September 22, 2020

Neuman Thompson
301, 550 – 91 Street SW
Edmonton AB T6X 0V1
Attention: Hugh J.D. McPhail, Q.C.
Fax: (780) 488-0026

Blair Chahley Lawyers
203, 10265 107 Street
Edmonton, AB T5J 5G2
Attention: Leanne M. Chahley
Fax: (877) 835-8920

Melloy Industrial Services Inc.,
Lorneville Mechanical Contractors Ltd.,
and AECON Industrial West
c/o 301, 550 – 91 Street SW
Edmonton AB T6X 0V1**Attention:**
Hugh J.D. McPhail, Q.C.
Fax: (780) 488-0026

International Brotherhood of
Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers, Local
Lodge No. 146
15220 114 Avenue NW
Edmonton, AB T5M 2Z2
Attention: Labour Relations
Fax: (780) 451-3927

Phyllis A. Smith, Q.C.
Emery Jamieson LLP
1700, 10235 101 Street
Edmonton, AB T5J 3G1
Fax: (780) 420-6277

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501, 10808 - 99 Avenue
Edmonton, Alberta
T5K 0G5

Tel: 780-422-5926
Fax: 780-422-0970

308, 1212 - 31 Avenue NE
Calgary, Alberta
T2E 7S8

Tel: 403-297-4334
Fax: 403-297-5884

E-mail:
alrb.info@gov.ab.ca

Website:
www.alrb.gov.ab.ca

RE: An application brought by Melloy Industrial Services Inc., Lorneville Mechanical Contractors Ltd., and AECON Industrial West for review of an arbitration award affecting International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 – Board File No. AR-00022

[1] This decision addresses an application under section 145 of the *Labour Relations Code* (the "*Code*") for review of an arbitration award (the "Decision"), dated November 18, 2019: [2019] A.G.A.A. No. 43 (Lexis Nexis). The application was filed by Melloy Industrial Services Inc., Lorneville Mechanical Contractors Ltd., and AECON Industrial West (collectively the "Employers"). The Decision relates to four grievances filed by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 (the "Union") on behalf of multiple individual grievors.

[2] At issue in the grievances was whether the grievors were entitled to pay for time spent completing on-line owner site orientations under the relevant collective agreement. The matter proceeded before a single arbitrator (the "Arbitrator") who found the grievors were entitled to pay. The Employers object to this conclusion. They say the Decision is unreasonable and should be set aside. The Union asks the Board to dismiss the application.

[3] The application came to hearing before a panel of the Board (Schlesinger, Flannery, Renke) in February 2020. For the reasons that follow, we dismiss the application.

Background

[4] The four grievances at issue alleged breaches of the National Maintenance Agreement ("NMA"), an umbrella collective agreement governing the employment relationship between members of a number of trade unions and contractors. The Employers and Union are parties to the NMA. The grievors were employed by one or more of the Employers to perform maintenance work at large industrial sites in Alberta. As framed by the Arbitrator, the sole issue in the grievances was:

> 4 ... whether the Employers were required by the provisions of the NMA to pay workers who completed the owners' site orientation delivered off-site by way of an online computer module to which they were granted access after receiving a dispatch notice from the Union.

[5] The Decision begins by reviewing how the grievors were dispatched:

> 6 ... The Union's members were dispatched through the Union Hall pursuant to manpower requisition notices from the Employers. The requisition from Aecon specifically required *"online orientation to be completed and provided before arrival on site"* and a link was provided to access the orientation materials. Lorneville's requisition provided that *"site orientation is delivered on-line"* and the employees were requested to provide an email address to gain access to complete it prior to accessing the site, although *"PC Access will be provided on Onboarding day if required to complete the site orientation training"*. Melloy's requisition provided that *"Online orientations are to be completed prior to arrival at site"* and gave specific directions of how to access the orientation online.
>
> 7 The Union posts all manpower requisitions on its website and workers can bid for the jobs. The Union dispatcher then determines from the list of workers who have bid on the job who will be dispatched. Once the dispatch slips are provided to workers the contractor is provided with a dispatch list.
>
> 8 All of the dispatch slips contained requirements with respect to orientation, as well as setting out any other requirements with respect to the job, including the requirement for pre-access drug and alcohol testing and any other training and certificate requirements. The Union offers training for these other job dispatch requirements. No payment is made to workers for either the time associated with complying with the drug and alcohol pre-access testing or the other job dispatch requirements which prescribe individual job certificate requirements for workers being dispatched. [Emphasis in original.]

