

IN THE MATTER OF THE ARBITRATION)	
)	
between)	FMCS 04-01569
PRATE INSTALLATIONS, INC.)	
)	
and)	MFN GRIEVANCE
)	
CHICAGO AND NORTHEAST ILLINOIS)	
DISTRICT COUNCIL OF CARPENTERS)	

REPORT AND DECISION OF ARBITRATOR

In these proceedings, a single grievance was submitted for an Award to James P. Martin, selected by the parties and appointed by the Federal Mediation and Conciliation Service to serve as Impartial Arbitrator herein. 18 days of hearings were held in Chicago, Illinois between March 13, 2007 and February 7, 2008, at which the parties were fully heard. The following appearances were entered:

UNION:

Travis J. Ketterman, Esquire
Whitfield, McGann & Ketterman

COMPANY:

Joshua D. Holleb, Esquire
Klein, Dub & Holleb, Ltd.

Michael A. Prate

The parties waived the Panel of Arbitrators, and submitted the matter to this Arbitrator for an award.

Briefs were filed with the Arbitrator on June 9, 2008. An extension was granted to September 7, 2008 for the issuance of the Award.

ISSUE

Was the union in violation of the agreement and more particularly the Most Favored Nations provision of the 2001 RCEC agreement by subjecting Prate Installations to wage rates, contract terms or work rules inconsistent with the manner in which the agreement was enforced for all other speciality trade employers? If so, what is the remedy?

NATURE OF CASE

Contractors employing union carpenters in the Northeast Illinois, Southeast Wisconsin and northwest Indiana area were parties to labor agreements through membership in one or both of two associations, MARBA for commercial work, and RCEC for residential work. This grievance arises under the RCEC contract, which has an addendum for the sub-trades involved in insulation, shingling, siding and drywall. The grievant company, Prate Installations, Inc. is a signator to the RCEC contract, and performs work in the insulation, shingling and siding fields. After the 1998 contract, when the Specialty Trades addendum was added to the agreement, the union established the Specialty Trades Department, for the purpose of dealing with the contractors doing the specialty work.

For years prior to the 1998 agreement, all of the specialty contractors paid their employees by piecework. This was a method of pay for production, regardless of the number of hours spent by the employee in doing at work. Because of the small units of employees on each production site in the specialty trades, supervision was economically impossible, and if the companies paid by the hour, they were at the mercy of the employees' honesty. Since the companies did not consider this a practical business model, piecework was uniformly used. This allowed the companies to set a fixed price for a project, and allowed them to bid for work with an accurate labor cost. There were several problems with this method of pay for the union: by undervaluing the time necessary to do a project,

a company could, for example, require an employee to spend eight hours to do a project which the company evaluated at six, thereby grossly devaluating the employee's wage rate; and the employer could avoid making the proper payments to the Trust Funds, which payments are based upon hours worked.

In negotiations for the 1998-2001 agreement, the late Earl Oliver, then president of the union, set as a non-negotiable demand the actual implementation of hourly pay. The specialty contractors, especially those employing shinglers (hereinafter called roofers), complained and attempted to retain piecework pay. Mr. Oliver declared there were no union contracts with piecework pay, and there never would be in the future, despite the fact that for some years there had been an Overhead Door addendum which was based upon piecework. In these negotiations, Mr. Prate was a leader in challenging Mr. Oliver, basically creating a roofers subcommittee and serving as its president.

At the beginning of the negotiations, while President Oliver was expounding on his determination to never allow any piecework payment, Mr. Prate approached him with a copy of the Overhead Door addendum. President Oliver became apoplectic, shouted that the Overhead Door addendum was a mistake and would never be repeated, and left the scene. The Overhead Door addendum, contrary to his statements, remained in effect until the summer of 2008, having been renegotiated several times. Later in the negotiations, President Oliver, apparently enraged by Mr. Prate's consistent opposition to his "non-negotiable" no-piecework provision, told Mr. Prate that since he was the largest roofing contractor, he was going to make an example of him and put him out of business. The negotiations concluded in the 1998 -2001 agreement, which contained very explicitly a ban on piecework. An interim agreement, based upon the 1998 agreement, essentially continued the contract until 2005.

