IN RE A GRIEVANCE ARBITRATION

BETWEEN:

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 870

(THE "UNION" or "IUOE")

and

E.S. Fox Ltd.,

(THE "EMPLOYER' or "Fox")

Before:	Anne M. Wallace, Q.C. Sole Arbitrator
Representing the Union:	Gary Bainbridge
Representing the Employer:	Larry Seiferling, Q.C.

Heard at Saskatoon, Saskatchewan
May 12, 2015

Preliminary Award on Jurisdiction

I. Introduction

1. The International Union of Operating Engineers, Local 870 (the "Operating Engineers" or the "Union") is the certified bargaining agent for all Operating Engineers employed by unionized employers in the foundation piling construction business in Saskatchewan. E.S. Fox Ltd. (the "Employer" or "Fox"), a construction company, is a certified employer. Fox is an industrial construction company involved in bridgework and structural steel erection.
2. The Union and Fox are subject to the provincially negotiated industrial collective bargaining agreement between the Construction Labour Relations Association of Saskatchewan and the Union, effective December 10, 2010 to April 30, 2014 (the "CBA"). There's also a new collective bargaining agreement effective August 17, 2014 to April 30, 2017.
3. The Employer was awarded a contract in 2014 for structural steel erection in a power upgrade/renovation of the Queen Elizabeth Power Station in Saskatoon (the "Project"). The Project started in June 2014 and ran until sometime in September.
4. At a pre-job mark-up meeting, the Operating Engineers claimed certain work on the Project. In the final assignment of work, the Employer assigned the work as

"tool of the trade" and as a result the work was done by members of unions other than the Operating Engineers. Other unions had not claimed the work.

5. On July 28, 2014 the Union filed a grievance (the "Grievance") as follows:

> Local 870 is filing a grievance as the employer has failed to recognize the Union and award work on the QE Sask Power Project (#14-2416) operating zoom booms (described by the employer at the pre-job meeting as "tow motors") to the Union. Such work falls within the exclusive scope of work performed by the Operating Engineers as defined in Article 1.03 of the collective agreement, and no other unions have claimed jurisdiction over that work. The employer's actions in designating the operation of that equipment as a "tool of the trade" and failing to call for dispatch of Operating Engineers is a violation of Articles 1.03, 3.01, 4.03 (and any other article that may apply) of the relevant collective agreement.
>
> As a remedy, the Union seeks an order from the arbitrator declaring the employer to be in breach of the collective agreement, and a further order directing the employer to pay to the Union all lost wages and benefits that would have been paid to Union members who would have, but for the employer's breach, being dispatched and perform the work.

6. The parties were unable to resolve the grievance and have submitted it by agreement to arbitration before me as sole arbitrator.

7. As preliminary issue, the Employer claims this dispute should not be resolved through the grievance procedure under the CBA, but rather through the *Plan for the Settlement of Jurisdictional Disputes in the Construction Industry* (the "Plan"). The Employer filed the Grievance and the CBA.

8. The Employer called no witnesses. The Union called Cory Cowley (Business Agent with the Union). The parties also agreed to put the Jurisdictional Dispute Plan before me.

II. The Collective Agreement Provisions

9. The CBA in effect at the time this dispute arose was the one effective December 19, 2010. Article 1.02, *Scope - Geographical* says:

> The terms of this Agreement are applicable within the **boundaries of the Province of Saskatchewan.** [emphasis added]

10. Article 1.03 deals with *Scope – Trade:*

> **(a)** This Agreement applies to all Employees employed as Operating Engineers in the province of Saskatchewan, Northwest Territories known as the District of MacKenzie and that section defined in Local 870 Charter. Operating Engineers shall be defined **as all persons engaged in the operation, service, maintenance, assembling and dismantling of all hoisting, portable and excavating machines, boilers and engines, including trucks.**
>
> (b) It is recognized that the **driving and servicing of mobile cranes** is the work of Operating Engineers.
>
> (c) The Operating Engineer shall have jurisdiction for **servicing all power-driven machinery**.
>
> [emphasis added]

11. Article 3.01 deals with *Union Recognition:*

> The Employer recognizes the Union as the sole collective bargaining agent for all Employees falling within the jurisdiction of the Union and Decisions and Agreements of Record of the AFL-CIO and the Canadian Jurisdictional Assignment Plan.