[6] The Arbitrator observed that the use of online testing for site-specific orientation was a relatively new development in the industry. She went on to describe the following factual context underlying the dispute:

> 9 ... Previously all orientation was done on-site after workers reported to the site but before maintenance work began. Typically, the orientation lasted one half to a full day. The site orientation consisted of two parts - an owner and a contractor orientation. The owner orientation was one provided to all trades on site working on the project and provided basic site information. The contractor orientation which followed is trade specific. Both orientation sessions focus on safety training. The same owner and contractor orientation sessions continue as

> those provided on-site, but now are delivered online. Certificates obtained as evidence of completing the required orientation for both the CNRL and the Nutrien sites were good for one year so if a contractor requisitioned manpower for those sites and the Union dispatched workers who had previously worked on one of those sites within the past year those workers would not have to repeat the orientation before attending the site.
>
> 10 This system has been greeted with somewhat mixed views by workers. Some struggle with the process and others have not had access to a computer. That problem is solved in Edmonton and Calgary as workers can come to the Union Hall located in those cities to complete the online orientations and seek assistance when necessary. The time required to complete the orientation varies. CNRL's online owner orientation takes three hours to complete. Other orientations take less time. Most complete the orientation including any testing requirements, but some do not and they are not allowed on the site.
>
> 11 The difference in the delivery mode has resulted in a difference in compensation paid for the orientation. While workers continue to be paid for all on-site orientations, each of the Employers involved in this arbitration ceased paying for owner online orientation for any trade, although they continue to pay for contractor orientation even when conducted online. It was noted that there is no consistent practice under the NMA with respect to payment to workers for the time spent to complete online owner orientations. Some contractors do pay for such orientations but the Union witness was not aware of any contractors who paid for online owner orientations in cases where the owner did not reimburse the contractor. Mr. Albright indicated that he had followed up with the contractors mentioned by the Union in the Agreed Statement of Facts as contractors who had paid for owner online orientation, and in every case the owner had reimbursed the contractor for that cost. The National Maintenance Council advises that there have been no grievances filed with respect to this issue by any other trade. Mr. Albright advised that with respect to the bargaining for the New Build agreement, a tentative agreement has been reached which would require payment for contractor online orientation but no payment would be required for owner online orientation. He confirmed that no trade has yet ratified this agreement.

[7] The Decision described in detail the parties' arguments at paragraphs 13-47. The Arbitrator then summarized the Union's key position as follows:

> 49 The Union seeks compensation for Grievors who attended online owner orientations required before they commenced maintenance work at the site of three different owners as employees of three different Employers. The Union's claim rests on its interpretation of the NMA, confirmed by past and current practice of contractors with respect to those orientations when they were conducted on-site as opposed to online.
>
> 50 The Union argues that the definition of "*work*" in Article 5.100 of the NMA includes work "*associated*" with the maintenance work described in that article, and that owner orientations, whether on-site or online is in fact "*associated work*" as it is a necessary and crucial aspect for equipping employees to work safely on the site, and is a mandatory requirement for undertaking work on the site.

> Moreover, it is work within the scope of work described in Article 4.100, being work assigned by the owner to the contractor as a necessary requirement for employers to utilize workers on the site for maintenance work. The case law supports this interpretation as the activity is a claim by the Employers on the employee's time and it is for the benefit of the Employers.
>
> 51 The Union argues that since orientation, whether owner or contractor or on-site or online, is work as defined in the NMA, it should be paid for pursuant to the wage requirements of the NMA. When those orientations were on-site only they were treated as work for the purpose of worker pay, and there is no reason why online orientations should be treated any differently. [Emphasis in original.]

[8] The NMA articles referenced in the above passages read as follows:

> 4.100 The scope of this Agreement covers all work of a maintenance nature (as defined in Article 5) assigned by the Owner to the Company and performed by the employees of the Company covered by this Agreement.
>
> 5.100 All work performed by the Company on existing equipment and machinery, including all associated work in a given plant, shall be maintenance. This shall include replacement of existing individual items of machinery and equipment with new units, including all associated work. It is understood that this concept would not include replacement of an entire process system installation in a facility in order to increase production.

