

John D. Feerick
6 Overlook Terrace
Larchmont, New York 10538

October 4, 2019

John Sheehy
Jurisdiction Director
District Council of Carpenters

Eric Meslin
President
Sheet Metal Workers Local Union 28

Dear Messrs. Sheehy and Meslin;

Enclosed please find my decision with respect to the installation of toilet partitions at 1 Vanderbilt, Manhattan, New York. My statement of services as arbitrator will be sent to you next week. Thank you for facilitating my handling of this dispute.

Sincerely,



John D. Feerick
Arbitrator

cc: Gary LaBarbera, President, New York Plan

NEW YORK PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES

IN THE MATTER OF ARBITRATION

BETWEEN

SHEET METAL WORKERS' LOCAL UNION 28,
METROPOLITAN NEW YORK AND LONG ISLAND

OPINION and AWARD
John D. Feerick, Arbitrator

AND

NYC & VICINITY DISTRICT COUNCIL OF CARPENTERS

Appearances

FOR SHEET METAL WORKERS LOCAL UNION 28:

Eric Meslin, President and Business Manager
Ralph Tortora, Business Representative
Ray Minieri, Business Representative
Jimmy Callahan, Business Representative

FOR NYC & VICINITY DISTRICT COUNCIL OF CARPENTERS:

John Sheehy, Director of Jurisdiction
Joseph DiNapoli, Carpenters' Representative
Paul Capurso, Carpenters' Representative
Joseph Defilippo, Carpenters' Representative

Preliminary Statement

The instant matter concerns a work dispute regarding an assignment made to the New York City and Vicinity District Council of Carpenters ("Carpenters") concerning the installation of certain toilet partitions at One Vanderbilt, New York City. The work assignment was challenged by Sheet Metal Workers Union Local 28 under the New York Plan for the settlement of jurisdictional disputes, a plan in which both parties participate ("New York Plan" or "Plan"). The Undersigned was notified of his appointment as arbitrator in accordance with the provisions of the Plan. By letter to the Undersigned, dated August 14, 2019, Local 28 requested an arbitration of this work assignment, noting that an unsuccessful mediation of the parties had occurred on August 6, 2019. The undersigned thereupon conferred with the parties by conference call on August 15 and set a date of September 4 for such an arbitration, if their

continuing discussions proved to be unsuccessful, as came to be the case. The Undersigned requested in the conference call that pre-arbitration position statements be sent to him by the close of business on August 30.

In its position statement, dated August 29, with attachments, Local 28 stated, among other things, that the work issue with respect to toilet partitions had been resolved in 1928 in its favor and was reaffirmed by a 2012 arbitration decision. The Local added that "since 2012 both parties have honored this decision. The Carpenters have maintained jurisdiction over the installation of wooden and composite toilet partitions while the Sheet Metal Workers have maintained jurisdiction over the fabrication and installation of metal toilet partitions." The Sheet Metal Workers also asserted that a Carpenter agent conceded at a meeting in early June 2019 that the work in question was within the jurisdiction of Local 28, as had the general contractor on the job, Tishman Construction.

In their position statement, dated August 30, the Carpenters, among other things, requested that the arbitration be dismissed as being time barred under the dispute resolution steps of the New York Plan. The Carpenters further stated that since 1925 they have been installing steel partitions and doors with a laminated wood filler "with the blessing of the New York Plan." The Carpenters further stated that there was no previous agreement of record between the parties regarding "metal encased composite bathroom partitions" but that an arbitration decision of March 27, 2002, by Robert P. McCormick, under the National Maintenance Agreement, found that such jurisdiction belonged to the Carpenters in a proceeding involving the Sheet Metal Workers. There, the partitions, the Carpenters stated, consisted of "resin impregnated, sound deadening honey comb core with an adhered steel veneer." The Carpenters also cited as support a 1925 decision with the Iron Workers, Local 52, and a 1971 decision of the National Joint Board for the Settlement of Jurisdictional Disputes involving "factory fabricated interior metal partitions with rigid installation core", which gave that work to the Carpenters and not the Sheet Metal Workers.

