 5<sup>th</sup> letter. Unfortunately, you are misinformed. Local 4 will continue to direct its membership to abide by The Otis Elevator Company Agreement.

Not only was it agreed to by both parties to remove the cover of the casing, use a crane to set the cylinder in the ground for safety and prevent damage to the PVC Liner by resting it on the casing; but it was also agreed that when the construction team was assigned to the job, rigging would be set up and the cylinder would be removed from the ground, the casing cut and the cylinder lowered back into the ground. [UX #5.]

Subsequently the Business Manager spoke with the Labor Relations Manager who sent the following May 20, 2004-letter:

I am writing to follow-up on our conversation on Monday May 17<sup>th</sup>, and your May 10<sup>th</sup> letter to [the Branch Manager], both regarding the hoisting of plungers and cylinders. As we discussed, it is Otis's position that under Article IV, par. 5 of the Otis Elevator Company Agreement plungers and cylinders may be hoisted and lowered into the wellhole with a crane.

As I understand Local 4's position on this matter, Local 4 alleges that the hoisting and lowering of a plunger and cylinder is not permissible under Article IV, par. 5. Moreover, in your May 5<sup>th</sup> letter to [the Branch Manager], you contended that an agreement was reached between Local 4 and Otis in which the parties agreed that after the plunger and cylinder was placed in the wellhole by a crane and the crew was assigned to the job, rigging would be set up and the plunger and cylinder would be removed from the ground and placed back in the ground. In [the Branch Manager's] reply to you, dated May 7<sup>th</sup>, Otis asked for any documentation that supported that alleged agreement and documents related to the grievances regarding plungers and cylinders described in [the then-Director, Labor Relations]'s letter (that letter is described in more detail below.) Although you have reiterated your allegation that there was some agreement on this issue, you have not presented any evidence to support your allegation, nor have you responded to Otis' request for information.

I have researched this issue and spoke to members of Otis management and other members of the labor relations department. I have not discovered any evidence of the agreement you contend exists between Local 4 and Otis. However, my research did reveal [the then-Director, Labor Relations]'s February 16, 1995 letter (which [the Branch Manager] sent to you previously) that summarized the disposition of two grievances filed by Local 4 over the use of cranes to hoist and lower plungers and cylinders that were heard by the NAC. Otis denied both grievances. It does not appear that Local 4 or the IUEC brought either of those grievances to arbitration, and, accordingly, Otis's dispositions stand. In those dispositions, there were no conditions placed on Otis' rights under the Agreement to use cranes to hoist or lower plungers and cylinders.

Moreover, Otis management has informed me that in Local 4's jurisdiction Otis' long-standing practice regarding the installation of hydros has not included completely removing the plunger and cylinder from the wellhole after it was placed there by a crane. However, the practice does include picking the plunger and cylinder to a sufficient height so that the casing can be cut. In the absence of any evidence of an agreement with Local 4 to the contrary, Otis will continue to follow its long-standing practice regarding hydro installations. Accordingly, if you have a copy of the agreement that you have referenced in your letters (or any other evidence up the agreement), please send it to me.

I hope that Local 4 chooses to resolve this issue by the contractually-mandated procedures. However, if Local 4 chooses to continue to disregard the grievance procedure in the Agreement and direct Otis employees to disregard the directions of their supervisors, Otis will pursue all

appropriate avenues to rectify Local 4's improper and unlawful conduct. [UX #6. Emphasis original.]

On May 26, 2004, the Labor Relations Manager sent the Business Manager the following letter via fax:

The purpose of this notice is to demand that the IUEC Local 4 immediately cease the work stoppage against Otis Elevator Company in which its employees are currently engaged. This work stoppage is illegal and in violation of Article XIV, the No-Strike clause ...

[CX #8.]