All of the above is background, and does not relate directly to the grievance herein.

The Trust Funds are an entity separate from the union, with the Trustees divided evenly between the RCEC and the union, but the Trust Funds Trustees from the union overlap the union officers completely. The Trust Funds receive a contractual contribution per hour worked from the employers, and can audit the employers to determine proper compliance with their obligations to the Trust Funds. It can also sue in federal court, based upon its audit, and can request the union to take strike action to enforce the employer's obligations. The practice of the Trust Funds has been for many years for an audit to be conducted, and after management has reviewed it, to meet and attempt to hash out a settlement. Since the purpose of the audit is to determine the employers liability, and the interest of the Trust Funds is to receive the proper contributions, it made sense to discuss and resolve any disagreement, rather than to strike the employer, financially harming him and making it less likely that a proper receipt of contributions could be made. Obviously, in the case of a recalcitrant employer, a strike is the ultimate weapon. Mr. Prate had a number of audits over the years and in each and every case, he was given a copy of the audit, met with the Trust Fund representatives, and resolved the matter to the satisfaction of all. After he was told by President Oliver that he was going to put him out of business, Mr. Prate had his company audited in 2001 for the period 1996 to 1998. The preliminary audit showed an indebtedness of \$1 million. Mr. Prate met with the Trust Funds/union officers and was told again by President Oliver that he was going to be put out of business. The final audit came out late in 2001, and showed a shortage of \$2.5 million. When Mr. Prate met with President Oliver, the facts were not discussed, but President Oliver told Mr. Prate that he would have a Trust Funds officer meet with him to discuss the delinquency. Mr. Prate waited for the contact, but discovered in mid-March, 2002 that he was under total strike. There was no discussion, no warning, and no settlement meeting. There was testimony at the arbitration hearing that one of Prate's employees was told he should look for another job because the union was going to shut Prate down and he would be out of work. Eventually, in the

second week of July, Prate and Mr. Prate filed a suit against the Trust Funds and the union, and a number of individuals within the organizations. There was a conference before a federal judge, both lawsuits were settled, and the strike ended. A settlement of the \$2.5 million delinquency was made for \$230,000, and an additional sum of approximately \$200,000 was paid by Prate for attorney's fees and costs. According to Mr. Prate, the strike almost put him out of business, and cost him not only permanent loss of customers, but financial loss in the millions. The settlement included a complete release by both parties for any actions taken by either prior to the settlement date of July 12, 2002.

In support of Mr. Prate's claim that the union intended to make an example for the others by putting the largest specialty contractors out of business, at the same time Prate was being struck, as the largest roofer, Reinke, the largest insulator was being struck, Zonac, the largest sider was being struck, and Presbyteria, the largest drywaller was being struck. All three besides Prate are currently out of business. Additionally, a memorandum was circulated by Mr. Rabinak, head of the Specialty Trades Department to President Oliver, recommending that the best way to enforce the contract was to put out of business all those contractors not fully complying with the agreement, and the union considered Prate, according to the testimony of the organizers visiting his sites, a scumbag and a bottom-feeder.

All of the above is background, and does not relate directly to the grievance herein.

