

PLASTERING WORK

185

-Agreement between Contracting Plasterers' Association and Operative Plasterers and Cement Finishers' Local No. 60.

Article IV, Section 9. There shall be no restrictions on the use of machine applications for all purposes.

Article IV, Section 10. Workmanship.

a. The mortar board shall be raised at least 10" from the scaffold. When practical the mortar boards are to be placed on barrels or stands.

b. All permanent plain mouldings shall be run in place or on a bench on the job, except as defined in paragraphs g, h, i and 1. All staffwork of composition shall be made and installed by journeymen plasterers. Materials known as compo shall be made and installed by compo workers.

c. All coves and bullnoses shall be run with a mould on strips over screeds. All arrises when in plaster must be run with a mould or formed with strips.

d. When two-coat work is specified, the same shall be known as brown coat and finish coat. The brown coat must be thoroughly set before the finish coat is applied.

e. When three-coat work is specified, the same shall be known as scratch coat, brown coat and finish coat. The scratch coat shall stand at least six hours, and shall be thoroughly set before the brown coat is applied, but this shall not apply on minor alterations. The brown coat must be thoroughly set before the finish coat is applied.

f. When the brown coat is used as a finish coat it shall be straight and true and floated or otherwise finished according to the texture desired, and shall be left in a workmanlike manner.

g. All browning shall be done in a thorough workmanlike manner and it is understood and agreed that all browning on walls, columns, pilasters and partitions shall be screeded and rodded to a straight and true surface before the finish coat is applied.

h. Where interior concrete surfaces are required to be plastered, the first or bonding coat shall be an ad-mixture especially prepared for this purpose to which nothing but water shall be added on the job.

i. All concrete ceilings shall be screeded and browned in a workmanlike manner, except when bonding agent and finish coat only are specified.

j. When the finish coat is applied it shall be trowelled to a smooth surface free from cat faces, blackheads, blisters, etc., and all angles and surfaces must be left straight and true.

k. All acoustic plaster shall be applied and finished in a workmanlike manner.

1. All partitions for terrazzo, mosaic or ceramic tile on walls and ceilings shall be scratched and browned and brought to a straight and true surface.

m. All cement work shall be done in a proper workmanlike manner.

n. No employee shall be allowed to work to any corner beads that are put on beams, arches or groined ceilings.

o. Moldings on walls or ceilings where seventy-five percent enriched and 8" or less in width, may be cast and stuck.

p. The casting or running of coffered ceilings, panels, balconettes, geometric designs or modernistic ornamentation shall be governed solely by the practical result desired. There shall be no restrictions as to the method employed if it does not impair the quality of the completed job. If there is a difference in opinion the matter should come before the Joint Trade Board hereinafter provided for.

q. On an alteration where the work which would ordinarily be run cannot be done without causing undue interference with the occupancy of the premises and undue delay in performance, it shall be permissible to cast and apply such work.

r. Application of epoxy, cementitious material or other base for trowelled on, sprayed on, or hand applied surfacing, whether receiving aggregate chips (regardless of size) or not, is to be done in a workmanlike manner.

All compo and compositions other than those poured or pressed in glue or plaster moulds, shall belong to the compo workers as their exclusive specialty. No compo or other compositions of the compo crafts, as above classified, shall be applied or handled in any form by members other than those specializing in this work.

s. Imitation Woodwork. On all plain surfaces or members of panels, cornices, etc., it shall be permissible to make an impression from the natural wood board, from which casts shall be made and died to models. All models for ornament shall be hand grained either by plasterer or modeler and same applied wherever necessary. Materials used for imitation woodwork should be especially prepared materials, fibrous or hard. Sizes of casts shall conform to the requirements of the job.

t. Acoustical or imitation stone work or texture antique finish

v. be cast or applied as required by the architect.

u. All small spandrel panels under two feet, small caps, and w r similar work, may be cast And stuck whether plain or enriched.

v. Diminished fluted pilasters and columns or pilasters and columns with entasis may be cast.

w. All caps on columns over two feet square shall be run Unless fifty (50%) per cent enriched.

185a

-Sta-Smooth, used for Pointing, Taping and Fillings, application 41 r

Tapers Union Local 1974 vs. Plasterers Union Local 60- Metro North, 101st St. East River Drive, Buildings No. 3 and 4, New York City.

The Executive Committee finds that the material (Sta-Smooth) used for Pointing, Taping and Filling of joints on drywall is a plaster: material and is the work of the Plasterers. - Decision of the Executive Committee, June 11, 1975.