In his response the same day the Business Manager explained the Union's position with respect to the Exeter, NH, Mashpee, MA and Falmouth, ME disputed jobs, i.e., that the Company had asked construction teams to work outside the Otis Elevator Company Agreement and they declined to do so. He concluded as follows:

Your supervisors continuing to instruct Local 4 members to violate The Otis Elevator Company Agreement and their refusal to do so does not constitute a work stoppage. Local 4 is filing grievances on these matters and reminds you that there is a ULP (case #1-CA-41777) filed against Otis Elevator regarding layoff of two Local 4 members for their refusal to violate The Otis Elevator Company Agreement.

The Local 4 members involved in these issues can continue to work around the work in dispute as stated in Article IV Par 11 a. The Local 4 crews have work at their previous jobsites. Do not, layoff, terminate or otherwise cause harm to Local 4 members due to their refusal to violate The Otis Elevator Company Agreement. We will file a additional ULP's if needed and seek alternate legal remedies. [CX 9.]

On May 27, 2004, in a letter to the Business Manager the Labor Relations Manager reiterated his demand that the Union immediately cease the work stoppage and recounted the Company's previously stated positions regarding the Union's obligation to file grievances, the effect of the withdrawal of the prior grievances, the practice of using the crane since then and the Company's interpretation of the Agreement permitting this work. (CX #10.)

The parties introduced testimony and exhibits concerning the referenced 1994 grievances, the alleged agreement, past practices and bargaining history. Those points will be briefly summarized below.

### The 1994 Grievances

The Union contends it had agreed to accommodate the Company's need to safely store the longer, single-piece jacks by using a crane to lower them through the top of the structure into the above-ground hoistways. When the Company expanded that use of cranes to include placing the jacks in the wellholes grievance #s 280 and 281 were filed. (CX #s 4 a and 4 b.) The grievances were appealed to the National Arbitration Committee (NAC), where they were denied by the Company.

The Company maintains that following the February 16, 1995-meeting of the NAC, the then-Assistant to the IUEC General President withdrew both grievances. This action is summarized in a March 7, 1995-memorandum from the then-Director, Labor Relations to the Regional General Managers, which reads in pertinent part:

The IUEC's Assistant to the General President [W.B.] has responded to my Step II answers of February 16, 1995 by seeking arbitration for ten of them.

He withdrew three grievances which were on two topics. One they dropped was #280 and #281 (Boston) where they claimed we could not put a plunger/cylinder in the hole or put them in the hole when there was no building. (We thought they would fight us!)... [CX #6.]

The Company argues that Article XV, Par. 7, which provides that the failure "to appeal the grievance within the time limits described above without mutual agreement shall be considered an abandonment of the grievance," bars Local 4's effort to relitigate the use of cranes to put jacks in wellholes.

The Union notes that while the 1994 grievances protested use of the crane to "install" plunges and cylinders into casings, the Construction Superintendent in Local 4's jurisdiction testified that on such jobs he instructed the cranes "to put the plungers and cylinders into the casings." (Tr. II at 150.) The Union contends this is different from actually performing the installation. In responding to the grievances, therefore, the then-Director, Labor Relations did not claim that the Company had the right to use a crane to "install" the plungers and cylinders.

The Union explained that at the time the then-Assistant to the General President allegedly withdrew the grievances, without prior notice to Local 4, he knew that Local 4's Business Manager was intending to run against him in the upcoming elections. In any event, it is well established that a union's earlier failure to grieve violations of clear contract language is not proof of acquiescence to the employer's practice and does not bar subsequent grievances once the union has given notice

that further noncompliance will not be tolerated. Here, in May 2004 at the Union informed Otis it would no longer permit use of cranes in violation of Article IV.

The Company contends that after the grievances were withdrawn no changes were made to its method of installing holed jacks and thousands have been installed in Local 4's jurisdiction since. The Local 4 Business Manager who filed the 1994 grievances later was elected Assistant to the General President and subsequently General President, but never again raised the issue of the Company using cranes in the protested manner. And, the Union's contention regarding the political dispute merely confirms that the withdrawal of the grievances was totally within the IUEC's control.