12. Article 4.03 with respect to *Hiring* says:

> No employer shall refuse to employ nor to continue to employ or otherwise discriminate against any person in regard to employment or any term or condition of employment because of nationality, creed, ancestry, place of origin, religion, color, race or sex.
>
> The Employer, when hiring men, shall notify the Union Hiring Hall Office in Saskatoon forty-eight (48) hours prior to the commencement of any new project, and twenty-four (24) hours' notice shall be given after the project has commenced. In the event the Union is unable to supply suitable and qualified workmen, then the Employer may hire from any available source. Upon exercising this option, the Employer agrees to supply the Union with the Employee's name, social insurance number, address and the date of hire. This information must be sent to the Union within the first week of hire. The Employer shall have the right to determine the competency of workmen supplied by the Union, and to reject or discharge any such workman on this account. It is specifically understood that all employees hired under the terms of this Agreement must have clearance from the dispatcher of Local 870. At the request of the Employer, clearance referral slips shall be transmitted electronically to the Employer or the Project.
>
> Name hire shall be one (1) in (2) (this means one (1) name hire, the next one (1) off the out of work board) and one hundred percent (100%) name hire for foreman. Foremen anytime as long as paid foreman rate. Apprentices who had previously been employed by the Employer may be recalled and are not considered name hires.
>
> Employee Sign-On Form
>
> The Employee shall provide a completed Employer supplied Employee Sign-On Form included as Appendix "A-a" to this Agreement, to the Employer before commencing work.

13. Article 10.00 dealing with *Jurisdictional Disputes Resolution* says:

> **Jurisdictional disputes involving workers employed under this Collective Agreement shall henceforth be resolved under the provisions of the Canadian Jurisdictional Disputes Plan** in accordance with its rules and regulations and without work stoppage, slow down or other lack of production, and it is further agreed that a jurisdictional dispute shall in no way interfere with the progress or prosecution of work. [emphasis added]

14. Article 11 deals with *Pre-Job Mark-Up Conferences, Jurisdiction and Assignment of Work*:

> 11.01 The Employer will hold a pre-job conference and equipment market-up attended by all interested Unions and will provide an overall description of the project, projected manpower requirements by craft, general information pertaining to hiring and recruiting procedures, transportation, on-site work rules, safety and security regulations, safety meetings and any other pertinent information. The Employer will inform the Unions as to the projected scope of the contract, information pertaining to the Employer's intended supervisory staff and other relevant information including intended work assignments. Notification of the pre-job conference and hard copy documents to be presented shall be given to the Saskatchewan Provincial Building & Construction Trades Council and the office of the President of the Building Trades Department AFL-CIO with a minimum of fifteen (15) calendar days prior to the date set for the conference. The pre-job and equipment mark-up in all cases shall be held at least ten (10)

calendar days before the work commences. The time limit set forth herein may be varied to suit unusual circumstances after consultation between the Employer and the Building Trades Council.

The Employer will arrange to have available for meetings general descriptions of the work to be performed, equipment lists defining whether the equipment will be received broken down into component parts or as a complete package, drawings and any other relevant information which will assist Unions in understanding their individual jurisdictional roles. Employer who will be installing process equipment may have a process engineer attend the mark-up portion of the meeting to explain the function of the equipment to be installed.

Before the close of the meeting, **the Employer will read over the items in dispute**. The Employer will then request that documentary evidence supporting **the disputing Unions' claims** be forwarded to him within a period of seven (7) calendar days. The Employer will make and **circulate to the disputing trades** final assignments, based on the evidence provided with in a further three (3) calendar days or as may otherwise be agreed at the mark-up. **All such assignments shall be made in accordance with the procedural rules of the National Joint Board.**

The Employer(s) recognizes **the jurisdictional claims of Union(s)** as set forth in the Charter Grants issued by the AFL-CIO subject to Trade Agreements and final decisions of the AFL-CIO as well as the decisions rendered by the Canadian Jurisdictional Disputes Plan.

It is incumbent on all Employers to assign work in accordance with the Employers' responsibility set forth in the procedural rules and regulations of the Canadian Jurisdictional Dispute Plan.

In the event a jurisdictional dispute arises, the representative(s) of the Union(s) shall first seek resolution of the dispute at the project level. In the event no resolution is found at the project level, the respective International Union(s) shall follow the procedure of the Canadian Jurisdictional Dispute Plan, or its successor.

A mark-up conference for small projects may be conducted by facsimile when mutually agreed between the Saskatchewan Provincial Building and Construction Trades Council. [emphasis added]

III. The Plan

15. The *Plan for the Settlement of Jurisdictional Disputes in the Construction Industry Including Procedural Rules and Regulations* **(**the "Plan") is a 184 page document which says is subtitled *Agreements and Decisions Rendered Affecting the Building Industry Covering the U.S. and Canada.* The document provided to me says it was approved by the Building and Construction Trades Department, AFL-CIO and is dated "June 1984 As Amended Through May 2011". As I understand the parties, this Plan is the Canadian Jurisdictional Assignment Plan referred to in Article 3.01 of the CBA.

16. *The first 38 pa*ges of the Plan cover *Procedural Rules and Regulations for the Plan for the Settlement of Jurisdictional Disputes and the Plan for the Settlement of Jurisdictional Disputes*. The remainder of the document is *Agreements and Decisions of Record.*

17. In the *Procedural Rules* section, the following excerpts appear:

ARTICLE I

CONTRACTOR'S RESPONSIBILITY

…

2. When a contractor has made an assignment of work, he shall continue the assignment without alteration unless otherwise directed by an arbitrator **or there is agreement between the National or International Unions involved.**

ARTICLE II

UNION'S RESPONSIBILITY

1. The Plan provides (Article VI, Section 1) that during the existence of the Plan there shall be no strikes, work stoppages, or picketing arising out of any jurisdictional dispute.