At the hearing of September 4, the business representatives of the parties, without the presence of counsel, presented their respective cases. Each submitted in evidence binders of documents, photographic exhibits, jurisdictional rulings, agreements, and other information. Physical exhibits of materials used in toilet partitions, including the product on the current job site, were also placed in evidence. Witnesses for the parties, including their representatives, testified at the hearing in support of their respective positions. Among the documents received in evidence was a letter dated August 29, 2019, from the assistant to the General President of the United Brotherhood of Carpenters, stating that "the established practice is that Carpenters install such items made of metal sheathed wood substitute, including any composite or honeycomb resin core encased in metal." Similarly, a supporting letter of the Carpenters position, dated August 28, was received in evidence from the Association of Wall Ceiling and Carpentry Industries, consisting of over 200 carpentry carpenters.

At the inception of the September 4 hearing, the Undersigned requested that the parties undertake another effort at a negotiated settlement, which they did, but it was not successful. At the conclusion of the hearing, the Undersigned emphasized the difficulty of the issue presented concerning the definition of metal and composite toilet partitions and encouraged a further effort at a negotiated settlement. The Undersigned also provided the parties with an opportunity to submit a further position statement based on the evidence and arguments made at the hearing. By e-mail dated September 16, the Undersigned wrote to the parties, stating:

"I would welcome in any communication to me by September 18 per my e-mail ... your view of the record as to the characteristics and materials of the toilet partitions actually involved in the installations underlying the decisions by Arbitrators O'Beirne and McCormick. With reference to the Agreement of March 1928 and clarification of April 1978 is there any record evidence before me as to whether toilet partitions were involved other than the reference in Arbitrator O'Beirne's decision at page 5, three lines from the bottom of the page. Finally, is there any record evidence before me as to metal toilet partitions without any supporting material to keep the form intact as is before me as to 1 (Vanderbilt) Manhattan."

On September 18 post-hearing position statements were received from both parties, which are briefly described below.

The issue of toilet partitions

The issue of work jurisdiction over the installation of toilet partitions has a long history as set forth in the respective evidentiary binders of the Parties. An agreement of significance by and between the Sheet Metal Workers International Association and the United Brotherhood of Carpenters and Joiners of America, dated March 21, 1928, provided, in part, as follows:

"For the purpose of bringing about conditions of harmony and co-operation the following agreement is this day entered into and agreed to.... It is agreed that members of the United Brotherhood of Carpenters and Joiners of America shall erect and install all interior metal trim such as bucks, jambs, doors, castings, base, chair-rail, picture mouldings, partitions, and all other material generally referred to as trim, except toilet partitions, which shall be done by Sheet Metal Workers. If any misunderstanding arises as to the meaning or carrying out of any of the provisions contained herein the matter will be taken up with the General Presidents of the two organizations."

The minutes of a Joint United Brotherhood of Carpenters and Sheet Metal Workers Committee meeting of April 11, 1978, addressed the 1928 Agreement, as follows: "It was agreed by the committee that the handling and installation of metal toilet partitions as set forth in the Agreement of Record dated March 21, 1928, shall be performed by the Sheet Metal Workers. Further that wood and composition toilet partitions shall be handled and installed by Carpenters." The committee added that "it is not the intent of this Committee to alter the Agreement of Record of March 21, 1928 however, clarification may be made from time to time until total agreement is reached and approved by the general Presidents."