### **The Alleged Agreement - Disputed Work**

The Business Manager testified about the agreement he described in his May 5, 2004-letter to the Branch Manager, quoted above on page 7. He said that it was his understanding that when a crane was used to place a jack in a wellhole, when the Elevator Constructors came to finish the job they would remove the jack from the wellhole, cut the casing, then install the jack in the wellhole.

On cross examination, the Business Manager testified that sometime after the 1995 letter, when he had just been elected as recording secretary, "it came back to the Local that it would be allowed that the jack would be placed in the hole and removed afterwards if they had been placed in the hole with a crane." (Tr. II at 96.) He said that the Regional Director of the IUEC, the Local 4 Manager and Representative, Otis' Regional person and the Construction Manager or Office Manager at the time were involved. He acknowledged that information provided in the affidavit submitted to the Court regarding who made the agreement and when was incorrect.

The Business Manager testified that the objectionable Company method is to use a crane to put the jack in the wellhole and leave it there. Instead of pulling the jack out to cut the casing they would lift it up just a little bit so they don't have to install the rigging to hoist the jack out of the way. He said that the work lost to the bargaining unit if the Company's method is followed includes moving and setting up rigging equipment on the top level, pulling the jack entirely out of the wellhole and setting it in the corner of the pit, and placing it back in the wellhole.

The Business Manager identified two letters from management officials at Stanley Elevator Company, Inc. and Kone Elevators Escalator, two companies with IUEC contracts in Local 4's area. He was familiar with the circumstances leading to both letters. The June 25, 2002 letter from Kone states:

As per my discussion with Business Representative [M. L.] regarding the Wilkes Passage job in Boston. We will continue to follow the agreement of removing and reinstalling jacks when they are placed in the ground with the use of a crane. For safety reasons or damage to equipment only, we will place them in the ground.

Any other jacks that are too long to move through the building will be placed in the hoistway with a crane and installed by Local 4 members. We will continue to bid our jobs using the most economical procedure including the installation of multi piece jacks as well as single piece jacks. [UX 7b.]

The December 9, 2003 letter from Stanley states:

This letter is to confirm our mutual understanding on the use of cranes to hoist single section cylinders in all areas under the jurisdiction of Local #4 including Massachusetts, New Hampshire and Maine. Stanley Elevator agrees to notify Local #4 via fax prior to the use of a crane to hoist single section cylinders within the building structure. The cylinders will either be stood in the hoistway or temporarily lowered into the earth casing. At the time of installation the cylinder will be hoisted by chain fall so the earth casing can be cut below pit floor then lowered into the earth casing for final placement.

This understanding shall stand until such time as a more formal agreement is reached but in no way should place Stanley Elevator at a competitive disadvantage when installing single section cylinders. [UX 7a.]

Company witnesses uniformly denied that such an agreement was ever made at Otis.

### **Past Practice**

The Business Manager testified that prior to May 2004 he was not aware of any hydraulic jack installation being performed in Local 4's jurisdiction using only a crane and without the Elevator Constructor pulling the jack back out of the ground. He described a McLean Hospital job he had worked on in the mid to late 80s for another company. The Business Representative agreed, due to unusual circumstances, to allow use of a crane to lift a 50 foot jack from outside the building, lower it through a hole in the roof and set it in the hoistway. Once the jack landed in the hoistway they released the rigging and the crane left. On cross examination he agreed that he and his helper had used to hoisting and rigging skills learned through the NEIEP educational program, that he oversaw the entire process of hoisting and installing the jack, and that the crane didn't do anything without his direction.

The Business Representative for Local 41, covering western Massachusetts Vermont and the two new Hampshire counties not in Local 4, who has held that position since October 1998, testified that Otis is the only employer in his area that uses a one-piece jack installed with a crane. He explained that, as in Local 4, IUEC members meet the truck at the site to unload. If it is a holed jack the crane is there and the Elevator Constructors rig it to the crane, hoist it, cut the top off the casing, drop it down into the wellhole, and store it there until the structure is built. When the crew returns to start the job they go to the top of the hoistway, hang the rigging, hoist the entire jack off the ground, put it to the side, cut the casing, re-hoist the jack, and set it back down into the wellhole. He introduced a series of photographs he took of jobs in which Local 41 members removed the jacks from the ground after they had been placed there by a crane and testified about his conversations with Otis' Construction Superintendent concerning his taking of the photographs and the work involved. (UX #8.)