2. When a contractor has made a specific work assignment, **all unions shall remain at work and process any complaint over a jurisdictional dispute** in accordance with the procedures herein established by the Administrator. Any union which protests that a contractor has failed to assign work in accordance with the procedures specified above, shall remain at work and process the complaint through its International office. The Administrator is prohibited from taking action on protests or requests to discuss jurisdictional matters from local unions or building and construction trades councils.

ARTICLE IV

FILING A COMPLAINT

1. When **a dispute over an assignment of work** arises, **the National or International Union challenging the assignment, or the employer directly affected by the jurisdictional dispute, or the signatory Employer Association** representing such employer, shall notify the Administrator in writing. Such notice shall include the following information:

    a. Unions involved

    b. A full and complete description of the work in dispute

    c. Name and location of project

    d. Contractors involved and their mailing addresses, telephone number and facsimile number

    e. The assignment of work and the contractor who made the assignment

    f. A statement indicating whether the responsible contractor and **the involved Unions** are stipulated to the Plan and these procedures.

    g. A statement **whether the representatives of the National and International Unions have met or attempted to meet at the local level in an effort to resolve the matter.**

    h. A statement **whether the National and International Unions involved in the dispute have voluntarily agreed to mediation**. …

ARTICLE VI

DIRECT RESOLUTION

1. Within two (2) days following receipt of a properly filed notice, the Administrator shall notify, by facsimile or other electronic means, all directly affected National and international Unions and employers that a dispute exists between local parties.

2. If any party intends to rely on a Decision of Record to support its claim to the work, that fact must be disclosed to the Administrator and the other parties to the dispute within two days of receipt of the notice of the dispute from the Administrator. The title of the Decision of Record and the page number where the decision is located should be included in the notice. If any other party to the dispute intends to challenge the Decision of Record on the basis of the prevailing practice in the locality in the past ten years, pursuant to Article V, Section 8(b) of the Plan, notice of such challenge must be provided to the Administrator and to the other parties to the dispute by the day the list of arbitrators is due back in the Administrator's office.

3. If the directly affected National and International Unions and employers, parties to the dispute, are able to settle the dispute, each shall inform the Administrator, in writing, signed by an authorized representative of each party, that a settlement has been reached.

4. If the directly affected National and International Unions and employers are unable to resolve the dispute, any of the directly affected parties may request arbitration of the dispute within five (5) days from the date the matter was referred by the Administrator, by filing a notice in writing to arbitrate with the Administrator, with copies to all directly affected parties.

ARTICLE VIII

3.

ARTICLE IX

POLICY REGARDING DIRECTIVES

1. The Plan and the Procedural Rules and Regulations provide for the **settlement of a jurisdictional dispute** on a specific job **by agreement or understanding between or among the National and International Unions involved**.

2. The Procedural Rules and Regulations also provide that an assignment of work may be changed by the responsible contractor(s) to conform to the terms of same, upon notification by the Administrator. Such notification shall be made by means of a directive sent to the responsible contractor(s) by the Administrator.

3. In order to give effect to the procedure set forth above, and before a directive may be sent to the affected contractor(s) by the Administrator, **the National or International Unions involved shall submit for the records of the Plan** the following:

    a. A statement of the exact terms of the agreement or understanding reached. Such statement is to be jointly signed by authorized representatives of each of the National or International Unions involved. If separate communications are submitted by the parties, the terms of the agreement or understanding must be identical in each communication.

    b. A statement regarding the notification to the responsible contractor(s) of the agreement or understanding reached. If objection to the agreement or understanding was made by the contractor(s) or representatives, the nature of the objection must be stated.

4. In accordance with the Plan and the Procedural Rules and Regulations, any directive from the Administrator shall be complied with by the affected contractor(s) unless, and within 24 hours following receipt of such directive, the contractor(s) notifies the Administrator that he elects not to comply with the directive, and requests that the jurisdictional dispute be processed through arbitration to a decision. Such decision shall be made in accordance with the provisions of Article V of the Plan.

18. In the Plan section, the following appears:

ARTICLE I

SCOPE OF APPLICATION

The procedures shall be available to resolve jurisdictional disputes between and among Employers and Unions engaged in the building and construction industry.

ARTICLE V

RESOLUTION OF JURISDICTIONAL DISPUTES

Sec. 1. When a dispute over an assignment of work arises, the National or International Union challenging the assignment, or the Employer directly affected by the dispute or the signatory Employer Association representing such Employer shall notify the Administrator in writing, with copies to the other parties to the dispute. The notice shall include a statement **whether representatives of the National and International Unions have met or attempted to meet with the local parties to attempt to resolve the matter.** For disputes in the United States, if the National and International Unions involved in the dispute voluntarily agree to mediation, the notice shall so advise the Administrator. The mediation may be used in lieu of the meeting of the International Representatives.