Please be advised that in accordance with an order dated August 2, 1976 of Hon. Abraham J. Gellinoff, Justice of the Supreme Court of the State of New York, decision 185-a of the Executive Committee concerning the application of "Sta-Smooth" used for pointing, taping and filling joints on drywall has been vacated and accordingly is to be expunged from the Handbook of the Building Trades Employers' Association of the City of New York ("Green Book") and is considered null and void.

185-2a

-U.S.G. 275 Plaster or Similar Material, used for taping and finishing of joints and nail holes and for skim coat application of wall surfaces, Application of.

Plasterers Union Local 202 vs. Tapers Union Local 1974 - New Lutheran Medical Center, Brooklyn, New York.

The Executive Committee finds that the taping and finishing of joints and nail holes with U.S.G. 275 plaster or similar material and the subsequent application of a skim coat of the same material to the entire wall surface is the work of the Plasters. - Decision of the Executive Committee, September 28, 1976.

In accordance with an order dated April 28, 1977 of Judge Helman, Justice of the Supreme Court, of the State of New York, Decision 185-2a of Executive Committee concerning the application of U.S.G. 275 plaster or similar material used for taping and finishing of joints and nail holes and for the skim coat application of wall surfaces has been vacated and accordingly is to be expunged from the Handbook of the Building Trades Employers' Association of the City of New York, ("GREEN BOOK"), and is null and void.

185-3a

-Drywall, Pointing and Taping of.

Tapers Union Local 1974 vs. Plasterers Union Local 530- World Trade Center, New York, New York.

The Executive Committee finds that the pointing and taping of drywall surfaces is governed by the Hearings Panel Decision of March 1, 1978 and that the work in question is the work of the Tapers since the material applied is not applied for the purpose of producing a uniform surface compatible with the pointed and taped joints. Decision of the Executive Committee, June 24, 1980.

186

Agreement between the Employing Plasterers' Association of New York and the Plasterers' Helpers' Protective Association of Greater

New York, April 1, 1916.

Section 4. It is further agreed that no scaffolds shall be built except by members of the Plasterers'

Helpers' Union, party to this agreement, or by plasterers, carpenters, or regular scaffold builders, and that all plasterers' materials are to be handled by the plasterers' helpers, party to this agreement.

(See Decision No. 15-2b.)

186a

-Rubbish, cleaning of.

Agreement entered into on August 4, 1930, between the Masons' laborers' Union and the Plasterers' Helpers, Local No. 30.

"After the plastering has been started and there is plasterers' rubbish to be cleaned, it is agreed that the cleaning gang will be composed of fifty-fifty of mason's laborers and plasterer's laborers to clean all rubbish regardless of whom it may belong to."

NEW YORK PLAN FOR THE RESOLUTION
OF JURISDICTIONAL DISPUTES

- - - - - x

In the Matter of the Arbitration

between

PLASTERERS LOCAL NO. 262

and

BRICKLAYERS LOCAL NO. 1

- - - - - x

OPINION AND AWARD

In accordance with the provisions of the New York Plan for the Resolution of Jurisdictional Disputes, a hearing was held before an Arbitration Panel on January 12, 2010, commencing at 9 a.m., at the offices of the Building Trades Employers Association in New York City, to resolve several jurisdictional disputes between the two above-named Unions. A mediation to try to resolve these disputes was held on December 3, 2009, but was not successful, and the parties were notified on December 21, 2008, of the date for this hearing. Representatives of both Unions appeared at the hearing, where they presented evidence and made arguments. The undersigned Arbitrator served as the Chairman of the Arbitration Panel. All four contractor members of the Panel were present at the hearing, and participated in deciding this dispute.

The jurisdictional disputes between the Unions in this case originally involved jobs at six separate locations, one of which the

Plasterers withdrew. However, since four of the remaining five jobs had been completed before the date of the hearing of the disputes, the Panel decided to rule only on the dispute over the ongoing work involving the "Application of Traditional Plaster, Conventional Plaster, and Ornamental Plaster" at the Milford Plaza Hotel, 700 Eighth Avenue, in New York City. All the work in dispute had been assigned by the contractor or subcontractor to the Bricklayers, and the work at the Milford Plaza Hotel, the scope of work at issue in this case, was assigned by the subcontractor, Commodore Construction Corp., to, and is currently being performed by the Bricklayers.