In a 2012 arbitration between the Parties concerning the installation of bathroom partitions, Arbitrator Stephen F. O'Beirne awarded the work in question to the Carpenters. The work as described by the Arbitrator in his award involved materials "such as solid plastic, plastic laminate, fiberglass, Corian Phenolic, Formica, and/or some combination of the foregoing." He did not have before him for decision the toilet partitions at issue in this arbitration. He noted at the outset of his opinion that the parties "do not dispute that the installation of wooden bathroom partitions has traditionally been the work of Carpenters while the installation of metal partitions has traditionally been the work of Sheet Metal Workers." He added that the dispute over which trade possesses the work of installing so-called composite partitions-those made of materials such as solid plastic, plastic laminate, fiberglass, Corian, Phenolic, Formica, and/or some combination of the foregoing-has apparently been going on for many years." In the concluding section of his decision, Arbitrator O'Beirne said that local trade practice was favorable to the Sheet Metal Workers but based on a preponderance of the evidence, he said "at least a portion" of the disputed work was obtained through the use of "substandard wages." In reaching his decision, he placed reliance on the McCormick decision.

The arbitrator also referenced a number of decisions favorable to the Carpenters in proceedings with the Sheet Metal Workers involving toilet partitions: Joint Board, August 27, 1968, involving plastic covered particle board, based on trade practice in Sacramento, Ca.; Joint Board, March 12, 1970, a formica laminated toilet board and door, based on trade practice in Albany, New York; Joint Board, January 7, 1971, wood core plastic laminated toilet partition and door, based on trade practice in Washington D.C.; Impartial Board, March 6, 1975, plastic laminated over particle board, based on trade practice in Atlanta, Georgia; Joint Board dated January 7, 1971, factory-fabricated interior metal partition with rigid installation core, in Illinois, based on agreement of March 21, 1928; Joint Board, February 15, 1962, formica panels with wood core, and wood posts, in Wayne, New Jersey, with ruling based on particular facts and evidence before the Joint Board and limited to "the particular job only."

Discussion and Decision

The Decisional Criteria Under the New York Plan

Under the New York Plan, the criteria for arriving at a decision, when a dispute is appropriately before an arbitrator, are outlined in Article V, Step 3 (i), which states that the arbitrator shall be bound by a) first whether a previous agreement of record, or appropriate agreement, including a disclaimer agreement, between the unions govern: (ii) only if the arbitrator finds that the dispute is not covered by an appropriate or applicable agreement of record or agreement between the crafts to the dispute, he or she shall then consider the established trade practice in the industry and prevailing practice in the locality; (iii) where there is a previous decision of record governing the case, the arbitrator shall give equal weight to such decisions of record; unless the prevailing practice in the industry in the last ten years favors one craft. In that case, the arbitrator shall set forth the basis for his or her decision and shall explain his or her findings.

The dispute resolution steps of Article V provide for an amicable resolution through negotiation, and, if then necessary, by mediation, with specific time provisions for each step. As previously noted in this decision, the parties undertook such steps and were unsuccessful, leading to this arbitration.

The Hearing in this Matter

At the outset of the hearing the Arbitrator noted the issue of his jurisdiction, as raised by the Carpenters in their submission of August 30, which claimed that the Sheet Metal Workers had not followed the time provision of Article V, Step 2 in seeking a mediation. The Undersigned inquired concerning this position, referencing his conference call of August 15 with representatives of the parties, recalling no suggestion in the call of a lack of his jurisdiction. Indeed, both parties expressed a need to have continued discussions with the contractor's representative, upon his return to New York, and only then would an arbitration occur with the Undersigned if no settlement was achieved. The Carpenters said at the hearing that they were prepared to proceed on the merits and have the Undersigned determine this matter on the merits. Accordingly, I find no reason to address further an issue of my jurisdiction which has become moot.

At the hearing, each of the parties, through their able and experienced representatives, walked me through the documents, decisions, and awards contained in their binders, which I delineate as Carpenter Exhibit 1 and Sheet Metal Workers Exhibit 1. They also offered differing testimony, through witnesses, as to whether Carpenter Joseph Defilippo conceded to Sheet Metal Workers Kevin Connors in early June 2019 that the work in question belonged to the Sheet Metal Workers. I see no need to resolve this issue of credibility based on my decision using the criteria of the New York Plan.