The IUEC Regional Director of the region encompassing New England, New York and one local in Pittsburgh, introduced the results of a survey he undertook in preparation for this arbitration hearing of practices in the locals he services. The responses for Local #s 14, 27, 35, 41, 62, 91, 138 and 129 indicated that when a hydraulic plunger and cylinder have been set in a wellhole by a crane it is removed from the wellhole and reinstalled. (UX #10.)

Employer witnesses testified that Otis has followed an established practice of using cranes to hoist jacks and lower them into wellholes with Elevator Constructors supervising the cranes and performing the hoisting necessary to cut the casing with the jacks lifted a few feet above the casing. Under certain circumstances it is necessary for the Elevator Constructors to remove the jack from the wellhole, e.g., to check for damage or where the tolerances are too tight to cut the casing level to the floor without risking damage to the PVC liner. Previously it had also been necessary to remove the plunger to remove the shipping rings or plumb the cylinder with a Spider Bob.

The Union argues that no practice is enforceable if it conflicts with the language of the contract and Article IV directly and unambiguously limits the use of cranes to hoisting and lowering heavy material *outside* of the structure. The heavy material that can be hoisted by a crane up the hoistway does not include plungers and cylinders.

### **Bargaining History**

The January 1, 1967 to March 23, 1972-Standard Agreement provided in Article IV-Work Jurisdiction:

Par. 5. Where heavy material is to be hoisted or lowered outside of the structure, a derrick can be used under the supervision of Elevator Constructors in the employ of the Manufacturer. Heavy material is confined to machines, controllers and generators. All other material is to be hoisted or lowered by Elevator Constructors without the use of derricks. [UX #11.]

The March 24, 1972 to July 8, 1977 Standard Agreement provided in Article IV-Work Jurisdiction:

Par. 5.

- (a) Where heavy material is to be hoisted or lowered outside of the structure, a derrick or crane can be used under the supervision of Elevator Constructors in the employ of the Employer. Heavy material under subparagraph (a) is confined to machines, controllers, generators, trusses, or sections of trusses, plungers and cylinders. (Where multiple sections of cylinders and plungers are used, they shall be connected in the field by Elevator Constructors.)
- (b) Where conditions are such that the following heavy material can be hoisted up the hoistway, it shall be hoisted by the Elevator Constructors. Where conditions are such that the following heavy material cannot be hoisted up the hoistway, it can be hoisted with a crane under the supervision of Elevator Constructors. Heavy material under subparagraph (b) is confined to beams, sheaves, and bundles of rails.
- (c) The above heavy material in subparagraphs (a) and (b) shall be hoisted separately with the exception of plungers and cylinders which may be hoisted together.
- (d) All other material is to be hoisted or lowered by Elevator Constructors without the use of derrick or crane. [UX #13.]

On March 20, 2002, during negotiations for the instant collective bargaining agreement, the Company made the following proposal to change Article IV, paragraph 5 (a) - (d)

#### **ARTICLE IV**

#### **Work Jurisdiction**

Par. 5 (a) - (d)