The Plasterers claim that the plastering work at issue belongs to its jurisdiction. The Plasterers assert, and it was not disputed by the Bricklayers, that until 2005, all plastering work of this kind in the New York City area had been assigned to and was performed by the Plasterers, but that since 2005, the Bricklayers also have been performing this work as a result of raids in the Plasterers' jurisdiction. The Plasterers argue that the prevailing practice in this area requires that the plastering work in dispute be assigned to the Plasterers, that the National Decision that permits the contractor to assign the work should not govern under the New York Plan, that the National Decision was erroneously decided, that Article V of the National Plan was amended in March 2008, and that there is a recent decision upholding the prevailing practice despite a contrary decision of record. The Plasterers also contend that Green Book decision #186B has been removed from the Green Book as a result of a law suit, and is not binding. For these reasons, the

Plasterers submit that the plastering work at the Milford Plaza Hotel should be assigned to the Plasterers.

The Bricklayers assert that its jurisdiction covers plastering work, that until in or about 2000, the Bricklayers and the Plasterers had an agreement under which they honored each other's geographic jurisdiction, but that the Plasterers abrogated this agreement, and the Unions have been raiding each other's geographic jurisdiction. The Bricklayers further assert that as a result of these continuing disputes, a National Decision was rendered in 2004, holding that the work assignment by the employer would be dispositive in each dispute. In addition, the Bricklayers argue that Green Book decision #186B, dated March 5, 2009, confirmed that the employer's decision would be dispositive, that this decision was never appealed, and that it governs this dispute. Finally, the Bricklayers note that the National Labor Relations Board has certified the Bricklayers for employees of the subcontractor, Commodore Construction Corp., who assigned this work to the Bricklayers. For these reasons, the Bricklayers submit that the plastering work in dispute was properly assigned to the Bricklayers.

The New York Plan, provides in Article V(3)(I), in relevant part, as follows:

The arbitration panel shall be bound by National or International Agreements of record between the trades, New York Green Book decisions, or GCA decisions where applicable, or where there are none, the recognized and established prevailing practice in the greater metropolitan area....

In addition, the amendment to Article V, Section 8 of the National

Plan states that as of March 15, 2008, if the Arbitrator finds that a dispute is not covered by an applicable agreement between the two crafts to the dispute, the Arbitrator,

shall then consider the established trade practice in the industry and prevailing practice in the locality. Where there is a previous decision of record governing the case, the Arbitrator shall give equal weight to such decision of record, unless the prevailing practice in the locality in the past ten years favors one craft. In that case, the Arbitrator shall base his(her) decision on the prevailing practice in the locality.

In making its determination, the Panel found that the Unions presented no evidence of any existing agreement of record or of any applicable international agreement between the two Unions in this matter. The Panel further found that Green Book decision #186B was not binding because this decision had been withdrawn pursuant to an agreement between the parties to the New York Plan in settlement of a federal law suit. Moreover, the Panel found that, in any event, the recognized and prevailing practice in the greater metropolitan area for at least the last 50 years was that plastering work, such as the work in dispute in this case, has been performed regularly and almost exclusively by the Plasterers. Thus, under the provisions of both the New York Plan and the National Plan, the Plasterers are entitled to perform the plastering work in dispute at the Milford Plaza Hotel.

Therefore, based on the facts and circumstances of this case, and for the reasons explained, the Arbitration Panel issues the following

Award

The plastering work in dispute in this case, i.e., the application of traditional plaster, conventional plaster, and ornamental plaster at the Milford Plaza Hotel at 700 Eighth Avenue in New York City, shall be assigned to Plasterers Local No. 262.

It is so ordered.



Richard Adelman, Chairman

Dated: January 20, 2010

186-c

(Appeal to 186-b)

On January 26, 2010, Bricklayers Local #1 filed an appeal of the above NY Plan decision to the National Plan for the Resolution of Jurisdictional Disputes.

On February 19, 2010, a National Plan Decision reversed the above NY Plan decision. The National Plan decision awards the work of the application of traditional plaster, conventional plaster and ornamental plaster at the Milford Plaza Hotel located at 700 8th Avenue to the Bricklayers Local #1.

This decision rescinds and makes null and void Green Book Decision 186-c.

In accordance with the rules and procedures of the NY Plan Addendum B, Article VI – Enforcement:

“Arbitration Decisions of the NY Plan that are reversed or overturned by appeal awards made by the National Plan For The Resolution of Jurisdictional Disputes shall be entered into the Green Book as project specific – rather than area-wide.”

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

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In the matter of Arbitration between:

International Union of Bricklayers and Allied Craftworkers

And

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

OPINION AND DECISION

And

Commodore Construction

RE: Plan Case No. NY 1/26/10 (Appeal of New York Plan Decision)

Before: Arbitrator Tony A. Kelly

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A hearing regarding this arbitration was held on February 19, 2010, at the offices of the Plan Administrator at 900 7th Street, N.W., Suite 1000, Washington, D.C., in accordance with the Procedural Rules of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("the Plan" or "National Plan").