Sec. 2. Upon receipt of said notice, the Administrator or his designee shall notify withintwo (2) days by facsimile or other electronic means all directly affected National and International Unions and employers that a dispute exists between the local parties. The Administrator shall also provide notice of the dispute to all other National and International Unions party to this Agreement. At the same time, if the National and International Unions involved in a dispute in the United States have consented to voluntary mediation, the Administrator shall contact the Federal Mediation and Conciliation Service and request the appointment of a mediator to assist the parties in the local area in settling the dispute. The mediator shall have three (3) days from the date the matter is referred by the Administrator to mediate the dispute. The mediator shall submit by facsimile or other electronic means a report to the parties and the Administrator indicating whether the dispute has been resolved no later than the end of the three (3) day period. The report of the mediator shall not be submitted to a Plan Arbitrator.

Sec. 3. If the respective National and International Unions of the disputing locals and the directly affected Employer are unable to resolve the dispute, any of the directly affected parties may request arbitration of the dispute, within five (5) days, from the date the matter is referred by the Administrator, by filing a notice to arbitrate with the Administrator, with copies to all directly affected parties. The Administrator will only honor a request to submit the matter to arbitration prior to the expiration of the five (5) day period if the requesting party has demonstrated that the International Representatives have met or attempted to meet with the local parties to resolve the matter or have been through the mediation process set forth in Section 2.

Sec. 4. Upon receipt of said notice, the Administrator shall send to all directly affected parties a list of impartial arbitrators knowledgeable about the construction industry, chosen by the JAC.

Sec. 8. 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 appropriate or applicable agreement of record or agreement between the crafts to the dispute, he 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 decision on the prevailing practice in the locality. Except, that if the Arbitrator finds that a 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 and established trade practice in the industry rather than the prevailing practice in the locality; and

(c) 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 higher-ranked criteria were not deemed applicable. The Arbitrator's decision shall only apply to the job in dispute.

Sec. 9. Agreements of record are applicable only to the parties signatory to such agreements. Decisions of record are applicable to all trades except as provided for in the Decision of Record.

ARTICLE IX

OBLIGATIONS OF THE PARTIES

Sec. 1. Each Employer agrees that **all cases, disputes or controversies involving jurisdictional disputes or assignments of work arising under this Agreement shall be resolved as provided herein**, and shall comply with the decisions and rulings of the Administrator, the JAC, arbitrators or National Arbitration Panels established hereunder.

Sec. 2. Each Union agrees that **all cases, disputes or controversies involving jurisdictional disputes or assignments of work arising under this Agreement shall be resolved as provided herein,** and shall comply with the decisions and rulings of the Administrator, the JAC, arbitrators or National Arbitration Panels established hereunder. Each Union agrees that the establishment of picket lines and/or the stoppage of work by reason of an Employer's assignment of work are prohibited.

Sec. 3. The Administrator shall send a monthly report to the parties to this Agreement setting forth all information on jurisdictional disputes for that month. The report should include the location and job where the dispute occurred, the parties involved, the subject of the dispute and shall indicate whether any stoppage occurred or picket lines were established.

IV. Union Evidence

19. Cory Cowley testified:

- Cowley was elected Business Manager for the Union Local 870 for approximately four years. Before that, he was an equipment operator for 27 years.
- The Union runs the Hiring Hall for Operating Engineers in Saskatchewan and Canada wide. The work involves bobcat dozers, steel mechanical operations, skid steers, zoom booms, and overheads including hydraulic to conventional cranes.

- There is always a pre-job mark-up meeting for any construction project. Before the pre-job mark-up meeting, the contractor sends a primary assignment plan and all unions have a chance to look at the plan before they attend the meeting. At the meeting, Terry Parker of the Saskatchewan Provincial Building & Construction Trades Council (the "Council") reads out the proposed assignment of work plan one item at a time. The various trades claim certain branches of work. If there is a dispute between two unions about who should be assigned certain work, the unions have a certain amount of time to submit evidence to the contractor to show this is work they have done in the past. The contractor then makes a decision about where the work will go.
- On May 23, 2014, the Council sent out a notice that there would be a pre-job mark-up meeting for the Project on June 11, 2014. The Employer sent out the information about the Project before the meeting. The document included *Preliminary Jurisdictional Assignments.* For the *Work Activity* entitled *Tow Motors and Gradalls on-site (casual use),* the *Proposed Assignment* was *Tool of the trade.* A tow motor is classified as a zoom boom or a telehandler. A gradall is the same thing, but is Ontario language.
- At the June 11, 2014 meeting, Terry Parker from the Council took control of the meeting and read the proposed assignments. When he read the proposed assignment for *Tow Motors and Gradalls,* Cowley said "OE claims." Parker then asked if anyone else claimed the work. Cowley said, "Anyone else?", and everyone chuckled. No one else claimed the work. Colin Daniels, the Business Manager for the Ironworkers Union, was at the meeting. He did not claim the work. There was no discussion and no controversy over the Operating Engineers' claim to the work. The Operating Engineers claimed the work for *Tow Motors and Gradalls* because it was within the scope of work the Operating Engineers have always done on all projects.
- In the *Preliminary Jurisdictional Assignments*, the Employer proposed the Operating Engineers for both *Cranes on site* and *Crane assembly on site*. The Operating Engineers claimed that work, and others said "correct assignment".
- By the end of the meeting, there was one dispute between unions that needed to be resolved, but it didn't involve the Operating Engineers.
- When the Employer made the *Final Assignment*, *Tow Motors and Gradalls* were assigned as *Tool of the trade.* The Employer did not follow the mark-up procedure used in Saskatchewan. They followed an Ontario practice. The consequence of the Employer's decision was that the zoom boom could be operated by everybody and there would be no dispatch for Operating Engineers. The Operating Engineers were the only trade not allowed to operate. Other contractors on-site had the Operating Engineers on the machines for their work, but Fox did not.