- (a) Where any heavy material is to be hoisted or lowered outside of the structure, a derrick or crane can be used under the supervision of Elevator Constructors in the employ of the Company. Heavy material under this subparagraph (a) ~~is confined to machines, controllers, generators, trusses, or sections of trusses, plungers and cylinders,~~ may include any equipment or material coming under the jurisdiction of the Elevator Constructor. (Where multiple sections of cylinders and plungers are used, they shall be connected in the field by Elevator constructors.)
- (b) ~~Where conditions are such that the following heavy material can be hoisted up the hoistway, it shall be hoisted by the Elevator Constructors. Where conditions are such that the following heavy material cannot be hoisted up the hoistway, it can be hoisted with a crane or material hoist under the supervision of Elevator Constructors. Heavy material under subparagraph (b) is confined to beams, sheaves, bundles of rails and preassembled landing door entrances.~~
- (c) ~~The above heavy material in subparagraph (a) and (b) shall be hoisted separately with the exception of plungers and cylinders, rails, beams, preassembled landing door entrances and where conditions warrant machines with beams, which may be hoisted together.~~
- (d) ~~All other material is to be hoisted or lowered by Elevator Constructors without the use of derrick or crane [UX #14.]~~

Those proposed changes were not agreed to by the Union and the language in the current July 9, 2002-July 8, 2007-Otis-IUEC agreement remains unchanged from that contained in the prior agreement.

The Union argues that the Company is trying to obtain through arbitration what it could not obtain at the bargaining table.

The Company contends that it was trying to negotiate greater flexibility in material handling.

## **RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**

## ARTICLE II

### Recognition Clause

**Par. 1.** 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 for all Elevator Constructor Mechanics and Elevator Constructor Helpers and Elevator Constructor Apprentices (hereinafter referred to sometimes as "Mechanics, Helpers and Apprentices") in the employ of the company engaged in the installation, repair, modernization, maintenance and servicing of all equipment referred to in Article IV, Par. 2 and Article IV (A).

**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**

- (a) The handling and unloading of all the equipment coming under the jurisdiction of the Elevator Constructor, from the time such equipment arrives at or near the building site, shall be handled and unloaded by the Elevator constructors, Mechanical equipment such as a forklift or truck

mounted swing boom may be used by the Elevator Constructors. A derrick, crane or material hoist may be used under the supervision of Elevator Constructors to handle and unload the heavy material described in Paragraph 5(a). Where unusual conditions are expected to exist prior to delivery of equipment at or near the building site in regard to handling and unloading of equipment in the primary or secondary jurisdiction of the local union, the Company shall contact the Local's Business Representative to make appropriate arrangements for the handling and unloading of such equipment. In areas outside the jurisdiction of the local union, the Company shall contact the Regional Director.

- (b) The erecting and assembling of all elevator equipment to wit: electric, hydraulic, steam, belt, dumb waiters, residence elevators, parking garage elevators (such as Bowser, Pigeon Hole, or similar types of elevators), shuttles, compressed air and handpower, automatic people movers, monorails, airport shuttles and like-named devices used in the transportation of people for short distances of travel (less than 5 miles), as well as vertical reciprocating conveyor systems

**Par. 5.**

- (a) Where heavy material is to be hoisted or lowered outside of the structure, a derrick, crane or material hoist can be used under the supervision of Elevator Constructors in the employ of the Company. Heavy material under subparagraph (a) is confined to machines, controllers, generators, trusses, or sections of trusses, plungers and cylinders. (Where multiple sections of cylinders and plungers are used, they shall be connected in the field by Elevator Constructors. Exception: Otis's multiple sections of cylinders may be connected either in the field or factory up to thirty-eight (38) feet in length; where multiple sections of plungers are used, they shall be connected in the field by Elevator Constructors.) In addition to the foregoing, the company shall have the right to utilize derricks, cranes or a material hoist to hoist or lower tools of the trade, gang boxes, welders, air and gas tanks, cutting torches, material handling equipment and safety equipment.
- (b) Where conditions are such that the following heavy material can be hoisted up the hoistway, it shall be hoisted by the Elevator Constructors. Where conditions are such that the following heavy material cannot be hoisted up the hoistway, it can be hoisted with a crane or material hoist under the supervision of Elevator Constructors. Heavy material under subparagraph (b) is confined to beams, sheaves, bundles of rails and preassembled landing door entrances.
- (c) The above heavy material in subparagraphs (a) and (b) shall be hoisted separately with the exception of plungers and cylinders, rails, beams, preassembled landing door entrances and where conditions warrant machines with beams, which may be hoisted together.
- (d) All other material is to be hoisted or lowered by Elevator Constructors without the use of derrick or crane.