[9] The Arbitrator also summarized the two key arguments raised by the Employers to counter the Union's claim:

> 52 ... First, they say that only employees are covered by the provisions of the NMA and that prior to the employees actually arriving at the work site and providing their dispatch slips they are not employed. Second, they say this is a direction from the owners and therefore it is not the Employers who are making a claim on the time of the employees but the owners. The Employers say that ultimately the requirement to attend site orientations online should be treated the same as the requirement for pre-access drug and alcohol testing and attaining job dispatch requirements. Employers do not pay, nor have they ever paid, for the time and any expenses associated with those activities.

[10] Ultimately, the Arbitrator accepted the Union's argument that the orientations at issue were work for which pay was required pursuant to the terms of the NMA.

[11] The Employers say the Decision is unreasonable. They take issue with a number of the Arbitrator's findings. Specifically, they allege the Arbitrator:

- failed to construe the terms of the NMA in a manner consistent with the established principles of contract interpretation;
- improperly relied on extrinsic evidence in construing the unambiguous terms of the NMA;
- failed to provide rational and coherent reasoning in distinguishing past jurisprudence;
- failed to consider relevant factors; and
- arrived at a conclusion that creates irreconcilable or absurd results.

Standard of Review

[12] The applicable standard of review is established by section 145(3) of the *Code*:

> *145(3) On an application under subsection (2), the Board may set aside the decision or award, remit the matters referred to it back to the arbitrator, arbitration board or other body, or to another arbitrator, arbitration board or other body, or stay the proceedings before the arbitrator, arbitration board or other body on the grounds that*
>
> *(a) a party to the arbitration was denied a fair hearing, or*
> *(b) the award is unreasonable because of a lack of intelligibility or transparency, or because it falls outside the range of possible acceptable outcomes that are defensible in respect of the facts and law.*

[13] In *UFCW Local 401 v. Sobey's West Inc.*, [2018] Alta. L.R.B.R. 282 ("*Sobeys*"), the Board held that section 143(3)(b) codifies the reasonableness standard from *Dunsmuir v. New Brunswick*, 2008 SCC 9. (The Board notes the changes to section 145(3) from Bill 32, *Restoring Balance in Alberta's Workplaces Act, 2020*, are not yet proclaimed in force.)

[14] In December 2019, the Supreme Court of Canada released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"). The parties provided submissions regarding the impact of *Vavilov* on the Board's approach to the standard of review under section 145. Both parties agreed the decision did not affect the standard to be applied. Their position has now been confirmed by the Board in *Northern Weldarc Ltd. v. International Association of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local Union No. 805*, [2020] Alta. L.R.B.R. LD-041, where the Board noted there was "nothing in *Vavilov* that requires the Board to revise its current approach to the review of arbitration decisions under section 145(3)": see paragraph 33.

Decision

[15] We address each of the Employers' grounds for review below.

Ground #1: The Arbitrator failed to construe the terms of the NMA in a manner consistent with the established principles of contract interpretation.

[16] This ground relates to the Arbitrator's conclusion that the orientations at issue were "work" contemplated under the NMA. The Employers assert the Arbitrator failed to consider the express wording of article 5.100. In particular, the Employers point to this wording: "All work performed by the Company on existing equipment and machinery, including all associated work in a given plant, shall be maintenance." The Employers emphasize the orientations at issue took place outside the plant and before workers arrived at the site. They claim the Arbitrator failed to reconcile the words "in a given plant" with the facts at issue and, as a result, the Decision lacks a rational chain of analysis required to support its reasonableness.

[17] The Employers also say the Arbitrator failed to interpret the terms of the NMA in their entire context. They argue other provisions in the collective agreement (*e.g.*, travel and subsistence) demonstrate that where workers are intended to be paid for activities outside of assigned work or work hours, there is express language to this effect.

[18] The Arbitrator explained why she viewed the orientations as "work" under the NMA. She clearly understood the issue before her was whether or not the grievors' performance of online owner orientations before arriving at the site was work for which they were entitled to pay under the NMA. The Decision makes specific reference to article 5.100, the provision now at the centre of the Employer's argument. The Arbitrator summarized the Union's argument at paragraphs 29 and 50 regarding its proposed interpretation of articles 4.100 and 5.100. At paragraph 46, the Arbitrator described the Employer's position regarding the interpretation of those articles as follows:

> In this case, the NMA is not silent about what work is. Articles 4.100 and 5.100 imply that "work" is only maintenance work assigned by the contractor.