- Cowley spoke to the project manager on-site. The Employer didn't say this was not Operating Engineers' work, but rather that there wasn't enough work for one zoom boom operator. Cowley produced a series of emails about this issue. On July 11, 2014, Cowley sent an email to Steve Holroyde from Fox:

  > Hello Steve, we have been getting calls from other trades on that job site and they have informed us that this equipment is running all day. I have quite a few people out their [sic] telling me this and I'm not sure why they would lie. I'm not sure what your company has against the Operating Engineers or why you feel your company is different than any other company in our province. And why your company insists on changing the past practice all trades have followed since the beginning of time, you leave me no choice but to consult my council on this matter.

  Steve Holroyde forwarded this message to Steve Matthews at Fox, who responded on July 11, 2014:

  > These pieces of equipment are used very sporadically. We have a cart that moves bolts around, not always the gradall. This is ittemedited [sic] usage by the trade. There is not fully [sic] time or even part time employment for an operator to run this equipment for us. Please take no offense to this, I cannot keep an operator busy with this task. The job has just been set up. Possibly in the first week we started erecting they [sic] may have seen a bit more usage, I'm sure things will settle down.

- The Union filed the Grievance because it was the only remedy they had available. There was no jurisdictional dispute between unions because no other union claimed the work. They had no one to compete with.

20. In cross-examination:

- Cowley said the Operating Engineers have never had a dispute with an employer about work assignment.
- When it was suggested to him that the Plan calls for settling of disputes between the Employer and the Union, Cowley said as far as he knows, the Plan covers disputes between union and union.
- Cowley said in his view the dispute here is under the CBA and is whether the Employer can take Operating Engineer work and assign it as "tool of the trade". In Saskatchewan, "tool of the trade" is not an accepted work assignment. "Tool of the trade" is not an assignment. Cowley believes the arbitrator should answer this question.
- Cowley said that even if the zoom boom work was somewhat sporadic, the Union offered to have the crane operator or the apprentice run the zoom boom.
- Cowley said if zoom boom usage on a jobsite is casual, the Operating Engineers always claim it. They are duly ticketed to operate any piece of equipment.

- Cowley acknowledged that before the Operating Engineers were certified as bargaining agent for Fox, Fox had used “tool of the trade” on another project.

V. Parties’ Positions

Employer

21. The Employer submits:

- The CBA, and in particular Articles 10 and 11 require that jurisdictional disputes be resolved under the Plan, not the CBA.
- The only question the Union raises in this Grievance is the work assignment. That being the case, then, the CBA clearly provides the matter is to be resolved by a different panel under the jurisdiction Plan. The body under that Plan will decide whether “tool of the trade” is a proper work assignment. The process under the Plan is the best way to decide the issue because other trades will be given an opportunity to come in and give their perspective. There may also be a question about how to deal with casual work on a project. Do you have to have an Operating Engineer sit there in case work comes up?
- Jurisdictional disputes are determined by the jurisdictional Plan. Lawyers do not participate in jurisdictional disputes under the Plan. The rules are complicated and difficult to understand and arbitrators under that process are the ones who are in the best position to understand.

Union

22. The Union submits:

- The Union agrees that under the CBA the parties have agreed that jurisdictional disputes will be dealt with under the Plan. However, the Plan was established to create a tribunal and a well-established body of rulings to deal with union versus union disputes and create a process where disputing unions are able to resolve their differences without work stoppage.
- In this case, there is no dispute between two unions. The dispute is between the Union who claimed the work (the Operating Engineers) and the Employer who says there wasn’t enough work to warrant hiring an Operating Engineer.
- On a proper interpretation of Article 11.01 of the CBA, there must be a dispute between two unions before the dispute resolution body under the Plan has jurisdiction. That body is to resolve competing claims of disputing unions, not make decisions about whether a piece of equipment is being used full-time or not. The question of use of the equipment is a purely local question confined to the parties’ own work site and the CBA.

VI. Analysis

Onus

23. In an arbitration involving interpretation of a collective agreement, the onus is on the party asserting a particular interpretation. In this case the Employer has raised the jurisdictional issue and therefore bears the onus.

24. The only issue is whether the Employer has established that jurisdiction over this dispute falls under the Plan rather than the CBA.