Immediately after the strike ended, according to the testimony of Mr. Prate and not rebutted by any competent evidence, Prate paid all of its carpenter employees on an hourly basis. This decision was encouraged by the union informing him that if in any way he attempted to pay piecework, the union would immediately take appropriate steps. Mr. Prate felt that this would mean another strike, which

he felt would put him out of business. Instead of arbitrarily switching his pay method to piecework, Mr. Prate attacked instead the ability of his competitors to pay piecework, and thereby undercut his ability to successfully bid jobs. This could only be accomplished if the union enforced the ban on piecework, thereby leveling the playing field for all specialty trade contractors. He testified that he felt he could compete with the other contractors if they all paid hourly, and he could compete if they all paid piecework. What he could not do was compete with the other contractors if they paid piecework, and he was the only or almost only contractor to be obliged to pay hourly. Since the union did not seem inclined to universally enforce the hourly pay provision, Mr. Prate took it upon himself to assist the union to equalize the pay obligations of all the contractors, and thereby the competitiveness of all. Following the strike, and mirroring his procedure prior to the strike, he sent letters, faxes, and memos to Mr. Shipley, the director of the Specialty Trade Department. Something approaching 75 letters were sent, and phone calls were made until Mr. Shipley decided to stop taking phone calls from Mr. Prate. These letters, faxes and memos listed jobsites, contractors, and in some cases employees, where Mr. Prate had been informed, personally or through his employees, that piecework was being paid to the employees. After every dozen letters or so, Mr. Shipley would reply, claiming that the information given him was inadequate to take any action, because it was all non--specific. The letters were admitted into evidence, and appeared to be highly specific. Mr. Prate also had any applicant for employment fill out a form which showed how he had been paid by his prior employer. In almost every case, the answer was piecework. This information was also provided to Mr. Shipley.

Testimony was submitted that the Organizer/Business Agents visiting the company's jobsites after the strike were principally involved with harassing the employees, bad mouthing the company, and disrupting the production of the company. This was done in many ways, including carding the same employees a number of times a week and even several times in a single day. Pinching off the air hoses, turning off compressors and removing ladders from the job were all activities of which the

Business Agents were accused.

After some two years of attempting to get the union to enforce its hourly rate provisions, the company filed a grievance under the Most Favored Nations article of the agreement. The company thereby attempted to join the rest of the employers in paying piecework, so that it stood on equal footing with its competitors. Mr. Prate continued sending the union information on employers violating the agreement through the payment of piecework. There was no evidence that the union took any consistent action against any of the companies reported to it by Mr. Prate as violating the piecework restriction.

CONTENTIONS

According to the union, the union did not enter into any collective bargaining agreement that governs the residential sub-trades other than the RCEC agreements in 1998, 2001 and 2005. The Most Favored Nations provision at issue requires a collective bargaining agreement with more favorable terms as the crucial element for a violation, and Prate conceded that this was not done. Even if selective enforcement is a viable legal theory, Prate failed to prove that the union selectively enforced the collective bargaining agreement and ignored breaches by other roofing, siding and insulating contractors. The union, in fact, did properly enforce the agreement, as the evidence submitted clearly established. Prate broadly released the union from any and all liability on July 12, 2002, effectively mooted the pending dispute. On a procedural note, the parole evidence rule bars the testimony Prate presented for its claim. Excluding that evidence, Prate has failed totally to establish liability for any union action. Essentially, Prate asked the arbitrator to change the wage scale, which is beyond and outside of the arbitrator's jurisdiction. Prate also failed to exhaust its

internal remedies, which is imposed upon it in the very article it wishes to establish as being violated. Finally, the negotiation of a subsequent collective bargaining agreement effective October 1, 2005 and containing an hourly wage and benefit rate, and a ban upon piecework, terminates the period under which Prate may claim a contractual violation by the union. The grievance is totally without merit, and should be denied, and in addition, attorneys fees and costs should be assessed against Prate for processing an unmeritorious grievance in bad faith.