Issue

The hearing is over an appeal by the International Union of Bricklayers & Allied Craftworkers of a decision by the New York Plan involving a jurisdictional dispute over the application of traditional plaster, conventional plaster and ornamental plaster at the Milford Plaza Hotel at 700 Eighth Street, New York City, New York.

Appearances

**For the International Union of Bricklayers and
Allied Craftworkers
(Referred to as the IUBAC or BAC)**

**Timothy J Driscoll
Director of Trade Jurisdiction**

**For the Operative Plasterers' and Cement Masons'
(Referred to as the OPCMIA and Plasterers)**

**Rob R. Mason
International Director of Jurisdiction**

Commodore Construction

Not represented at the hearing

Appeals from Decisions of Recognized Local Boards

The Procedural Rules and Regulations of the Plan, Article X, Paragraphs 3 and 4, state, "Appeals referred to arbitration will be processed in accordance with Article V of the Plan. Presentations shall be in writing and limited to that which was presented at the recognized local Plan for the settlement of jurisdictional disputes."

Background of the Dispute

The work in dispute is being performed under a Project Labor Agreement (PLA), which requires that the New York Plan for the Settlement of Jurisdictional Disputes ("New York Plan") shall apply to the settlement of all jurisdictional disputes involving the project."

On January 12, 2010, a hearing was held before an Arbitration Panel to resolve a jurisdictional dispute between the OPCMIA and the IUBAC over "Application of Traditional Plaster, Conventional Plaster, and Ornamental Plaster" at the Milford Plaza Hotel, 700 Eighth Avenue, in New York City. The work in dispute was assigned to employees represented by the IUBAC by subcontractor Commodore Construction Corp.

Arbitration Panel Determination

The New York Plan provides in Article V (3) (I), in relevant part, as follows:

"The Arbitration Panel shall be bound by National or International Agreements of record between the trades, New York Green Book decisions, or GCA decisions where applicable, or where there are none, the recognized and established prevailing practice in the greater metropolitan area...."

In addition, the amendment to Article V, Section 8 of the National Plan states that as of March 15, 2008, if the Arbitrator finds that a dispute is not covered by an applicable agreement between the two crafts to the dispute, the Arbitrator,

"...shall then consider the established trade practice in the industry and prevailing practice in the locality. Where there is a previous decision of record governing the case, the Arbitrator shall give equal weight to such decision of record, unless the prevailing practice in the locality in the past ten years favors one craft. In that case, the Arbitrator shall base his (her) decision on the prevailing practice in the locality."

In making its determination, the Panel found that the unions presented no evidence of any existing agreement of record or any applicable international agreement between the two unions in this matter. The Panel further found that Green Book Decision #186-B was not binding because this decision had been withdrawn pursuant to an agreement between the parties to the New York Plan in settlement of a federal law suit.

Moreover, the Panel found that the recognized and prevailing practice in the greater metropolitan area for at least the last 50 years was that plastering work, such as the work in dispute in this case, has been performed regularly and almost exclusively by the Plasterers.

Thus, under the provisions of both the New York Plan and the National Plan, the Plasterers are entitled to perform the plastering work in dispute at the Milford Plaza Hotel.

Therefore, based on the facts and circumstances of this case, and for the reasons explained, the Arbitration Panel issued the following Award, dated January 20, 2010:

"The plastering work in dispute in this case, i.e., the application of traditional plaster, conventional plaster, and ornamental plaster at the Milford Plaza Hotel at 700 Eighth Avenue in New York City, shall be assigned to Plasters Local No. 262. It is so ordered."

Appeal of the New York Plan's Decision

In a letter dated February 2, 2010, the Plan Administrator informed the General Presidents of the OPCMIA and the IUBAC and Commodore Construction of the following:

The IUBAC had filed a timely appeal of the Arbitration Panel's decision with the Plan Administrator pursuant to the procedures of the New York Plan, a recognized Local Plan under Article VIII of the National Plan.

In accordance with the National Plan's Administrative Practices and Procedural Regulations Governing Appeals from Recognized Local Boards, two (2) issues must be determined:

First, were the parties afforded the opportunity to present evidence at a hearing conducted for that purpose and held in conformity with generally recognized procedures not incompatible with the provisions and procedures of the National Plan.

Secondly, did the decision of the Local Board address the established criteria of Article V, Section 8, of the National Plan. In this consideration the Plan Administrator shall apply the same restrictions placed on the Joint Administration Committee (JAC) in considering an appeal from a Plan Arbitrator's decision: "The sole issue to be considered on appeal is whether the Arbitrator failed to address the established criteria of Article V, Section 8."