**Par. 9.** No restriction shall be imposed as to methods tools or equipment used.

**Par. 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.
  
- (b) While any question or dispute pertaining to Article IV or Article IV (A) is being processed the Company, where possible, shall assign the employees work other than the work in dispute. Where the work has progressed to a point where it is not possible to perform work other than the work in dispute, then the employee shall perform the disputed work pending final resolution as provided herein.

#### **ARTICLE IV (A)**

#### **Systems, Modular and Industrial Structures**

#### **ARTICLE XV**

#### **Arbitration**

**Par. 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 the differences in accordance with the procedure outlined below:

**Par. 2.** Oral Step....

**Par. 3.** Written Step One. ...

**Par. 4.** Written Step Two. If the grievance is appealed it shall be placed on the agenda of a scheduled meeting of the National Arbitration Committee. The Employer shall be represented by the Director, Labor Relations or his designee and a panel of two (2) additional Employer Representatives. The Union shall be represented by the General President or his designee and two (2) additional representatives.

The National Arbitration Committee shall meet once per calendar quarter. Each party shall submit an agenda not less than seven (7) working days prior to the meeting.

The Director Labor Relations or his designee (or the General President, IUEC or his designee) shall render a disposition of the grievance in writing at the National Arbitration Committee Meeting. If the grievance disposition is accepted, it shall be final and binding on all parties.

**Par. 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).

**Par. 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.

**Par. 11.** Any of the time limits contained herein may be mutually extended by the representatives of the parties. Failure to appeal the grievance within the time limits described above without mutual agreement shall be considered an abandonment of the grievance. If a grievance is not dispositioned within the above time limits it shall be immediately processed to the next step of the procedure.

## **FINDINGS**

First it should be noted that the parties offered a significant amount of testimony regarding details of the alleged "work stoppage" and the alleged availability of "work other than the work in dispute" referred to in Article IV Par. XI. (b). The issues of whether the Union violated Article XIV and whether the Company violated Article IV Par. 11(b) were not submitted for resolution by the undersigned arbitrator and, accordingly, will not be discussed.

The Company's argument that the instant grievance is untimely and also barred by Article XV, Arbitration, Par. 11 is based upon the Union's failure to timely appeal grievance #s 280 and 281 to arbitration. The difficulty with that argument is that the grievance in this case alleges the existence of an agreement reached *after* those grievances were finally denied by the Company at the NAC level. Thus, resolution of this case cannot be foreclosed by what went before.

The instant grievance complains that the Company has "refused to continue the agreement regarding cylinders placed in the whole or hoistway with a crane." In the Union's view the work jurisdiction provisions do not permit the use of a crane to lower jacks into wellholes because crane use to hoist or lower plungers and cylinders is restricted to "outside the structure." Therefore, a crane could only be used to lower jacks into the hoistway or wellhole if the Union so-agreed. Without such an agreement the terms of the collective bargaining agreement apply to the work and the Union seeks to have its interpretation of those provisions applied here.

The Company maintains that cranes may be used in the protested manner under the terms of Article IV. In their briefs both parties made detailed arguments construing the language contained in paragraphs 2 and 5 of that Article.

Article IV, Par. 2 starts with the broad statement that

- (a) The handling and unloading of all the equipment coming under the jurisdiction of the Elevator Constructor, from the time such equipment arrives at or near the building site, shall be handled and unloaded by the Elevator Constructors, Mechanical equipment such as a forklift or truck mounted swing boom may be used by the Elevator Constructors.

The Company's Standard Material Handling Process for Hydraulic Elevators contains the procedure for unloading holed plunger cylinders from the delivery truck using a truck-mounted swing boom. (UX 18, pgs. 11-13.) That type of crane work is not in dispute.