[19] In concluding the orientations at issue were "work" as defined under the NMA, the Arbitrator engaged in the following analysis:

> 54 ... Case law provided by the Union supports the view of a broader definition of work than simply performing the job for which the worker was employed. This is particularly so with the admitted safety priority imposed on every participant in the workforce by reason of the increasingly demanding obligations in occupational health and safety statutes and regulations. Closely related to and explicitly required by that legislation In, for example, s. 37(1)(g) of the *Occupational Health and Safety Act* is the requirement for training and safety orientation. Such activities fit within the definition of "*associated work*". The Shorter Oxford English Dictionary defines "*associate*" as "*combine for a common purpose*". The common purpose of orientations being "*associated*" with "*maintenance work*" is to ensure worker safety and efficiency on the site which is for the benefit of owners and employers. It is intended, as argued by the Union, to give them the tools to do the maintenance work they were hired to perform.
>
> 55 Consequently, the Employer has not seriously disputed that the site orientations are "work" as defined under the NMA. [Emphasis in original.]

[20] Later in the Decision, at paragraph 57, in the context of distinguishing the jurisprudence relied on by the Employers (discussed in more detail below), the Arbitrator made the following additional comment that speaks to how she viewed the orientations at issue: "The '*work*' that is being required to complete site orientations is work that is an essential part of the maintenance work to be performed on site." [Emphasis in original.]

[21] In short, the Arbitrator did not adopt the narrow interpretation the Employers seek in relation to article 5.100. She viewed the orientations as integral to the work in the plant and part of the job on the site. It is evident from the passages above that the Arbitrator found the orientations at issue fit within the words "associated work in a given plant" under article 5.100. There is nothing unreasonable about this finding. It is tied to the wording of the provision, its purpose, and the particular context at issue. There is a line of analysis within the given reasons that reasonably leads from the evidence to the conclusion: see *Vavilov*, at paragraph 102.

[22] Given the Arbitrator's conclusion that the orientations at issue were "work" under article 5.100 of the NMA, there is no basis to question the Decision's lack of reference to other NMA articles contemplating payment for certain activities undertaken outside of assigned work or work hours.

Ground #2: The Arbitrator improperly relied on extrinsic evidence.

[23] The Employers maintain the Arbitrator, contrary to established principles of contractual interpretation, relied on extrinsic evidence to interpret the collective agreement in circumstances where the collective agreement contained no ambiguity. In particular, the Employers take issue with the Arbitrator's consideration of evidence relating to the practice of employers paying for on-site contractor and owner orientations and the practice of employers paying for online contractor orientations.

[24] The most notable reference to such practices in the Decision appears immediately prior to the Arbitrator's consideration of whether the orientations at issue amounted to work under the NMA, when she noted:

> 53 In considering this matter I start with certain undisputed facts. Employees have consistently been paid by employer contractors for all of the time associated with attendance at on-site orientations without regard to whether it was an owner or contractor orientation. Further, since the recent introduction of online orientations, the Employers who have utilized online orientation for their contractor site orientation have paid employees for the time involved in completing those orientations. Since it is a reasonable inference that it is unlikely that contractors will pay employees for work they are not obliged to under the NMA, it appears that these Employers consider that orientation is work as it is defined under the NMA.
>
> 54 In reaching that conclusion, I am of the view that they have reached the correct conclusion. ... [The Arbitrator then sets out her interpretation of the NMA referenced under Ground #1, above.]

[25] Additional references to employer payment practices for orientations are found in paragraphs 57 and 64 of the Decision (quoted below).