The parties also submitted evidence as to the characteristics of toilet partitions, both generally and specifically, and the Carpenters placed in evidence examples of toilet partitions. I am treating these partitions as a group and delineating them, Carpenter Exhibit 2. Four of these partitions reflect a combination of ingredients. Sheet Metal Workers Exhibit 2 is an example of a partition used on the job site in issue.

The literature from the manufacturer of the partitions in issue, Hadrian Inc. describes them as "Stainless Steel Metal Toilet Partitions" in a section of its literature dealing with material specifications. Thus, par. 1.01, titled Construction Features: "Doors, Panels, and Pilasters shall be constructed of two sheets of panel flatness Type 304, #4 brushed finish stainless steel, laminated under pressure to a 0.75" honeycomb core for impact resistance, rigidity and sound deadening. Formed edges to be welded together and interlocked, under tension, with a roll-form oval crown locking bar, mitred, welded, and ground smooth at the corners. Honeycomb to be virgin, long fiber paper with a maximum 12.5 mm (1/2") cell size."

Under subdivision "High-Density Universal Grab Bar Panel for Metal Toilet partitions Technical Data Sheet" the literature provides as follows:

1.01 Overview: "The high-dash density core of Hadrian's universal grab bar panel reinforces the entire panel, making grab bar installation easier than in panels that utilize thin strips of anchoring material, which are difficult to locate at a job site and can easily be missed by fasteners. The high-density core also simplifies the specification and ordering process for grab bar panel as there is no need to outline specific reinforcement locations. Hardian's high-dash density core supports any grab bar configuration, including (but not limited to) horizontal, vertical, and diagonal grab bar installation.

1.02 Panel Construction: Panels shall be constructed of two sheets of panel flatness, laminated under pressure to a high-density 0.25" vertical honeycomb core impact resistance, rigidity, sound deadening and grab bar support. Formed edges to be welded and interlocked under tension, with a roll-formed oval crown locking bar, mitred, welded, and ground smooth at the corners. Available in standard, (58"/1473mm high), elite (64" /1626mm high) and elite plus (72"/1829 mm) configuration, panels shall be 1"/25 mm thick with cover sheet not less than 22ga. (0.8mm). Powder coated panels shall be galvanized ASTM A653 GR33. Stainless steel panels shall be type 304, #4 brushed finished for type 304 with an embossed 5WL patt.

Turning to the toilet partitions used on the instant job site, it is noteworthy that the manufacturer describes and labels them as stainless steel metal toilet partitions. It does so in its description of the material specification above, (Sheet Metal Workers Exhibit 2). In working through the many agreements and assignment rulings brought to my attention one notable agreement stands out with respect to metal toilet partitions, namely, the agreement of March 21, 1928 between the international Unions and presidents of the Carpenters and Sheet Metal Workers. It has been relied upon and cited many times in rulings of panels as the basis of decisions. The Agreement's, 1978 clarification, according to the minutes of the then working committee of Carpenters and Sheet Metal Workers, reemphasized that the installation of metal toilet partitions was the work of Sheet Metal Workers and that wood and composition toilet partitions were the work of Carpenters. The absence of any definition in 1978 of "composition toilet partitions" that would express an intent to include metal toilet partitions is significant. On the contrary, the 1978 agreement itself reemphasized the sweeping language of 1928 that removes from the Carpenters' otherwise broad jurisdiction over interior metal trim work, the work of "metal toilet partitions." Indeed, the 1978 committee stated, as noted, that the handling and installation of metal toilet partitions as set forth in the Agreement of 1928 shall be performed by the Sheet Metal Workers." The material used by Hadrian in making its "Stainless Steel Metal Toilet Partitions" does not, in the view of this Arbitrator, remove these partitions from the category of Metal Toilet Partitions covered by the Agreement of March 21, 1928. The partition in dispute consists substantially of a hard metal, with an inner core, as described in the manufacturer's specification language quoted above. This is in striking contrast to the composite partitions referred to by Arbitrator O'Beirne in his 2012 decision.