The first mention of Elevator Constructors supervising the use of a crane, impliedly operated by a crane operator and not an Elevator Constructor, comes in the very next sentence of Article IV, Par. 2 (a):

A derrick, crane or material hoist may be used under the supervision of Elevator Constructors to handle and unload the heavy material described in Paragraph 5(a).

Paragraph 5 (a) and the limitations placed on such use of cranes will be discussed below.

The Union contends that the concluding sentences of Article IV, Par. 2 (a) are also applicable here. That is:

Where unusual conditions are expected to exist prior to delivery of equipment at or near the building site in regard to handling and unloading of equipment in the primary or secondary jurisdiction of the local union, the Company shall contact the Local's Business Representative to make appropriate arrangements for the handling and unloading of such equipment. In areas outside the jurisdiction of the local union, the Company shall contact the Regional Director.

In the Union's view the arrival of a large one-piece jack for a multi-story building is such an "unusual condition" requiring the Company to make arrangements with the Local's Business Representative. The Union contends that the agreement the Company has now refused to acknowledge or follow was such an arrangement.

The testimony establishes that one-piece jacks have been in use for decades and they have gotten larger over time. Testimony also establishes that there have been numerous discussions between Company and Union officials concerning the handling of such jacks within Local 4's jurisdiction and elsewhere. The fact that such discussions took place and questions were resolved satisfactorily does not mean that an "unusual condition" existed as that term is used in Article IV, Par. 2 (a). The delivery of one-piece jacks is a normal and regular occurrence, not an "unusual" condition.

As to Article IV, Par. 5. (a) the Union argues that a crane can only be used *outside* the structure. Since the one-piece jacks are being placed *inside* the structure the use of the crane violates the collective bargaining agreement, in the Union's view.

The pertinent part of that subparagraph reads:

- (a) Where heavy material is to be hoisted or lowered outside of the structure, a derrick, crane or material hoist can be used under the supervision of Elevator Constructors in the employ of the Company. Heavy material under subparagraph (a) is confined to machines, controllers, generators, trusses, or sections of trusses, plungers and cylinders.

The Union's interpretation would find stronger support if the words "hoisted *and* lowered" were used rather than "hoisted *or* lowered." Use of the conjunctive "and" would limit derrick, crane or

material hoist use to hoisting and lowering moves outside the structure, leaving all hoisting and lowering moves to be performed inside the structure by Elevator Constructors using their tools and equipment, notably chain falls.

That is not, however, the way this provision is written. The use of "or" means that a derrick, crane or material hoist use may be used under the supervision of Elevator Constructors where "heavy material is to be hoisted outside of the structure" *or* where "heavy material is to be lowered outside of the structure."

An interpretation of subparagraph (a) that would permit use of a crane to hoist "machines, controllers, generators, trusses, or sections of trusses, plungers and cylinders" outside the structure only for the purpose of lowering them outside the structure leads to a highly impractical result in that Elevator Constructors would then need to use their equipment to hoist those machines, controllers, etc. from outside the structure. The Elevator Constructors rig chain falls to the hoisting beam inside the hoistway, not outside the structure. The Rigging and Hoisting booklet from the NEIEP program, 1.6.2, describes use of a portable gantry crane but the Capacity is limited and use is indicated for installation of escalators, not elevators. (UX #17, pgs. 20-22.) Further, such an interpretation is not consistent with other provisions of Article IV.

Hoisting and lowering of material for the purpose of unloading it from delivery trucks is covered in Par. 2, discussed above. The hoisting covered by Par. 5 deals with moving heavy material - machines, controllers, generators, trusses, or sections of trusses, plungers and cylinders under subparagraph (a) and beams, sheaves, bundles of rails and preassembled landing door entrances under subparagraph (b) - into position for the construction/installation to begin. That is, inside the structure.

This point is further illustrated by the division in subparagraph (b) between conditions under which the specified heavy equipment is to be hoisted up the hoistway by Elevator Constructors and conditions that permit use of a crane or material hoist. The provisions of Par. 5, read together, contain no indication that the parties intended to limit use of derricks, cranes and material hoists to lifts hoisted and lowered outside the structure when this language was first negotiated in the Standard Agreement many years ago. (See UX #13 quoted above, pg. 14.)