According to the company, it is entitled to relief under the Most Favored Nations provision. It has established that from July 12, 2002 to present, the union entered into collective bargaining agreements, tacit or otherwise, with other construction industry employers that allowed those employers to compensate its roofing and insulation employees on a piecework basis, more favorable than that required of the company, and therefore covered under the Most Favored Nations clause. From the date mentioned, the company has informed the union, specifically and in detail, how competitor companies were paying their employees on piecework, and the union failed to take any action to enforce the hourly provisions against these companies. When the company requested that the union extend these more favorable terms to the company, the union denied this request and, because the company knew from recent history that if it unilaterally implemented piecework compensation, the union would strike and picket the company, which would likely have resulted in the company's death, it chose instead to pursue its remedy through the grievance-arbitration process. Many of the union's business agents were presented as witnesses, each of whom had a substantial motivation not to testify against the union's interests. None however could produce any documentation as to what efforts were made with regard to any of

the company's piecework allegations. Those witnesses' credibility is lacking. The union produced no documentary evidence that substantiated its claims that it investigated the company's allegation of piecework. Numerous subpoenaed records from the union and the Trust Funds contained no documents that showed the union made any effort to investigate the company's many allegations over a six to seven year time period. In 1999, one company, Popko, had an audit which determined that it was paying piecework. In 2000, Popko was again audited, with a half-million dollar claim against the company based upon disguised piecework. While Prate was struck for a similar audit, Popko was not, and the audit had not been resolved as of the arbitration hearing. The company did not need to demonstrate the existence of a written bargaining agreement with more favorable terms. The company established this case by proving that the union had agreements, most likely unwritten, with at least several employers whereby the union had modified the agreement to permit those employers to compensate employees on a piecework basis, not the less favorable hourly basis required of the company. The company demonstrated that it repeatedly informed the union, orally and in writing, that it was aware that other contractors paid specific employees on a piecework basis. That the union declined to take any action to investigate and enforce the no-piecework prohibition of the agreement demonstrates the union's condonation of the practice. The only reasonable inference arising from this failure and/or refusal to stop piecework is that the union had an agreement with those employers to allow them to compensate their employees on that basis. The purpose of a Most Favored Nations provision is to remove the cost of labor from the scope of competition among competitors. While the company does not dispute that minor dereliction or occasional enforcement lapses would not ordinarily amount to a contract modification, in this case, when the union does

nothing to enforce the contracts, even after being repeatedly advised of the company practices, the union has not only condoned these practices but has effectively agreed to these more favorable terms so as to invoke the Most Favored Nations provisions of the agreement. The company did release the union from all liabilities arising before July 12, 2002. That release, however, expressly bars only claims based on action that occurred prior to July 12, 2002. This grievance is based on the union's ongoing acts occurring subsequent to that date. The release is irrelevant to the instant dispute. The company was not required to seek relief from the Labor-Management Committee; the grievance procedure is the appropriate mechanism for the company to contest the union's violation of the agreement. The company has been damaged by the union's violation of the Most Favored Nations clause with directly quantifiable damages of \$7,862,030, and non-quantifiable damages bringing the total to at least \$10 million. The grievance is meritorious, and the arbitrator should allow it, with the remedy requested, including damages of \$10 million.

APPLICABLE CONTRACT PROVISIONS

ARTICLE XVIII

SETTLEMENT OF DISPUTES

18.1 Except as provided in Sections 12.13, 13.11, 14.11, 27.1, 28.2, 33.1, 34.1, 35.1, and 36.1 of the Agreement, any dispute as to the proper interpretation of this Agreement shall be handled in the first instance by a Representative of the UNION and the EMPLOYER, and if they fail to reach a settlement within two (2) days it shall be referred to a Board of Arbitration composed of one (1) person appointed by each party, the two (2) so appointed to select a third member. In the event that the two (2) so appointed arbitrators are unable within two (2) days to agree upon the third arbitrator, they shall jointly request the Federal Mediation and Conciliation Service to furnish a panel of five (5) names from which the third member shall be selected. The decision of the Board of Arbitrators shall be handed down within two (2) days after the selection of the third member and the decision of the Board of Arbitrators shall be final and binding upon both parties.

18.2 Except as provided in Sections 12.13, 13.11, 14.11, 27.1, 28.2, 33.1, 34.1,35.1, and 36.1 of this Agreement, the Board of Arbitration shall have jurisdiction over all questions involving the interpretation and application of any Section of the Agreement. It shall not, however, be empowered to handle negotiations for a new Agreement, changes in the wage scale or jurisdictional disputes.

