

IN THE MATTER OF THE ARBITRATION  
BETWEEN

IBEW LOCAL 984

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)

**OPINION AND ORDER**

and

)

)

Re: MTD Jurisdictional Dispute

USW LOCAL 12-369

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Case No. 11-03

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BEFORE

TERRANCE B. McGANN

ARBITRATOR

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March 8, 2012

REPRESENTATION

IBEW LOCAL 984

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## Nature of the Proceedings

This is an appeal of a decision made by a five (5)-member panel of the Jurisdictional Committee ("Hearing Committee") of the Hanford Atomic Metal Trades' Council ("HAMTC") over a jurisdictional dispute between the United Steel Workers, Local 12-369 ("USW") and the International Brotherhood of Electrical Workers, Local 984 ("IBEW). HAMTC is composed of fifteen local unions affiliated with fourteen international unions. Each of the parties agreed to resolve jurisdictional disputes under procedures adopted by HAMTC. Under those procedures, the decisions of the HAMTC jurisdictional committee are subject to appeal to the Metal Trades Department of the AFL-CIO, which provides that a neutral arbitrator or referee shall have authority to review the decisions of the Hearing Committee. (Joint Exhibit 4)

On February 1, 2011, the IBEW through its Business Manager, Mr. Terry Cherney, filed a challenge to the assignment of work under the HAMTC procedures. Mr. Cherney claimed that the work which included setup, and removal of ropes, tape, chains, signs, stanchions, posts and other boundary identifiers was incorrectly assigned to USW workers under the D&D classification. (Joint Exhibit 2) Pursuant to the established HAMTC procedures to resolve the dispute, the five member Hearing Committee was impaneled and held a hearing on March 8, 2011. (USW Exhibit 1) The Hearing Committee determined that the work in dispute belonged to members of the USW. (Joint Exhibits 2 & 3) The IBEW filed its timely appeal of the decision of the

Hearing Committee to the Metal Trades' Department, which provides authority to a neutral arbitrator to review the decision of the Hearing Committee. (Joint Exhibit 2) Initially, the parties did not contest the arbitrability of the dispute. (T. p. 7) However, the record reflects that the stipulation was later withdrawn by the IBEW based upon procedural grounds having to do with notice of the jurisdictional hearing to employer Eberline Services and Washington Closer Hanford, LLC. (T. p. 85-87) This issue will be discussed later in the award.

An appeal hearing was held in Richland, Washington on October 11, 2011, with each party having a full opportunity to present arguments, witnesses and evidence in support of their respective positions. The parties subsequently submitted briefs on December 15, 2011 in support of their positions.

#### Work in Dispute

The work in dispute involves the physical establishment and maintenance of radiological positing and boundaries of D&D facilities and areas at Washington Closer Hanford. (USW Exhibit 1) It's important to note that the work of determining the actual boundaries of the radiological zones is not in dispute. The record reflects that the USW are not claiming the work of determining the locations where the radiological postings must be placed as this is properly assigned to Radiation Control Technicians who are represented by the IBEW. (T. p. 16)

#### Standard of Review

Consistent with prior arbitration decisions under the HAMTC and Metal Trades' Department procedures, the IBEW must establish by a preponderance of the evidence that the Hearing Committee erred in awarding the work in dispute to the USW. *Heat Frost and Asbestos Workers Local 120 v. USW 12-369, MTD Case 06-08 (2008)*

#### Statement of the Issue

The issue is whether the IBEW has demonstrated by a preponderance of the evidence that the award of the Hearing Committee was erroneous.

#### Statement of Facts

The dispute arose in early 2011 when IBEW Business manager Terry Cherney learned that members of the USW's D&D Classification were assigned to perform the physical establishment and maintenance of radiological positing of certain radioactive boundaries. This included the setup, and removal of ropes, tape, chains, signs, stanchions, posts or other boundary identifiers. (Joint Exhibit 2). On February 1, 2011, Mr. Cherney sent a communication to HAMTC President David Molnaa contesting the assignment of work. (Joint Exhibit 2) On February 10, 2011 a communication was sent by HAMTC President David Molnaa to Stephanie Green, President of USW Local 12-369 and Terry Cherney, Business Manager for IBEW Local 984 notifying them that the selection for the jurisdictional panel would take place on February 14, 2011 and that the hearing would be held on March 8, 2011. (Joint Exhibit 2). Affiliates Battelle, MSA, WCH, WRPS and CHPRC were copied on the letter. (Joint Exhibit 2) A hearing was

held on March 8, 2011 before the 5 member Hearing Committee. HMTC has established the following criteria which must be applied by the Hearing Committee:

### **INSTRUCTIONS FOR JURISDICTIONAL COMMITTEE**

The procedure outlined in the Hanford Atomic Metal Trades Council By-Laws – Article IV, Section 2, Subparagraph E – provides for an orderly disposition of all disputes where only delegate members of the Council participate in the decision process, thus taking the employer out of decisions that affect the Council affiliates.

When the procedure was drafted and accepted by the Council body, there were three criteria that were to be considered by committee members and only those three. There should never be any personal preferences, political considerations or compromises set forth by these jurisdictional committees. The three criteria for jurisdictional decisions are as follows in order of importance:

1. The first item for consideration is a written HAMTC agreement on the questioned work between the parties. If such an agreement exists, you must base your decision on the agreement.

2. In the absence of a written HAMTC agreement between the parties, you must establish if there has been a material past practice in performing the questioned work under the HAMTC agreement. And, if so, award work accordingly.

3. In event there is no written agreement or an established material past practice under the HAMTC contract, such as might be the case in new work, it would then be acceptable to use outside agreements between the respective affiliates in making your decision.

These are the only criteria that should be used in making your decision. The By-Laws provide for either party to appeal this decision through the Metal Trades jurisdictional procedure.

(Joint Exhibit 3)

The Hearing Committee awarded the work in dispute to the USW based upon Criteria No. 1 and found that the IBEW and the USW entered into a written agreement in 1955 which addresses the assignment of the work in dispute. (Joint Exhibit 3).

On March 9, 2011, a communication notifying the recipients of the award of the Hearing Committee was sent by HAMTC President David Molnaa to the following recipients: Mission Support Alliance, Washington Closure Hanford, Workforce Services, Battelle and CH2M Hill Plateau Remediation Company, Local 984 and Local 12-369. (Joint Exhibit 2) On March 10, 2011, the IBEW requested that the decision of the Hearing Committee be appealed to the AFL-CIO Metal Trades Department. (Joint Exhibit 2)

#### IBEW's Position

The IBEW maintains that the performance of radiological functions including posting is properly assigned to RCT's represented by the IBEW. In support of its position, IBEW maintains that the terms of its collective bargaining agreement with Eberline Services and Washington Closure clearly reflect that the work of area posting belongs to the RCT workers. The IBEW challenges the 1955 Jurisdictional Agreement on several points including that it is in conflict with the scope of work contained in its CBA, the 1995 Agreement predates the formation of USW's D&D classification and the incorporation of the D&D 003 classification in 1995. The IBEW contends that RCT's are

trained to not only determine the actual boundaries of radioactive areas on the Hanford site but to perform the actual physical posting consistent with the terms of its CBA and the established Department of Energy Regulations.

They argue that this work has historically been performed by RCT's whose highly trained workforce perform the work safely and efficiently. The evidence established that employer preference favored the assignment of RCT's to perform the work in dispute. Finally, the IBEW challenges the arbitrability of the dispute on the basis that the employer, Eberline Service, was not provided notice of the March 8, 2011 hearing and, therefore, was denied an opportunity to provide a written statement of its position to the Hearing Committee.

#### USW Position

The USW relies almost exclusively on the decision of the Hearing Committee which awarded the work to members of the USW based upon the existence of a 1955 Jurisdictional Agreement and the established criteria which binds the Hearing Committee in making its determinations. In response to IBEW's claim that the work in dispute is contained in its CBA, the USW concede that similar language does not appear in the Appendix A job description for D&D workers. (USW Brief p. 3). The USW assert that even though the 1955 Jurisdictional Agreement lacks signatures of the parties it constitutes an admissible business record and is consistent with past recordkeeping practices.