The IUBAC asserted that the Arbitration Panel failed to address the established criteria of Article V, Section 8, of the Plan. Specifically, the IUBAC alleged that the Arbitration Panel improperly applied the current criteria of Article V, Section 8, of the Plan rather than the criteria in effect prior to March 15, 2008.

On March 15, 2008, the Plan's JAC amended the criteria of Article V, Section 8, of the Plan. The JAC also issued a Policy Statement directing "Plan Arbitrators, in any dispute in which the Decision of Record of February 1, 2004, as amended on March 11, 2004, is deemed applicable, to apply the criteria in effect prior to the adoption of the March 15, 2008, amendments." Accordingly, the IUBAC argued that the New York Arbitration Panel should have applied the Plan criteria in effect prior to the adoption of the March 15, 2008, amendments because the IUBAC relied on the 2004 Decision of Record.

The Plan Administrator determined that the New York Panel's decision is deficient in two respects. First, although the IUBAC argued that the 2004 Decision of record applied to the dispute, the Arbitration Panel did not address the Decision of Record in its decision. After finding that a New York Green Book Decision was not applicable to the dispute, the Panel merely stated that the prevailing practice in the area favored an assignment of work to the OPCMIA.

Coupled with the Panel's failure to address the 2004 Decision of Record is its failure to apply the Plan criteria in effect prior to March 15, 2008, or to explain why it was proper to apply the current criteria. Under the JAC's Policy Statement, in cases in which the 2004 Decision of Record is applicable, Plan Arbitrators are to apply the criteria in effect prior to March 15, 2008. The IUBAC presented evidence that it provided the Panel with copies of the JAC's Policy Statement and the Plan criteria in effect prior to March 15, 2008. Despite having this information, the Panel failed to explain why it applied the current Plan criteria rather than the criteria in effect prior to the Plan amendments.

The Plan Administrator indicated that the OPCMIA emphasized the limited nature of his review of an arbitration decision rendered by a Local Board. Although it is true that the Plan Administrator's review is extremely limited, he is nevertheless, required to consider whether the Local Board properly addressed the criteria of the National Plan. As stated above, the Panel

failed to address the 2004 Decision of Record. Moreover, the Panel failed to apply the Plan criteria in effect prior to March 15, 2008, or to explain why it was proper to apply the current criteria. Accordingly, the Plan Administrator found that the Arbitration Panel failed to address the established criteria of Article V, Section 8, and determined that the IUBAC's appeal should be referred to a National Plan Arbitrator.

Positions of the Parties

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

Position of the OPCMIA

The position of the OPCMIA is that the IUBAC's request for appeal of the New York Plan decision is unwarranted on the basis that the original hearing before the New York Plan held January 12, 2010, addressed all of the required criteria, and that the prevailing practice in the locality favors the OPCMIA.

The OPCMIA submitted that, unlike the National Plan, the New York Plan employs a professional court reporter for each hearing and provides a hearing transcript to the parties. The New York Plan hearing transcript shows that the 2004 Decision of Record and the criteria set forth under Article V, Section 8, of the National Plan was accepted into evidence and that the Arbitration Panel did, in fact, address them. Further, the transcript also shows that the contractor's statement was addressed; however, the Arbitration Panel found that it was not required. Conversely, the record shows that all criteria were addressed and the decision was written after all evidence was heard and all criteria were considered.

The National Plan rules governing appeals require only that the Plan criteria be addressed and considered at the initial hearing by the Local Board, and not interpreted in a specific way.

The OPCMIA argued that by proceeding with this appeal, the National Plan is challenging and negating a valid decision made by a recognized Local Board per a Project Labor Agreement (PLA) approved by the Building and Construction Trades Department. The PLA recognizes the New York Plan as the dispute resolution process for jurisdictional disputes. All steps of the resolution process have been met. The Award rendered by the Arbitration Panel and should be final and binding on the parties because all of the criteria of both the New York Plan and the National Plan were met. Thus, an appeal hearing is not warranted.

Since the Plan Administrator has already determined the basis for this appeals hearing, the hearing proceeded.

The OPCMIA claimed that the plastering work at issue belonged to its jurisdiction on the basis that prior to 2005, all plastering work of this kind in the New York City area had been assigned to and performed by workers represented by the OPCMIA. Since 2005, the IUBAC have also been performing plastering work, which the OPCMIA alleged were a result of "raids in the Plasterers' jurisdiction," and perpetuated by the Decision of Record issued in 2004 by the National Arbitration Panel, to dispose jurisdictional disputes between the OPCMIA and the IUBAC over plastering work on the basis of contractor preference and assignment of craft.