18.3 Each party shall Individually pay the expense of the arbitrator it appoints and the two (2) parties shall jointly share the expense of the third arbitrator. There shall be no stoppage of work during arbitration.

MISCELLANEOUS PROVISIONS

20.9 Employees covered by this Agreement shall not perform work on a piece-work basis

ARTICLE XXI

MOST FAVORED NATIONS

21.1 (a) In no event shall any EMPLOYER be required to pay higher wage rates or be subject to more unfavorable wage rates, contract terms or work rules, than those agreed to by the UNION in any Collective Bargaining Agreement with any other construction industry employer with Cook, Lake and DuPage Counties, Illinois. In no event, shall wage rates contract terms, or work rules granted any sub-trade (including sub-trades whether or not dealt with in Articles I, XXII, XXIII, XXIV and XXV) be applied to general carpentry or any other sub-trade. However, all EMPLOYERS operating within a sub-trade shall have the benefit of this provision within that sub-trade. This paragraph shall not apply to the terms and conditions of any national or international agreement, nor the terms and conditions of any contract involving shop, stair shops, in-plant, industrial, municipal, factory, millmen, component parts, maintenance agreements, CEDA and such other similar governmentally funded community programs and government agreements, nor to the terms and conditions in effect for the first one hundred and eighty (180) days of an agreement with an EMPLOYER who had not been bound to an agreement with the UNION during the prior twelve (12) month period. (Agreements lasting more than one hundred and eighty (180) days must be approved by the Labor-Management Committee established under this Article.)

(b) Notwithstanding anything to the contrary above, in the event the UNION shall establish prior to bidding or award for a particular contract, or identifiable sector or specialty work, any wage rates, contract terms or work rules that will be applicable to that contract, sector or specialty work which are more favorable to the EMPLOYER than those contained In this Agreement, then all

EMPLOYERS bidding on that project, sector or specialty work shall be entitled to the benefit of such more favorable terms. The UNION shall promptly provide the Labor-Management Committee established under this Article with written notice of the establishment of such more favorable terms. In the event that subsequent to the award of a particular contract, the UNION through the President of the District Council or his designee for good cause desires to establish more favorable wage rates, contract terms or work rules for that contract, said more favorable terms shall become effective with the concurrence of the Labor-Management Committee established under this Article.

(c) The Labor-Management Committee established under this Article shall consist of the President of the District Council and one (1) representative appointed by the Association.

(d) Notwithstanding anything to the contrary above in this Article XXI, the terms and conditions of any Amendment which results from the application of or pursuant to Article XXXI of this Agreement (or any counterpart thereof in any other Agreement with the UNION) shall not be subject to the prior sub-sections of this Article XXI except as may be specifically provided in such Amendment(s).

DISCUSSION

CREDIBILITY ISSUES

There were five groups of witnesses called to testify, and general findings of credibility can be made as to each group, and as well to individuals within the group.

OWNERS

A number of owners of the competing business were called as witnesses, some by Prate and some by the union. They were examined under oath, in front of Mr. Shipley, manager of the Specialties Trades Department, who has the authority to recommend audits. Each was asked if he paid piecework, and each denied that, stating that he always paid hourly. I do not find that they lied, but I do find that their testimony was not credible. In other forums, they might have taken the Fifth Amendment to avoid self-incrimination, but here, that was not an option. I do not fault them for that testimony, but I did not believe it, either.

CARPENTERS CALLED BY PRATE

Essentially, these witnesses testified in conformance with the documentary evidence submitted by Prate, that they were paid piecework by every employer for whom they worked. This testimony was certainly not in their personal best interests, since they were members of the Carpenters Union, and though they had the minimal protection of testifying under subpoena, by testifying as they did, they exposed themselves to retaliation. I credit their testimony highly.