Interpretation of the CBA and the Plan

25. The Employer says as arbitrator under the CBA, I lack jurisdiction to arbitrate the Grievance because the Union's complaint is a jurisdictional dispute and the parties have agreed in the CBA that jurisdictional disputes will be decided pursuant to the Plan.

26. The Union says the detailed set of rules and procedures under the Plan were developed to resolve jurisdictional disputes between unions rather than disputes between an employer and one union.

27. The interpretive question is essentially whether the dispute between the Operating Engineers and Fox is a "jurisdictional dispute" contemplated by the CBA and the Plan.

28. In *Service Employees International Union West and Saskatoon Regional Health Authority (Article 6 Grievance),* [2010] S.L.A.A. No. 9. Arbitrator Pelton adopted the modern method of interpretation employed by Arbitrator David Elliott in *Imperial Well Strathcona Refinery & C.E.P. Local 777*, (204), 130 L.A.C. (4th), 239 at 253:

> I use as my approach to the interpretation of collective agreements the same principle that the Supreme Court of Canada has adopted for the interpretation of legislation. I refer to this approach as the modern principle of interpretation. In my view, the modern principle of interpretation is a superior statement, as a guide to interpretation, than the rule stated in Halsbury's Laws of England to which Canadian texts refer, which relies heavily on the "intention of the parties". The modern principle of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.
>
> The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by the modern principle of interpretation which, for collective agreements, is:
>
> > In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.
>
> Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.
>
> Before applying the modern principle of interpretation to this grievance I will identify the components of the modern principle and what they encompass. The modern principle of

interpretation is a method of interpretation rather than a rule, but still encompasses the many well-recognized interpretation conventions. The modern principle directs interpreters:

1. to consider the entire context of the collective agreement
2. to read the words of a collective agreement
   - in their entire context
   - in their grammatical and ordinary meaning
3. to read the words of a collective agreement harmoniously
   - with the scheme of the agreement
   - with the object of the agreement, and
   - with the intention of the parties.

29. With these principles in mind, I will examine the language of the CBA and the Plan. The CBA applies to the Province of Saskatchewan (Article 1.02). Operating Engineers work (Article 1.03) in "*the operation, service, maintenance, assembling and dismantling of all hoisting, portable and excavating machines, boilers and engines, including trucks"* and their work includes "*driving and servicing of mobile cranes*" and "*servicing all power-driven machinery*". Because of these provisions, a question might arise under the CBA as to whether certain work is Operating Engineer work within the meaning of the CBA.

30. Article 10 of the CBA makes it clear that "*jurisdictional disputes involving workers employed under this Collective Agreement*" shall be resolved under the Plan. "Jurisdictional disputes" is not a defined term in the CBA or in the Plan, so the meaning of those words must be found in the context in which they appear in the CBA and the Plan. Article 11 is the only other relevant provision in the CBA. The Article sets out the pre-job mark-up process. It says that at the end of the mark-up meeting, the Employer will "*read over the items in dispute"* and will "*request that documentary evidence supporting the* ***disputing Union's claims***" be provided. Then the Employer is directed to make final assignments to the "***disputing trades***" in accordance with the procedural rules of the National Joint Board. The article also says that in the event a jurisdictional dispute arises, "*the* ***representative(s) of the Union(s)*** *shall first seek resolution of the dispute at the project level."*

31. The language in the CBA, while not entirely clear, suggests jurisdictional disputes arise where competing unions dispute the Employer's assignment of work during the pre-job mark-up process.

32. Turning now to the Plan, as I have said, the Plan does not specifically define "*jurisdictional disputes".* While there is no question employers will be involved in cases where unions are disputing who is entitled to certain work on a project, overall the language of the Plan suggests jurisdictional disputes arise where two or more unions dispute which union should be entitled to certain work on a project. For example:

    - Article IV of the *Procedural Rules,* requires a notice to the Plan Administrator that includes the "***Unions involved***". It speaks to the

contractor and the *"**involved unions**"* being stipulated to the Plan. It talks about whether the representatives of the unions have met or attempted to meet to resolve the matter and whether the unions involved have voluntarily agreed to mediation.

- Article IX of the *Procedural Rules* says in paragraph 1 that the Plan and the rules provide for settlement of a jurisdictional dispute on a specific job "*by agreement or understanding **between or among the National and International Unions involved**."* In paragraph 3, the ***"Unions involved"*** are directed to submit certain things for the records of the Plan. These provisions clearly suggest a jurisdictional dispute is one between or among unions.
- In the *Plan* section, Section 1 again refers to whether the Unions have met or attempted to meet to resolve the matter. Section 3 sets out what happens if the National and International Unions of the "***disputing locals***" are unable to resolve the dispute. Section 8 directs the arbitrator under the Plan to determine whether there is a previous agreement between the "***disputing unions***". Again these provisions suggest a jurisdictional dispute is one between or among unions.