The parties offered substantial testimony regarding the practices employed by Otis and other companies within Local 4's area and elsewhere. The Company argues that a practice has been established of using cranes to lower single-piece jacks into wellholes. Given the above interpretation of Article IV, it is not necessary to make a finding with respect to any alleged practices.

It should be noted that Article IV, Par. 2 (b) places all the work involved in "erecting and assembling of all elevator equipment" under the jurisdiction of Elevator Constructors, Elevator

Constructor Helpers and Elevator Constructor Apprentices. That work includes hoisting jacks and plungers from the wellhole, as needed, to cut the casing and plumb the cylinders. While testimony indicated a variety of ways in which the cutting and plumbing can be accomplished, there is no suggestion on this record that the Company has ever used a crane to hoist a jack or plunger from a wellhole once it has been placed there.

The Union has cited three prior arbitration decisions interpreting aspects of the Standard Agreement work jurisdiction provisions. In National Elevator Industry, Inc. and IUEC, issued February 22, 1973, Impartial Arbitrator Peter M. Kelliher found a violation when a crane was used to hoist "more than one machine beam at the same time outside of the structure with a crane or derrick." Kelliher found that under the prior 1967-72 contract language beams fell under the category of "all other material" and not under the category of "heavy material." Therefore, he held that any

alleged past practice under the Contract expiring March 23, 1972 ... relating to the lifting of beams outside of the structure without mutual agreement involved situations which were clearly contrary to the express language of the Agreement and had no controlling effect. [Kelliher 1973 at 3-4.]

The successor contract contained modifications initially proposed by the Employers. He noted that

in both the prior Contract and the present Contract the general rule was that with the exceptions noted all other material was to be hoisted by elevator constructors without the use of a derrick or crane. The clear purpose of this language as well as the other provisions of Article IV was to retain the Union's jurisdiction over hoisting with certain well-defined exceptions. Considering the restrictive conditions that existed prior to the present Contract, it is unreasonable to believe that this Union would grant a right not only to hoist several machines, controllers, generators, etc., at one time, but also as interpreted by an Employer witness, would permit the hoisting of a mixture of machines, controllers, etc., as long as they were not part of a complete machine room. The exceptions set forth in Paragraph 5 (c), i.e.; as to plungers and cylinders which may be hoisted together, does help to explain the general rule. The testimony is that plungers and cylinders are delivered with the plunger in the cylinder. The Employers expressed a fear that unless this was so stated as an exception, a Union Representative might insist that they be disassembled prior to hoisting. The Arbitrator must find that where the Parties desired items within a category, such as rails, to be hoisted together, they clearly so stated by the use of the term "bundles." Where they agreed on the propriety of hoisting more than one category of materials, such as plungers and cylinders, in one pick, they specifically so stated. [Kelliher 1973 at 3-4.]

Thus the focus of the analysis was on what types of materials were covered by the negotiated exceptions. The Kelliher decision did not turn on the use of the crane "inside" or "outside" of the structure. Arbitrator Kelliher's admonition that "the parties are presumed to know the economic consequences of the language they adopt" still holds true. In intervening years changes may make a provision less or more valuable to one party or the other and they may wish to renegotiate certain provisions.

The other two decisions cited by the Union, a September 28, 2000-decision issued by Arbitrator David A. Petersen and an August 17, 2003-decision issued by Arbitrator M. David Vaughn, both involved unsuccessful attempts by Employers to have work performed at factories that had been reserved for Elevator Constructors by specific provisions in Article IV.

None of the three cited decision provide a useful analysis or precedent for interpreting the language critical to resolution of this case, i.e., the meaning of the phrase "outside the structure."

For the above reasons, no violation of Article IV has been established. The grievance will be denied.

## **AWARD**

The grievance is denied.

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1/7/05

Elizabeth Neumeier, Arbitrator