UNION BUSINESS AGENTS

These witnesses certainly had an incentive to slant their testimony, and that incentive had to be taken into account in evaluating the credibility of their testimony. Interestingly, one testified to finding just what Mr. Prate alleged in the matter of piecework pay, and another testified that on every jobsite he visited, there were two groups of employees, those who acknowledged being paid piecework, and those who were liars. Overall, where their testimony was placed against the testimony of the Carpenters, such as harassment matters, I credited the Carpenters.

PRATE MANAGEMENT

In general, I found the testimony of these witnesses to be credible. Their testimony was not lock-step with that of Mr. Prate, and I found that to be more convincing than damning. Testimony identical in every point regarding matters up to six years old speaks more to through coaching than to truth.

MR. PRATE

Mr. Prate would be a very unlikely candidate for work as an adviser to a charm school, and while he is still too young, if God grants him enough years, he may well qualify as a curmudgeon. However, his record in this matter is truly impressive: years of fighting the union, at great cost and with little success, and an indomitable determination not to be walked upon. There were moments of hyperbole, a few contradictions, and an error or two, but on the whole, and almost totally, I credit the testimony of Mr. Prate to be true and honest, and thoroughly worthy of belief.

BACKGROUND

While the events of this background precede the date and the claims of the grievance, they are necessary to review in order to understand and properly rule on the issues involved in the grievance.

Commencing in 1998, when negotiations for the new contract started, there began what can only be described as a vendetta by the upper leadership of the union against Mr. Prate and his companies. Mr. Prate represented a challenge to the union leadership, and the next four years, culminating in a four-month strike, were a series of skirmishes to achieve the union leadership's ultimate goal: the destruction of Prate companies. On several occasions, President Oliver told Mr. Prate to his face that since he was the largest roofer, he was going to put him out of business and make an example of him to keep the other companies in line. A prime example of the attitude of President Oliver was the opening of the 1998 negotiations. He started by stating that there was no piecework in the union contracts, and there never would be. When Mr. Prate correctly challenged him with a copy of the Overhead Door addendum, President Oliver exploded, told Mr. Prate that the addendum was a mistake and would never be repeated, and stalked out of the meeting. The threat to destroy Prate followed.

In 2001, Prate was audited. A preliminary audit was \$1 million owed by Prate. As was typical at that time, Mr. Prate met with the union and the Trust Funds, and was again threatened with being put out of business. No resolution was reached, which was not typical. Shortly thereafter, a final audit came out showing that Prate owed 2.5 million. A further meeting resulted in President Oliver telling Prate that a Trust Funds representative would contact him. Instead, Prate was struck without warning. This action was obviously not to collect the maximum funds for the Trust Funds, but was instead an attempt to implement President Oliver's threat to put Mr. Prate out of business. There was no refusal on the part of Mr. Prate to pay the benefits deduction, and the strike without discussion was without precedent. Instead of a last resort to force a recalcitrant company to make its contributions, it was used as a bludgeon, without regard for its potential adverse effect of reducing the ultimate contribution collected. The final settlement of the strike and the audit contribution strongly suggests that the audit was a sham. A claim of \$2.5 million owed was settled for \$230,000, plus \$200,000 in attorneys fees and costs. A settlement of nine cents on the dollar after a four-month strike, without an insolvent defendant, clearly reveals the illegitimacy of the audit as a basis for collection, and reveals it for what it was, an attempt by President Oliver to destroy Prate.

. While Prate, the largest of the roofers was being struck, Reinke, the largest of the insulators was being struck, Zonac, the largest of the siders was being struck and Presbetera, the largest of the drywallers, was being struck. This further confirms what Mr. Prate testified to as to what President Oliver told him: that he was going to put out of business the leaders in each of the sub-trades, to keep the rest of the companies in line. Only Prate is still in business today.

Two other background facts have pertinence as to the union leadership's relationship with Prate. Another roofer, Popko, had an audit deficiency of approximately one half million dollars based upon disguised piecework, at approximately the same time as the Prate strike was called. No strike

occurred at Popko, and the audit was still unresolved at the time of the arbitration hearing, giving more credence to the nature of the Prate/union leadership conflict. Finally a memorandum was sent to President Oliver from Mr. Rabinak, recommending destroying companies as a desired method of solving contractual violations.