33. In the Plan's section on *Agreements and Decisions of Record,* which is some 146 pages in length, there are no Agreements involving the construction industry and any union. The agreements are between and among unions. There are no decisions involving disputes between any employer and any union. All the decisions are as a result of disputes between and among unions. This also tends to suggest the Plan's drafters intended *"jurisdictional disputes"* to mean disputes between and among unions, not disputes between an employer and a union.

34. Based on the language of the CBA and the Plan, therefore, I have concluded that a "Jurisdictional Dispute" is a dispute between or among unions. The next question, then, is whether the dispute raised in the Grievance is a jurisdictional dispute or a dispute between the Employer and the Operating Engineers.

35. In support of its position that this is a jurisdictional dispute, the Employer relies on the Saskatchewan Labour Relations Board's decision in *Teamsters, Local 395 v. PCL Industrial Constructors Inc.* (LRB File 019-10, December 20, 2011). The case involved a situation where PCL, in its final jurisdictional work assignments for an expansion at the Consumers' Cooperative Refineries Ltd. plant in Regina, did not assign any work to the Teamsters union. The work claimed by the Teamsters was assigned to other trades. The Teamsters disputed the assignments. One of the questions before the Labor Relations Board on an unfair labor practice application was whether the Board should defer the dispute over the work assignments to a determination under the Plan. In discussing this question, the Board said this:

> 54 Counsel for the Union makes a somewhat circular argument. For us to assume jurisdiction over the dispute and make a determination of the unfair labour practice application, some essential facts must be determined. In essence, for us to determine if the Teamsters have been discriminated against, we must first find that they, as a fact, are entitled to the work which they claimed as being Teamsters' work. Absent that

> determination, we are unable to determine that they have been discriminated against by PCL.
>
> 55 **Additionally, to support the factual basis for a finding of an unfair labour practice, the Board would be required to review and determine if PCL was required by the PCA [Project Collective Agreement] to provide any work to the Teamsters as a matter of contract, something best left to an arbitrator pursuant to Section 25(1) of the Act.**
>
> 56 **The Board is not the best party to deal with either of these factul [sic] disputes. The Plan is far more experienced and better able to deal with jurisdictional work disputes in the construction industry. This is the Plan's only purpose. Similarly, an arbitrator under the provisions of section 25(1) would be better equipped to deal with the issues surrounding the question of whether PCL was obligated under the PCA to provide work to the Teamsters**. [emphasis added]

36. On close examination, this case actually supports the Union's position because the Board recognized that:

    - The question of whether a collective agreement requires an employer to provide certain work to a union is best left to the arbitrator under the collective agreement; and
    - Where there is a dispute between two unions with respect to entitlement to work, that issue is best left to a tribunal under the Plan.

37. Union counsel has referred me to additional authorities including:

    - *Blouin Drywall Contractors Ltd. V. CJA, Local 2468* (1973), 4 L.A.C. (2d) 254 (O'Shea); reversed on judicial review and restored on appeal at [1975] O.J. No. 31 (Ont.C.A.);
    - *C.J.A. Local 18 and Cooper Construction (Eastern) Ltd.* (1971), 23 L.A.C. 62.

38. *Blouin*, *supra,* involved a collective agreement containing a hiring hall provision with respect to carpenters. The employer decided to take advantage of some financial incentives and hired eight Canada Manpower trainees. The union objected on the basis that it had qualified unemployed members ready to do the work. The employer then entered into a purported collective agreement with the Lathers union to have the trainees become members of that union, but excluded them from recognition under the Lathers' Local 538 agreement. The Carpenters' union filed a grievance, claiming damages on behalf of its members who had not been hired. The employer challenged the arbitration board's jurisdiction arguing this was a jurisdictional dispute between the Lathers and the Carpenters and that under a provision similar to Article 11.01 of the CBA, the union should have dealt with the dispute under the Plan. The arbitration board concluded:

> 14 Having considered all the evidence and the representations of the parties and apart from any question that might arise concerning the propriety of the collective agreement between the company and Local 538, we find on the evidence before us that there was no jurisdictional dispute between Local 2486 and Local 538 with respect to the application of drywall on the Laurentian University Residence Project of the company. As indicated above, after the collective agreement dated January 4, 1973, was entered into by the company with Local 538, Local 538 made no attempt to enforce its agreement. Mr.

> Weller testified that he was aware that carpenters were working on the Laurentian Project through the period in question. However, he acknowledged that he made no attempt to enforce Local 538's jurisdictional claim to the work involved and indeed raised no issue with respect to the fact that carpenters were performing the work. **In order that there be a jurisdictional dispute within the meaning of art. 22.02 of the collective agreement in this matter, there must be a dispute between two competing trade unions.** On the evidence before us, it would appear that while the constitutional jurisdiction of the carpenters and the jurisdiction claimed by the Lathers Local 538 overlaps in that both unions have constitutional jurisdiction over the work with which we are here concerned, only Local 2486 made a claim for the work that was performed at the Laurentian University Residence Project. Apparently, Local 538 was content to collect certain moneys from the company which were forwarded to Mr. Weller in payment of union dues. Local 538 never raised any issue with the company concerning the assignment of any of the drywall work which was assigned by the company to members of Local 2486. We therefore find that there was in fact no jurisdictional dispute between Local 2486 and Local 538 with respect to the work in question within the meaning of art. 22.02 of the collective agreement in this matter. [emphasis added]