[26] Later in the Decision, the Arbitrator expressly referred to the interpretive principle relating to extrinsic evidence, saying:

> 65 I have therefore concluded that the time expended by workers completing the site orientations online, whether they are owner or contractor orientations is work for which pay is required pursuant to the terms of the NMA. The grievances are therefore allowed.
>
> 66 In reaching this conclusion I have not considered the Union's argument that the lack of pay was a reflection of lack of negotiations for that pay with owners. There was no evidence provided as to the negotiating skills or otherwise of the Employers, nor the basis upon which contracts with owners were concluded, nor is any of that relevant to the determination. I have also not given any weight to the practice of other contractors and trades involving payment for owner online site orientations. I agree with the Employers' submission that the practice is inconsistent, and with the Union's submission that there is insufficient

> evidence of the reasons why there have been no grievances from the other trades. But in any event evidence of past practice is not admissible for the purpose of interpreting a contract if the contract is unambiguous. I am of the opinion that there is no ambiguity in the NMA which requires resort to extrinsic evidence. I am aware that I have referred to past practice with respect to what occurs with on-site orientations, but that was not for the purpose of interpreting the NMA, but for the purpose of confirming that the interpretation of the NMA which I have concluded is the proper interpretation is one that has been consistently applied by contractors.

[27] Despite the Arbitrator's statement that she did not rely on the extrinsic evidence to interpret the NMA, the Employers ask us to find she did. They claim the extrinsic evidence figured so prominently and pervasively in the Arbitrator's analysis, we must conclude it coloured the Arbitrator's interpretation of the collective agreement. In addition, the Employers dispute the accuracy of the Arbitrator's findings in relation to the extrinsic evidence.

[28] The impugned passages identified by the Employers suggest the evidence at issue was used: to set the background to the grievances; as a way of confirming the Arbitrator's interpretation of "work" under the NMA; and as one element in the factual matrix for considering case law tied to whether the grievors were entitled to pay for the work. The evidence was not used to interpret the wording of the collective agreement. Accordingly, there has been no improper use of extrinsic evidence that could form the basis for an argument aimed at undermining the Decision's reasonableness.

[29] The Employers also challenge the accuracy of the findings the Arbitrator made in relation to the extrinsic evidence. In particular, they say the evidence showed there was no consistent practice regarding payment for owner online orientations and, therefore, there was no basis to conclude employer practices supported the interpretation adopted. The Arbitrator specifically acknowledged there was no consistent practice regarding payment for online owner orientations: see paragraphs 11 and 66 of the Decision. The Arbitrator drew an inference from the evidence relating to payment practices for on-site orientations and online contractor orientations – not owner online orientations. There is nothing unreasonable about the inference drawn or the other findings made by the Arbitrator regarding the evidence of payment practices. In any event, given the limited purposes for which the extrinsic evidence was used, the concerns raised by the Employers do not undermine the reasonableness of the Decision.

[30] This ground for review is dismissed.

Ground #3: The Arbitrator failed to provide rational and coherent reasoning in distinguishing past jurisprudence.

[31] After finding the orientations at issue were "work" as defined by the NMA, the Arbitrator went on to address the two key arguments raised by the Employers: (1) the owner online orientations are not work the Employers have to pay for under the NMA because, at the time the orientation is performed, the workers were not employees; and (2) if the grievors were employees, the work was not a demand by the Employers on the employees' time. This third ground for review relates to the first of these arguments.

[32] In rejecting the Employers' argument, the Arbitrator reviewed and distinguished two decisions relied on by the Employers: *P.C.L. Industrial Constructors Inc. v. International*

Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146, [2007] A.G.A.A. No. 65 ("*P.C.L.*"); and *Lockerbie and Hole Co. v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 488*, [2005] A.G.A.A. No. 93 ("*Lockerbie*").

[33] The Decision set out the following reasons for distinguishing the two cases:

> 57 In the *PCL* case, Arbitrator Jones rejected a claim by a grievor that the conditions imposed upon him with respect to a failed pre-access drug and alcohol test violated the collective agreement, because the conditions were imposed in a pre-employment situation. Leaving aside the obvious distinguishing feature of the case that the Union was challenging the conditions imposed with respect to a failed drug test, Arbitrator Jones made an observation which is relevant to these grievances. At page 19 he stated:
>
> > A longer analysis is required if one accepts the view that the collective agreement can have some application to at least some pre-employment contexts, particularly in light of the Employer's agreement to the use the Union's hiring hall.
>
> and went on to refer to Arbitrator Sims' analysis in *Muskeg River*. In the case before me, a longer analysis is required, and that longer analysis requires consideration of what work is being requested and why circumstances are distinguishable from the circumstances in *PCL*. The *"work"* that is being required to complete site orientations is work that is an essential part of the maintenance work to be performed on site. It is listed as a requirement on the manpower requisitions from the Employers and in the dispatch slips issued by the Union. But more importantly, it is not related to the individual job preparedness but to the collective preparedness of employees for the site at which the work is to be performed. Further, this allegedly pre-employment context includes the fact that Employers do pay for contractor site orientations conducted online. In the result, I conclude that the requirements for individuals to have undergone successful pre-access drug and alcohol testing and possess particular training before they become employees entitled to the benefit of the NMA is not relevant to the issue of whether they are entitled to payment as employees for completion of owners online orientation prior to attending at the site.
>
> 58 In *Lockerbie and Hole*, Arbitrator Jones rejected a claim by a grievor for compensation, when he was delayed a week in being allowed onto the worksite because of a delay in the provision of satisfactory pre-access drug and alcohol test results, on the basis that he was not an employee entitled to the protection of the collective agreement. Leaving aside the obvious distinguishing feature of *Lockerbie* from the matter before me, that the grievor was seeking compensation for work he did not do, this case again involved pre-access drug and alcohol testing, which is a requirement to ensure individual preparedness before employment can be undertaken. It is also to be noted that in the *Lockerbie* case, the collective agreement being considered by Arbitrator Jones contained a specific clause which precluded employment of any worker by the Employer until clearance was given by the Union or a dispatch slip from the Union is presented. The wording of that clause was relied upon by Arbitrator Jones in paragraph 45 of his decision. There does not appear to be any similar provision in this

> agreement although I acknowledge that all of the dispatch slips stipulated that the workers were to bring a *"dispatch slip to sign on"*.
>
> 59 In the result, I am satisfied that in this case the broad principle expressed by Arbitrator Jones in PCL is qualified (as he also contemplated could occur) by the context in which the work for which payment was sought. As the Union has noted that while the location of site orientation has changed, the purpose and requirement for it has not changed. Consequently, for the purpose of determining eligibility for payment for this work, the workers are employees entitled to the protection of the NMA. The manpower requisitions and dispatch slips make orientations mandatory, and the dispatch slips provide information to access online training. Accessing online training permits the workers to complete an employment obligation imposed by the Employers. In such circumstances those workers are entitled to the protection of the NMA. [Emphasis in original.]

[34] The Employers disagree with this reasoning, maintaining there is no fair or reasoned basis to distinguish the past jurisprudence. They claim the Decision lacks the intelligibility and transparency required to meet the reasonableness standard.

[35] A number of specific errors are alleged. They are largely premised on the Employers' position the orientations at issue are not "work" under the NMA. The Employers' arguments are also firmly rooted in their view that the online owner orientations cannot be distinguished from requirements for individuals to have passed pre-access drug and alcohol testing and possess certain training before they become employees. The Employers object to the Arbitrator's reliance on the wording of dispatch slips and manpower requisitions, noting the requirement for drug and alcohol testing and specified training are also listed on those documents.

[36] We have above rejected the Employers' argument that the orientations at issue were not work under the NMA. The Arbitrator's finding on this point significantly undermines the force of the Employers' arguments under this ground. It makes the context at issue before the Arbitrator significantly different from cases involving drug and alcohol testing. The Arbitrator viewed the orientations at issue as an integral part of the work at the site. The finding about the work at issue being part of collective preparedness as opposed to individual preparedness flowed logically from the Arbitrator's findings about the central role these orientations play in the overall work done.

[37] In short, the Arbitrator expressly considered and rejected the Employers' argument, providing logical reasons for doing so. We find no basis to intervene with the Decision under this ground for review.

Ground #4: The Arbitrator failed to consider relevant factors.

[38] Under this ground, the Employers contest the Arbitrator's rejection of their second key argument – that the orientations at issue were an owner-imposed requirement, for the benefit of the owner, rather than an employer-imposed requirement for the benefit of the employer. In so doing, the Arbitrator reasoned as follows:

> 62 I am not persuaded by that argument. Article 4.100 defines the scope of the agreement as including all maintenance work assigned by the owner to the Employers. Article 5.100 defines maintenance work as including all associated work and I have earlier concluded that "associated work" for the purpose of this