ON THE MERITS

The grievance herein arises following the settlement agreement at the end of the first 2002 strike. The settlement of that audit, lawsuit and strike included the release of all parties by all parties for anything that occurred prior to that release. Prate does not ask for any remedy for any actions of the union leadership prior to that settlement, July 12, 2002. When the 2005 negotiations concluded with an agreement effective on September, 2005, the instant grievance had been filed, and procedurally and substantively controlled the claim of Prate going forward. The violation charged was a continuing one, with the remedy requested also continuing.

Mr. Prate thought that the Hunt and Destroy activities were over after four years and a comprehensive settlement. President Oliver obviously thought otherwise. From the date of the settlement, Prate complied with the agreement, and paid all of its roofers by the hour. On the assumption that all the employers would pay on the same contractual basis, Mr. Prate prepared to move on. However, he discovered that piecework was still the name of the game among the specialty trades. He began to send incident reports to Mr. Shipley, his designated contact, by letter, fax and phone. Mr. Shipley shortly refused to take phone calls from Mr. Prate, but the letters and faxes continued. President Oliver was copied on a number of these. The letters and faxes were specific as to date time and place, company, address -- all that would be needed to investigate if that were the union's intention. It patently was not. 75 letters were admitted into evidence, but other than some oral statements by some of the business agents, there was no record of any action actually

being taken to enforce the no-piecework rule. Another classic example of union actions supporting the company's claim of the union's intention to put it out of business is Mr. Shipley's letters to Mr. Prate, in response to the dozens of letters specifying locations where the prohibited piecework was being paid. After every half-dozen or dozen letters from Mr. Prate, Mr. Shipley would respond with a letter stating that he had received nothing specific, and the union could take no action until it had more detailed information as to where the violations were occurring. These letters were absurd, considering the fact that Mr. Prate's letters were exquisitely detailed with facts: precise locations, names of employees involved, names of companies involved, and further details which would make the ability of the union, had it so chosen, to make a detailed investigation of the charge. It is not difficult to determine the audience to which these letters were truly directed. Obviously, it was not an attempt to deceive Mr. Prate, because he knew the facts. It is my belief, and I so find, that these false, and in fact lying letters were sent to build a case to defend the union's inaction when and if the matter came before an arbitrator, hearing officer or judge. That attempt was singularly ineffective.

After two years of the union failing, or refusing, to enforce the no-piecework rule, Mr. Prate found himself more and more unable to compete successfully in bidding for work paying hourly, while his competition was allowed by the union leadership to pay on piecework. All of his efforts to assist the union leadership were to no avail, harassment on the job site continued, and his only conclusion had to be that he was still selected by the union leadership for destruction. He filed the instant grievance in 2004, but continued his attempts to compel the union leadership to comply with the Most Favored Nations provision by creating what the provision calls for, a level playing field for all, either by letting him pay on piecework as was obviously done for his competitors, or requiring his competitors to pay by the hour, as the contract stated, and as he was compelled to do.

The evidence does not support Prate's claim that other contracts were negotiated between the union

and Prate's competitors. and the union maintained that there was no violation of the agreement unless the union negotiated a different and more favorable agreement, in writing. Evidence of a separate written agreement is not necessary to find for the grievant. The article in the existing agreement has been grossly violated by the union, to the detriment of the grievant, The language has no meaning unless it is enforced, because "higher wage rates" or "more unfavorable wage rates" relate to companies who are the parties to the agreement. They do not relate to each company individually, but to all of them as a group, otherwise the words 'more unfavorable' would make no sense. "Unfavorable" compared to whom? Thus the union leadership, under that article, cannot pick and choose those companies it will enforce the wage rates or work rules against, and whom it will excuse from those requirements. If it does not enforce the wage rates and rules against all, then those against whom it is enforced are being required to pay higher wage rates, and the union leadership has thereby violated the concept and the words of the Most Favored Nations article. Under these circumstances, the no-piecework provision cannot be enforced without violating the Most Favored Nations article.