At the center of the dispute is a question of whether the partition used in the work at One Vanderbilt, which the manufacturer describes as “stainless steel metal toilet partitions” consisting of “two sheets of panel flatness Type 304, #4 brushed finish stainless steel, laminated under pressure to a 0.75” honeycomb core for impact resistance, rigidity and sound deadening,” is a metal toilet partition.

The Agreement of 1928 found that metal toilet partitions was work within the jurisdiction of the Sheet Metal Workers, excluded from all of the metal trim work acknowledged to belong to the Carpenters. Nothing was said about partitions composed of just plain metal and those composed of metal and other material. The 1978 Agreement specifically reaffirmed the jurisdiction of the Sheet Metal Workers over metal toilet partitions without distinguishing between plain metal and partial metal. As noted, intent is expressed by the language of the 1978 Agreement to change or limit the exclusion of the 1928 Agreement with respect to the jurisdiction of the Sheet Metal Workers. The 1978 Minutes, to be noted, was that of a joint committee of both trades whereas the 1928 Agreement was by and between the international Carpenters and Sheet Metal Workers Unions, signed by their international leaders at the time. I find that the 1928 Agreement is an agreement of record and in accordance with the Plan criteria, applicable to this dispute, namely step 3 (i).

To the ordinary eye, the material to be used at the job site at One Vanderbilt is a metal toilet partition, confirmed by the manufacturer’s own literature. It also has the physical feel of being a metal toilet partition and not a composite partition like the toilet partitions found belonging to the Carpenters in Arbitrator O’Beirne’s decision (see Carpenters Exhibit 2).

After weighing all of the particular facts, circumstances, and evidence before me, I find that the work of installing toilet partitions at issue at One Vanderbilt is within the jurisdictional wording of the Agreement of March 21, 1928 as work of the Sheet Metal Workers. I therefore determine that the work in question at One Vanderbilt shall be relinquished to the Sheet Metal Workers. I reserve jurisdiction for the limited purpose of facilitating the transition of such work to the Sheet Metal Workers.

In reaching my determination, I make no finding about the particular partition’s exclusivity with the Sheet Metal Workers as requested by Local 28. The record is not sufficiently developed to support such a broad finding beyond One Vanderbilt.¹ I respectfully suggest that the Carpenters and Sheet Metal Workers engage their respective internationals in an effort to scope out the

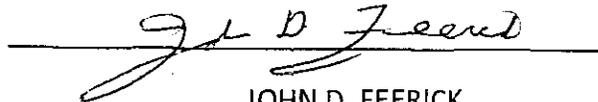
¹ In expressing this view, I note the many decisions in Carpenter Exhibit 1 concerning toilet partitions awarded to the Carpenters in various locations of the country, many of which dealt with plastic partitions and a few with metal partitions, including the partitions involved in the decision by Arbitrator McCormick. In Sheet Metal Workers Exhibit 1, on the other hand, many decisions are set forth awarding the work of metal toilet partitions to the Sheet Metal Workers. Many of these were from Impartial Dispute Resolution Boards based on the March 21, 1928 agreement.

work division with respect to composite toilet partitions and metal toilet partitions. That spirit is expressed by the decision of record of March 21, 1928.

October 4, 2019

AWARD

The work of installing Hadrian Stainless Steel Metal Toilet Partitions at One Vanderbilt, Manhattan, New York, is within the jurisdiction of the Sheet Metal Workers. I reserve jurisdiction for the limited purpose of facilitating the transition of the work relinquishment and resolving any issues that may arise as a result of the transition.



JOHN D. FEERICK
ARBITRATOR

I, John D. Feerick, do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

STATE OF: New York

COUNTY OF: *Westchester*

DATED: October 4, 2019



WILLIAM G. GOODENOUGH
Notary Public, State of New York
No. 01GO6072834
Qualified in Westchester County
Commission Expires April 15, 2022