The OPCMIA argued that the 2004 National Decision of Record that permits the contractor to assign work to the craft of its preference "was erroneously decided," and that this should not govern under the New York Plan. The OPCMIA further contended that a recent arbitration decision in Illinois¹ upheld the prevailing practice argument contrary to the 2004 Decision of Record and the criteria set forth under Article V of the National Plan prior to amendment in March 2008.

The OPCMIA also contended that New York Green Book Decision #186-B, (which recognized the 2004 National Decision of Record to resolve disputes over cement finishing and plastering work tasks in favor of the work assignment by the contractor) had been removed from the Green book as a result of a law suit and was not binding.

For these reasons the OPCMIA submitted that the plastering work at the Milford Plaza Hotel be assigned to the OPCMIA on the basis of prevailing area practice.

Position of the IUBAC

The IUBAC testified that prior to 2000 the IUBAC and the OPCMIA had an International Agreement, dated February 28, 1911, which controlled the jurisdiction between the two unions for plaster work, on a territorial basis, throughout the United States. This was done by color-coded maps that reflected each respective union's jurisdiction and was the basis for removing competing claims of work and ongoing disputes. The IUBAC provided a map for the New York

¹ A decision pursuant to the procedures of the Chicago Joint Conference Board (a recognized Local Plan) rendered by Arbitrator Steven M. Bierig in Case No. 667 on May 17, 2009, regarding a jurisdictional dispute between Cement Masons Local 502 and Bricklayers Local 21 over concrete finishing work in Cook County, IL. Arbitrator Bierig awarded the work to the OPCMIA based on "prevailing practice in the locality of Cook County, IL."

The IUBAC appealed this decision to the Plan Administrator for the matter to be heard by a National Plan Arbitrator on the basis that Arbitrator Bierig failed to recognize the IUBAC's claim to the work based on the 2004 Decision of Record and the evidence that they had performed concrete finishing work in the locality and relied on the lower-ranked criteria of prevailing practice in the locality. This appeal was denied by the Plan Administrator on the basis that neither the Plan Administrator nor the JAC have the authority to interpret the 2004 Decision of Record and that Arbitrator Bierig had "addressed each criterion of the National Plan and explained why lower-ranked criteria were relied upon."

metro area and ceded that at one time the city and the five boroughs were the exclusive jurisdiction of the OPCMIA. However, on July 31, 2000, the OPCMIA abrogated this territorial agreement, "thereby providing each union the ability to represent plasterers without any limitation."²

Further, as a result of continuing disputes between the two unions over plastering and cement finishing work, a Decision of Record was rendered by the National Arbitration Panel on February 11, 2004, which provided in pertinent part, "*all jurisdictional disputes solely between BAC and OPCM to be resolved in favor of the work assignment of the involved Employer. Such scope is limited to cement finishing and plastering work tasks.*" This Decision of Record consequently removed any consideration of prevailing practice in any dispute that would come before the National Plan or its local subordinate bodies, including the New York Plan.

It is the position of the IUBAC that the assignment of plastering work by Commodore Construction to the IUBAC is in accordance with the 2004 Decision of Record and the criteria of the National Plan requires that the contractor's assignment of work to the IUBAC be sustained

The IUBAC opined that the OPCMIA arguments that seek to rely on prevailing practice must be rejected. The National Arbitration Panel in rendering its Decision of Record removed claims to prevailing practice criterion in all disputes between the OPCMIA and the IUBAC over plastering work. The IUBAC pointed out that the JAC recognized the need to ensure that the status quo that the 2004 Decision of Record was not disrupted. In this regard, the IUBAC provided a copy of the Policy Statement issued by the JAC directing all Plan Arbitrators to follow the criteria in effect prior to March 2004 when the Decision of Record was applied.³ The criterion in effect prior to March 15, 2004, and set forth under Article V, Sec. 8, c), of the Plan states, in part, as follows:

"If the Arbitrator finds that a previous decision of record governs the case, the Arbitrator shall apply the decision of record in rendering his decision except under the following circumstances. After notice to the other parties to the dispute prior to the hearing that it intends to challenge the decision of record, if a trade challenging the decision of record is able to demonstrate that the recognized and established prevailing practice in the locality of the work has been contrary to the applicable decision of record, and that historically in that locality the work in dispute has not been performed by the other craft or crafts, the Arbitrator may rely on such prevailing practice rather than the decision of record. If the craft relying on the decision of record demonstrates that it has performed

² The IUBAC entered a Circular Letter, dated August 2, 2000, from OPCMIA General President John J. Dougherty stating that "the OPCMIA had terminated any and all territorial agreements with the BAC."