USW contend that while the challenge to the current assignment is limited to a portion of the Hanford site, the record shows that D&D workers are trained and have performed the work throughout the Hanford site. (T.p.12)

### Analysis

The issue that must be addressed in this arbitration is very narrow. Did the IBEW demonstrate that the Hearing Committee erred in determining that the work in dispute is properly that of the USW based upon the 1955 Agreement between the IBEW and the Chemical Operators which is the predecessor to the USW? Eberline Services' Training Specialist Mr. Terry LaFreniere testified to the training received by RCT's including area posting and the prior assignments of posting work to RCT's by Bechtel, TMA, WCH and Eberline (T.p. 39) RCT's must be certified by the DOE every two (2) years. (T.p. 49) Ms. Annette Howell is employed by Eberline Services as a Senior RCT and she is also the Chief Steward for the IBEW. She testified that with the exception of large projects, RCT's perform posting. (T.p. 87)

While the witnesses for the IBEW testified at length about the extensive training received by its RCTs' and the volume of work performed by RCT's at the Hanford facilities, the Hearing Committee clearly did not take those factors in consideration in making its determination which is the subject of this appeal. In addition, while I may agree with IBEW Business Manager Terry Cherney that the performance of area posting

is more efficient with the use of RCT's rather than a composite crew of RCT's and D&D Workers, that issue, like training, is outside the scope of my review.

In addition, Eberline Services' preference to assign the work to RCT workers represented by the IBEW rather than D&D worker represented by the USW is simply not a material issue at this level of the review process. (T.p. 77)

#### Arbitrability

The IBEW challenges arbitrability of the dispute based upon what it contends is the lack of notice of hearing to the Employer Eberline Services. (T.p. 71) This, of course, constitutes an affirmative defense for which the IBEW bears the burden of proof. While Eberline's Project Manager testified that he did not remember receiving notification there is nothing in the record which sets forth how communications are received by the company or whether the communication may have been received by another representative of the company. (T.p. 71) It's clear that the company issued a rebuttal letter after the Hearing Committee made its determination. (IBEW Exhibit 7). While counsel for both parties contend that the HAMTC Bylaws provide that the employer is to receive notice of hearing and that is clearly the course of conduct previously followed by HAMTC, the Bylaws do not reflect that notice is required. (Joint Exhibit 4, Section 3(B)) The Bylaws do require the Council President to "notify by phone and verify by official letter any *participant* in a jurisdiction dispute as to the time and place for selection of the hearing committee and the time and place for the actual hearing." "I am

not convinced, as argued by the IBEW, that employers are in fact “participants” to the dispute. Article V of the labor agreement does, however, contain a requirement that the Council provide the employer with notice and an opportunity to present its written position. (Joint Exhibit 1) In any event, I agree with the USW that whether notice was provided, is irrelevant based upon the actual finding of the Hearing Committee that the 1955 Jurisdictional Agreement was controlling.

#### The 1955 Jurisdictional Agreement

The USW failed to introduce into evidence a jurisdictional agreement executed by representatives of both the IBEW and the Chemical Workers (predecessor to USW). Nonetheless, the USW maintains that USW Exhibit 2 constitutes a valid agreement which addresses the physical establishment of radiation zone boundaries. The combined testimony of David Wright (T.p. 128-151-152) and Stephanie Green provide sufficient evidence to establish that USW Exhibit 2 does accurately reflect an agreement between the parties. In addition, the January 24, 1983 letter from the President of the Chemical Workers to HAMTC President P.J. Todish confirming that its D&D Classification workers would assume the work agreed to in the 1955 affirms the 1955 agreement and that the work would continue to be performed by its D&D Classification workers. (USW Exhibit 3) Accordingly, the fact that the 1955 Jurisdictional Agreement predates the formation of the D&D classification is of no consequence.

## The Collective Bargaining Agreements

The IBEW maintains that the performance of radiological functions including posting is properly assigned to RCT's represented by the IBEW. In support of its position, the IBEW submit the 2009 collective bargaining agreement ("CBA") between HAMTC and Eberline Services and Washington Closer Hanford. The USW concede that similar language does not appear in the Appendix A job description for D&D workers. (USW Brief p. 3) The IBEW challenges the 1955 Jurisdictional Agreement on the basis that it is in direct conflict with the language contained in the CBA, and that the Agreement preceded the formation of the USW's D&D Classification in 1983, and the incorporation of the D&D 003 Classification in 1995.