39. In the *Cooper Construction* case, *supra*, the Carpenters objected to the employer's failure to assign scaffolding work to the union. The collective agreement required the employer to abide by jurisdictional decisions already made under the jurisdictional dispute procedure and the union grieved the fact the employer had failed to follow a decision on scaffolding in the Carpenters' favor. The employer took the position this was a jurisdictional dispute that would affect the union that had done the work. In the arbitration, the union was not making a claim for the work, but rather seeking damages from the employer for breach of the collective agreement. The union argued that the employer had not complied with the provisions of the collective agreement in relation to making assignments of work and therefore the issue was the proper subject matter for a grievance. The union was not asking the arbitration board to give the work to the Carpenters and take away from some other union. The arbitration board concluded:

> 10 In our opinion, this submission by the union that the failure of the employer to comply with the procedure set out in art. 15..1 as to the assignment of work could properly form the basis of a grievance alleging a violation of the provisions of the article has merit. As stated, **the argument is that the work assignment was made without reference to the criteria set out in art. 15.1 rather than that the work was assigned to the wrong party. It would seem that non-compliance with the method to be used in making a work assignment as opposed to the work assignment itself could be a violation of the terms of this collective agreement without becoming a jurisdictional dispute in the true sense.** In effect, there are two steps to be taken by the employer, or his sub-contractor, in that, firstly, he considers the criteria referred to in art. 15.1 and, secondly, he assigns the work. **In our view, an arbitration board would not be obliged to make a work assignment or to decide which of two unions was rightly entitled to the work in question in order to find that an employer by omitting the first step, had not followed the required procedure in making an allocation of work, regardless of to whom he allocated it. The possible remedy available to an arbitration board upon making the latter finding is another question and we make no comment thereon at this time.** [emphasis added]
>
> …

> 18 In our view, a finding by a board of arbitration on the issue raised by the union would not require a decision as to which union should have been allocated the particular work in question, nor is it foreseeable that the rights of any third party would be affected. It would appear that this complaint of the union is, in fact, one dealing with an alleged violation of certain procedural requirements agreed upon by these parties; and, even though these procedural requirements are found in the articles dealing with jurisdictional disputes settlement, there is no apparent reason why this board should be deprived of jurisdiction on this question.

40. On the evidence before me, the Operating Engineers were the only union to claim the *Work Activity* of *Tow Motors and Gradalls on site (casual use).* No other union claimed the work. There was no dispute between unions to trigger the requirements of Article 11 that the Employer read over the items in dispute and request documentary evidence supporting the disputing unions' claims. At the end of the mark-up meeting there was no dispute over the Operating Engineers' claim to the work assignment.

41. The dispute is not between or among competing unions to require the matter be decided under the Plan. There were no competing unions at the mark-up meeting. This is not a jurisdictional dispute as contemplated by the CBA and the Plan. It is a dispute between Fox and the Operating Engineers about whether the CBA requires Fox to recognize the Operating Engineers , in the first instance, as the Union to whom the *Work Activity* of *Tow Motors and Gradalls* should be assigned. In other words, the Grievance is about whether there is a violation of the CBA, and in particular Article 11.03. As in the *Cooper Construction* case, *supra*, the Union's argument is that the work assignment was made without regard to the CBA, not that the work was assigned to the wrong party. To deal with the Grievance, the arbitrator will not have to make a work assignment or decide which of two unions was rightly entitled to the work. The question will be whether in making the work assignment of "tool of the trade", the Employer violated the CBA. If the Union is able to establish there was a violation of the CBA, the decision will not affect other unions because the Project is complete. The question of the appropriate remedy if the Union is successful in the Grievance will be left to the parties to argue at the ultimate hearing.

VII. Conclusion

42. In the end, then, on the evidence before me, the Employer has not met the onus to establish that its interpretation of the CBA is the correct one. The subject matter of the Grievance is not a jurisdictional dispute that should be determined under the Plan. I therefore dismiss the Employer's preliminary jurisdictional objection. The Grievance is properly before me under the CBA and should proceed under the CBA. In the Grievance, the Union will bear the onus to establish a breach of the CBA and that the remedy they request is the appropriate one.

43. At the outset of the hearing, Employer counsel said if this case is to proceed through arbitration under the CBA, the Ironworkers Union wants to be involved in the case. He also said he was not sure whether other unions might be interested

in participating. If any other union believes they have an interest in whether Fox has breached the CBA with the Operating Engineers and whether the Operating Engineers and/or its members are entitled to damages or other remedies from the Employer, then they may make application for intervenor status when the case proceeds and I will deal with any such application at that time. After hearing evidence and submissions, I will decide whether, and if so, to what extent any proposed intervenor will have status in the hearing of the grievance.

Dated this 24th day of August, 2015.

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Anne M. Wallace, Q.C.
Arbitrator