³ On March 15, 2008, the JAC Issued a Policy Statement directing "Plan Arbitrators, in any dispute in which the Decision of Record of February 1, 2004, as amended on March 11, 2004, is deemed applicable, to apply the criteria in effect prior to the adoption of the March 15, 2008, amendments."

the work in dispute in the locality of the job, then the Arbitrator shall apply the decision of record in rendering his decision. (Emphasis by the IUBAC)

Application of the 2004 Decision of Record has been ongoing since its inception, and the IUBAC has been performing plastering work in the New York area, as the record indicates. The IUBAC offered various letters of assignment from contractors listing the projects where they have performed plastering tasks with members of Bricklayers Local 1 in the New York area.

The IUBAC further asserts that the OPCMIA has previously recognized the National Plan's 2004 Decision of Record when an Arbitration Panel ruled on March 5, 2009, that the application of conventional plaster and ornamental plaster and the restoration of conventional and ornamental plaster at the Beacon Theater, New York, NY, is "consistent with a National Plan Decision and may be awarded to either trade at the discretion of the Employer." This decision was subsequently entered into the New York Green Book as Decision 186-B and applicable area-wide.⁴

Though the OPCMIA contends that Decision #186-B has been subsequently withdrawn from the Green Book, it is the position of the IUBAC that Decision #186-B is still viable and controlling in this dispute, since the OPCMIA has never requested an appeal of this decision to the National Plan.

The IUBAC submitted copies of five (5) separate arbitration decisions rendered by Plan Arbitrators involving jurisdictional disputes between the OPCMIA and the IUBAC over cement finishing and plastering tasks on projects in Illinois, Pennsylvania, Michigan and Ohio.⁵ In each of these cases the OPCMIA argued and relied on historic practice in the locality rather than the 2004 Decision of Record and were rejected. The National Arbitration Panel has made it clear that the 2004 Decision of Record is not subject to challenge by claims to prevailing practice by either union.

The IUBAC also presented two (2) letters from the OPCMIA, at both the local and International union levels, to demonstrate that the OPCMIA has previously embraced and lauded the merits of the 2004 Decision of Record.

⁴ An Award was made March 15, 2009, by the New York Plan Arbitration Panel chaired by Eric J. Schmertz, in a jurisdictional dispute between Plasterers Local 262 and Bricklayers Local 1 over plastering work tasks that stated "In accordance with the National Decision on Cement and finishing and Plastering Work Tasks, the plastering work in dispute in this case at the locations cited may be assigned by the Employer involved." This award confirmed the contractors work assignment to Bricklayers Local 1.

⁵ These Arbitrator decisions involved the following Plan Cases: IL 10/17/06; MI 8/6/09; IL 8/3/06 and 8/18/06; PA 7/29/04 and OH 6/3/09.

- A letter dated February 20, 2004, by the OPCMIA General President which stated in part, "Under the circumstances, the National Arbitration Panel wisely concluded that employer assignment of the work should prevail."⁶
- A letter dated May 2, 2005, from Carmen Barrasso, Trustee to Plasterers Local 530 (which is now Local 262), to Bricklayers Local 5, which stated in part, "There may be jurisdictional disputes from time to time, but then again the OPCMIA and BAC have that "Decision of Record" dated February 11, 2004, to resolve those disputes. So between us it will come down to employer preference."⁷

Further, the IUBAC noted that the National Labor Relations Board (NLRB) has certified the IUBAC as the union representative for the employees of the subcontractor in this dispute, Commodore Construction Corp., who has assigned the work in dispute to the IUBAC.

For these reasons, the IUBAC submits that the New York Plan decision rendered on January 20, 2010, must be vacated, and a Plan decision issued that sustains the employer's assignment of plastering work to the IUBAC pursuant to the 2004 Decision of Record.

Position of the Contractor

In a letter dated February 18, 2010, to the Plan Administrator, Gerry Boyle, President of Commodore Construction, who was unable to attend the hearing, stated the company's position, as follows:

"Commodore construction has a contract with Turner Construction to perform plaster and plaster restoration work at the Milford Plaza Hotel project. This project is covered by a PLA that Commodore Construction is party to. Our contract for work in this project includes traditional plastering, conventional plastering and ornamental plastering work. This work has not commenced as Turner Construction and the project owner have revised the project schedule due to financing and other considerations. We anticipate beginning our plaster work on this project in spring of 2010.

"Consistent with our company's past practice we are assigning this work to the plaster members of BAC Local 1. This assignment is consistent with the 2004 Decision of Record and the local area practice since that decision was issued. Further, BAC has been certified by the NLRB as the exclusive representative of our plaster employees

⁶ A letter dated February 20, 2004, from OPCMIA General President John J. Dougherty to Richard M. Resnick, Administrator and Council to the Plan, in response the request for appeal by the IUBAC of the 2004 Decision of Record.