> agreement includes site orientation. As a practical reality with respect to online site owner orientations, the owners have assigned that work to the Employer to get done. The Employers get that work done by requiring site orientations as part of their manpower requisitions, and that is included in the job requirements in the dispatch slips. It is the Employers, albeit at the direction of the owners who are imposing this requirement on workers who have no employment relationship with the owners. It is not an activity undertaken on a voluntary basis such as those activities discussed in the Employers' cases, but a mandatory requirement placed on employees when accepting a dispatch slip. In the context it is a demand by the Employers on the employees' time and they are entitled to payment.
>
> 63 Based upon arbitral precedent that is sufficient to establish a requirement for payment under the NMA. But I am also satisfied that the Employers benefit in at least in two aspects. First, notwithstanding the submissions of the Employers, the multitude of obligations that the Employers have under the *Occupational, Health and Safety Act* and *Safety Code* (which are considerably more extensive than the obligations on owners), on the evidence, are at least in some part the subject of the owner site orientations. To that extent the Employers receive some benefit. However, the most important benefit to Employers is that it allows them access to the projects. While individual workers must engage in the time to complete the online owner orientations, it the collective work of their employees in doing so which allows the Employers to access the site to carry out their contracts with the owners. To deny that the online orientations are a benefit to the Employers ignores the reality of the situation. There is another benefit. It reduces the expense of having workers on site because some, albeit a small portion, of the work is actually done in the workers' home locations.
>
> 64 I would finally note that employees were paid for that portion of the time spent on owner orientations which were conducted on site. Clearly the Employers were not treating that work as being at the direction of the owner to avoid responsibility for paying for it.
>
> 65 I have therefore concluded that the time expended by workers completing the site orientations online, whether they are owner or contractor orientations is work for which pay is required pursuant to the terms of the NMA. The grievances are therefore allowed.

[39] The Employers disagree with the Arbitrator's reasoning. They again take issue with the finding that the orientations are "work" under the NMA. They also contend the online orientations at issue are no different a requirement than pre-access drug and alcohol testing or other training in the sense that they are all requirements of the owners that employers pass on to individuals. In addition, the Employers say the Arbitrator failed to consider evidence that, once completed, the owner orientation is good for a period of time. Therefore, one employer could end up paying for an owner orientation that might benefit another employer if a worker later went to work for that other employer on the same site. The Employers say this consideration is relevant to the issue of whether employers benefit from owner orientations and it shows the orientations relate to individual (as opposed to collective) preparedness.

[40] Again, much of the Employers' position under this ground is premised on their disagreement with the Arbitrator's finding that the orientations were work under the NMA, a finding we have above concluded is unassailable on review and one that significantly changes

the context for evaluating this issue. It is clear the Arbitrator viewed the requirement to complete site orientations as being a fundamentally different demand than the one relating to drug and alcohol testing and other training.

[41] The Arbitrator referred to the evidence indicating orientations were valid for one year and the prospect some workers might not have to complete the orientation: see paragraph 9. It is apparent from the Decision that the Arbitrator did not view this as determinative of the issues before her.

[42] We find nothing unreasonable about the Arbitrator's evaluation of the evidence or her treatment of the Employers' argument on this point.

Ground #5: The Decision creates irreconcilable or absurd results.

[43] The Employers take issue with what they maintain is the outcome of the Decision. In particular, at paragraph 93 of their written submissions, they say:

> In no other context will you encounter this scenario that an individual is clothed with the status of "employee" while performing *only one* of many pre-conditions of employment, even though that person may never start at their job (if he or she fails to meet all of the pre-conditions) or complete the hiring process. [Emphasis in original.]

[44] In particular, the Employers take exception to the following passage in the Decision, saying it highlights the irreconcilable results produced by the Decision and supports the view the Decision is unreasonable:

> 60 I recognize in reaching this conclusion that there is a complication which may at some future date have to be addressed which is what to do with the person who becomes disentitled to work on the site because of a failure to meet the individual qualifications necessary for employment for maintenance work after they have completed the online orientation. I do not propose to address that issue as that issue is not before me. As I understand the issue, all of the Grievors did report to work and none were disqualified after completing the online orientations from employment with the Employers. Therefore, it is not necessary for me to deal with a hypothetical issue, the frequency of which was a matter of speculation.

[45] There is nothing unreasonable about the Arbitrator's reluctance to speculate about what the outcome would have been if different facts had been engaged. The Arbitrator addressed the facts at issue before her and came to a reasoned conclusion. This ground of review is dismissed.

Conclusion

[46] For the reasons set out above, the Employers' application for review is dismissed.

Nancy E. Schlesinger
Vice-Chair