The IBEW established through its Business Manger, Mr. Terry Cherney, that the collective bargaining agreements at the Hanford site are ratified by all of the affiliated local unions which comprise HAMTC rather than individual trade unions. (T. p. 107) Since the scope of work language contained in its CBA contains the area posting, it could be argued that the CBA language constitutes a written agreement between the parties sufficient to supersede the 1955 jurisdictional Agreement. In any other context this might appear to be a plausible argument. However, it is very clear from the HAMTC Bylaws and the collective bargaining agreements, the parties intended a very diminished and limited role for employers in jurisdictional disputes among the HAMTC trades. In fact, the employers appear to concede any role in determining trade

disputes and defer to the internal mechanism provided in the HAMTC bylaws and the binding determinations contained in those documents. This fact was confirmed in the testimony of USW witness Mr. David Wright whose statement was also cited in IBEW's post Hearing Brief. (T.p. 117-118; IBEW Brief VI. B) Even more poignant is the language contained in the Instructions For Jurisdictional Disputes adopted by HAMTC whose procedures state the following with respect to the employers' role, "...thus taking the employer out of decisions that affect Council affiliates." (Joint Exhibit 3) For these reasons, it is abundantly clear that that the parties did not intend that work assignment contained in CBA's would supersede jurisdictional agreements entered into directly between the trade unions.

#### Department of Energy Regulations

The IBEW contends that the Department of Energy Regulations support the assignment of work to the RCT's rather than the D&D workers. Specifically, IBEW cites CFR 835.104 which states the following:

10 CFR 835.104 requires that written procedures be developed and implemented as necessary to ensure compliance, commensurate with the radiological hazards and consistent with the education, training, and skills of the exposed individuals. . . . The level of detail provided in these procedures should be sufficient to provide assurance that the affected individuals can implement the program in a manner that will achieve and maintain regulatory compliance. 10 CFR 835.104 provides flexibility for a site- or facility-specific determination of the appropriate balance between individual education, training, skills, and specificity of the required written procedures. As an example, if responsibility for posting radiological hazard signs is assigned to radiological control technicians (RCTs) qualified in accordance with the RCS, then the written procedures may be relatively brief, based upon the detailed knowledge possessed by the RCTs. Conversely, if responsibility for posting radiological hazard signs is assigned to another

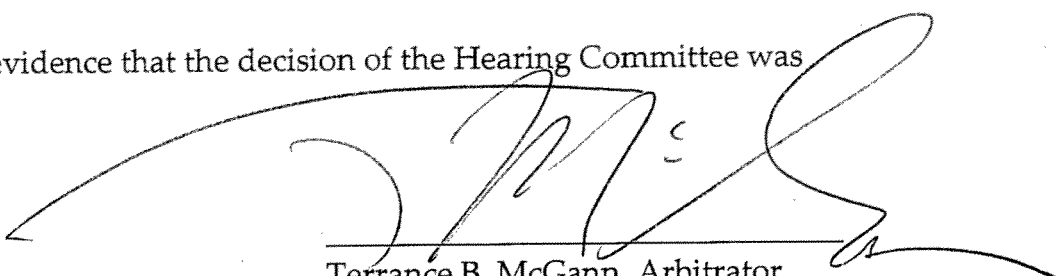
work group in the facility whose members have a less-detailed knowledge of the regulatory requirements, then more detailed procedures should be developed and implemented, based on the cognizant individuals presumably more rudimentary understanding of the specific requirements of 10 CFR 835.

(IBEW Ex. 4 at 146-47).

As argued by the USW and conceded by IBEW witness Mr. Terry LaFreniere on cross examination, the federal regulation may proscribe the training necessary to perform the work and the procedures which must be followed but nothing in the regulations require that a specific class of workers actually perform the work. As in the decision in *USW Local 12-369 and Teamsters Local 839, MTD Case 9-03 (2011)*, the D&D workers are not foreclosed from securing the training necessary to perform the work in dispute. Eberline Services' Project Manager Charles Stewart testified that since the award was issued by the Hearing Committee the work was being performed by a composite crew of RCT's and D&D workers without incident. (T.p. 84)

#### Determination

Despite the amount of time which has elapsed from 1955 to March 2011, I cannot find an intervening cause, action or event which would render the Jurisdictional Agreement unenforceable. Accordingly, I find that the IBEW have not demonstrated by a preponderance of the evidence that the decision of the Hearing Committee was erroneous.



Terrance B. McGann, Arbitrator  
March 8, 2012