⁷ A letter dated May 2, 2005, from Carmen Barrasso, Trustee to Local 530 to Tony Piacente, President of Bricklayers Local 5.

since 2005. Consequently, we have performed numerous plastering projects throughout Greater New York with BAC over that period.

"For the foregoing reasons, we respectfully request that our assignment of work to the BAC be upheld."

Application of Plan Criteria

Based on the authority vested under the Plan, Article V, Section B (in effect prior to March 15, 2008) provides the criteria for making this award, as follows:

In rendering his decision, the Arbitrator shall determine:

- a) *First, whether a previous agreement of record or applicable agreement, including a disclaimer agreement between the National or International Unions to the dispute governs;*
- b) *Only if the Arbitrator finds that the dispute is not covered by an agreement or applicable agreement of record or agreement between the crafts to the dispute, he shall then consider whether there is a previous decision of record governing the case.*
- c) *If the arbitrator finds that a previous decision of record governs the case, the arbitrator shall apply the decision of record in rendering his decision, except under the following circumstances. After notice to the other parties to the dispute prior to the hearing that it intends to challenge the decision of record, if a trade challenging the decision of record is able to demonstrate that the recognized and established prevailing practice in the locality of the work has been contrary to the applicable decision of record, and that historically in the locality the work in dispute has not been performed by the other craft or crafts, the arbitrator may rely on such prevailing practice rather than the decision of record. If the craft relying on the decision of record demonstrates that it has performed the work in dispute in the locality of the job, then the arbitrator shall apply the decision of record in rendering his decision. If the arbitrator finds that the craft has improperly obtained the prevailing practice in the locality, through raiding, the undercutting of wages or by the use of vertical agreements, the arbitrator shall rely on the decision of record rather than the prevailing practice in the locality.*
- d) *If no decision of record is applicable, the arbitrator shall then consider the established trade practice in the industry and the prevailing practice in the locality.*

- e) *Only if none of the above criteria is found to exist, the arbitrator shall then consider that because efficiency, cost or continuity and good management are essential to the well being of the industry, the interests of the consumer or the past practices of the employer shall not be ignored.*

The Arbitrator shall set forth the basis for his decision and shall explain his findings regarding the applicability of the above criteria. If lower-ranked criteria are relied upon, the Arbitrator shall explain why the high-ranked criteria were not deemed applicable. The Arbitrator's decision shall only apply to the job in dispute.

Opinion and Decision

With respect to the OPCMIA's position that the IUBAC's request for appeal is unwarranted "based on the fact the original hearing before the New York Plan held January 12, 2010, addressed all of the required criteria."

This issue was addressed by the Plan Administrator in his letter, dated February 2, 2010, referenced above, whereby he determined that though the Arbitration Panel was provided the required criteria for consideration in this dispute, "the Panel failed to apply the Plan criteria in effect prior to March 15, 2008, or to explain why it was proper to apply the current criteria." Addressing the criteria means applying the criteria by the Local Board to the dispute being considered; therefore, this Arbitrator rejects this request.

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

This dispute shall then be considered by this arbitrator on the basis of criteria b) *only if the Arbitrator finds that the dispute is not covered by an appropriate or applicable agreement of record or agreement between the crafts to the dispute, he shall then consider whether there is a previous decision of record governing the case.*

Since the inception of the 2004 Decision of Record, the opinions and decisions rendered by this Arbitrator in previous Plan cases involving work disputes between the IUBAC and the OPCMIA have consistently been that the Decision of Record of February 11, 2004, and amended March 2, 2004, exclusively and unequivocally govern "all jurisdictional disputes between the IUBAC and the OPCMIA involving cement finishing and plastering that are brought before the Plan and shall be resolved in favor of the work assignment of the involved contractor. This Arbitrator contends that the Decision literally means "all jurisdictional disputes," irrespective of any claims by either party to prevailing practice as set forth under c) of Article V, Section 8, of the applicable plan's criteria (Plan criteria in effect prior to March 15, 2008).

The parties have agreed that the work in this dispute involves plastering work tasks. The contractor has assigned the plastering work tasks to employees represented by the IUBAC. Therefore, the 2004 Decision of Record prevails and the work in dispute, the application of traditional plaster, conventional plaster, and ornamental plaster at the Milford Plaza Hotel located at 700 Eight Avenue in New York, New York, shall continue as assigned to employees represented by the IUBAC.

This decision shall only apply to the job in dispute.



Tony A. Kelly
Arbitrator

Dated: February 24, 2010