That is found to be the case here. The union leadership has chosen to impose the specific contractual requirements of hourly pay upon Prate, and has effectively chosen to waive those hourly pay requirements for all, or most, of Prate's competitors. The reason for that choice has been thoroughly set out above: the intent of the union leadership to destroy Prate economically, by imposing higher wage rates upon it than upon the other companies. The grievance charging a violation of the Most Favored Nations article is allowed.

There is a second, and even a third, basis for finding the union in violation of the Most Favored Nations article. Just as constructive eviction in the face of a written lease is a well-established principle, a Collective Bargaining Agreement can be violated by action, and the evidence clearly shows it was here. The intent of the Most Favored Nations article is to equalize the wage element

for all employers. The actions of the union in this case flies in the face of that intent, and it is not a peripheral violation; in fact, it completely contradicts the intent. Instead of equal, it vindictively makes Prate unequal to all others. I find it to be the intent of the union to destroy Prate through, among other means, violating the Most Favored Nations article through selective enforcement from July 12, 2002 through the date of the Arbitration.

The third basis for allowing the grievance is based upon the union's claim that it was unable to enforce the no-piecework provision any better than it did, which is found to be essentially not at all. Even though the finding has been made that it did not make much effort to enforce the provision, except as to Prate, if the union's position is taken as true, then it has knowingly signed an agreement with which it is unable to comply. Piecework, unenforced, cannot coexist with the Most Favored Nations article. Through its inability, claimed or actual, to enforce the no-piecework provision, it has effectively removed that provision from the agreement, and its enforcement of the no-piecework provision against Prate subjects Prate to more unfavorable wage rates, thus violating the Most Favored Nations article.

For one or more of the above reasons, the union violated the agreement, and the grievant Prate is entitled to a remedy. Prate asks for two remedies: that it be allowed to pay piecework, and that it be made whole for its losses, caused by the union's actions , from July 12, 2002 on.

As to the first, the Most Favored Nations article requires equality among the signatories, and the union has alleged that it cannot enforce such equality concerning the no-piecework provision. Given that, the ruling must be that the no-piecework provision of the agreement must be suspended, until such time as the union can establish that it is able to enforce it. Effective with this award, Prate is entitled to pay on the basis of piecework, pending the establishment by the union that it is capable of universally enforcing the prohibition.

As to Prate's claim for damages, it offered in evidence a claim in the amount of \$7,862,030 for the period from July 14, 2002 to August 1, 2007, a period of five years. While not clinically perfect in its calculation, a damage figure of this type cannot achieve perfection. Given the nature of the reason for the union's actions causing this damage, it is accepted as a reasonable figure. Testimony was that the losses continued to this day, and the assumption may fairly be made that the losses were consistent over the subsequent year, which brings it roughly to the time of this award. Adding in the final year to the first five, an additional 20%, brings the total award of damages to \$9,434,436. In addition, it is appropriate in this case to award attorney's fees and costs. The union is to pay Prate's reasonable and itemized attorney's fees and costs, in an amount not to exceed \$2 million.

AWARD

That the grievance shall be and hereby is allowed; that the union violated the Most Favored Nations article when it required Prate to pay on an hourly basis instead of by piecework from July 14, 2002 to the date of this award; that Prate is to be allowed to pay by piecework until the union establishes that it can enforce the no-piecework provision uniformly; that Prate is to be made whole for its losses, from July 14, 2002 until the date of this award in the amount of \$9,434,436; that the union is to pay the reasonable and itemized attorney fees and expenses expended by Prate for the preparation and prosecution of this grievance, not to exceed \$2 million.

September 3, 2008
Chesterton, Indiana

James P. Martin
Labor Arbitrator