ONTARIO LABOUR RELATIONS BOARD

To: Keyes, Joe
Fax: 905-671-8212
Subject: Amended Decision - February 11, 2020 - Case No: 2807-18-G, 0904-17-G, 0903-17-G

Please see attached document(s) with reference to the case(s) noted above.

Vous trouverez ci-joint le(s) document(s) au sujet du/des dossier(s) mentionné(s) ci-dessus.

Ontario

ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: **0903-17-G**
Construction Grievance

United Brotherhood of Carpenters and Joiners of America, Local 1946, Applicant v **Hayman Construction Inc.**, Responding Party v Labourers' International Union of North America, Local 1059, Intervenor

OLRB Case No: **0904-17-G**
Construction Grievance

United Brotherhood of Carpenters and Joiners of America, Local 1946, Applicant v **Toyota Motor Manufacturing Canada Inc.**, Responding Party v Labourers' International Union of North America, Local 1059, and Construction Labour Relations Association of Ontario, Intervenors

OLRB Case No: **2807-18-G**
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COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

It has come to the Board's attention, there is a typographical error in todays previously released decision. Attached is an amended decision, dated February 11, 2020.

DATED: February 11, 2020

Catherine Gilbert
Registrar

Website: www.olrb.gov.on.ca

Address all communication to:

The Registrar
Ontario Labour Relations Board
505 University Avenue, 2nd Floor
Toronto, Ontario M5G 2P1
Tel: 416-326-7500
Toll-free: 1-877-339-3335
Fax: 416-326-7531

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United Brotherhood of Carpenters and Joiners of America, Local 1946, Applicant v **Hayman Construction Inc.**, Responding Party v Labourers' International Union of North America, Local 1059, and Toyota Motor Manufacturing Canada, Inc., Intervenors

BEFORE: Jack J. Slaughter, Vice-Chair

APPEARANCES: Doug Wray and Dustin Hare appearing for the United Brotherhood of Carpenters and Joiners of America, Local 1946; Brian MacDonald and Peter Hayman appearing for Hayman Construction Inc.; Lorne Richmond and Nathan Moniz appearing for the Labourers' International Union of North America, Local 1059; Scott Williams and Rene Mulder appearing for Toyota Motor Manufacturing Canada Inc.; No one appearing for the Construction Labour Relations Association of Ontario

DECISION OF THE BOARD: February 11, 2020

1. These are three referrals of grievance to arbitration (construction industry) under section 133 of the *Labour Relations Act, 1995*, S.O. 1995 c.1, as amended ("the Act").

2. The applicant in each case is United Brotherhood of Carpenters and Joiners of America, Local 1946 ("the Carpenters"). The responding parties include Hayman Construction Inc. ("Hayman") and Toyota Motor Manufacturing Canada Inc. ("Toyota").

3. In each file, an intervention has been filed by Labourers' International Union of North America, Local 1059 ("the Labourers"). Construction Labour Relations Association of Ontario ("CLARO") has intervened in Board File No. 0904-17-G only.

4. The panel conducted a hearing in these matters on December 6, 2019.

5. After discussions with the panel and amongst themselves, the parties reached agreement on the procedure to be followed for litigating the outstanding issues in these files. That agreement was accepted by the panel.

6. Having regard to that agreement, Board File No. 0904-17-G is hereby withdrawn at the request of the Carpenters with leave of the Board.

7. Having further regard to that agreement, the Board adopted the following litigation protocol for the remaining two files:

- The first issue to be determined is whether it would be appropriate in all the circumstances of this case to award damages to the Carpenters.

- Until that determination is made, the Board will not deal with the enforceability of the Project Agreement or the status of the Labourers to intervene.

- On the basis of the foregoing, the Labourers will not participate in the argument of the first issue, without prejudice to their other positions.

- The Board can rely on all the materials filed in Board File No. 1271-17-JD.

- Before any other issue is litigated, the Board will issue its decision on whether it would award damages to the Carpenters in all the circumstances of this case.

- For the purposes of litigating the first issue, it will be assumed that the Board has the jurisdiction to decide it.

8. The parties elected to litigate the first issue solely on the written materials and legal authorities placed before the Board. Argument on this issue was completed on December 6, 2019. The Labourers did not participate in the argument pursuant to the litigation protocol set out above. After hearing the Carpenters' submissions, Toyota elected not to participate in the argument of this issue either. Therefore, the Board will determine the first issue solely with reference to the materials before it, and the submissions of the Carpenters and Hayman.

9. In addition to the materials contained in Board File No. 1271-17-JD and certain other documentary materials referred to below as necessary, counsel for Hayman relied on the following authorities: *Sayers & Associates Limited*, [1994] O.L.R.D. No. 3212 (August 29, 1994*); Robertson Yates Corporation Limited*, [1995] OLRB Rep. February 158; *Ellis-Don Ltd.*, [1997] OLRB Rep. March/April 202; *The Roberts Group Inc.*, [2004] OLRB Rep. September/October 972; *Bondfield Construction Co. Ltd.*, 2007 CanLII 16237 (ON LRB) (May 8, 2007); *Bétons Préfabriqués du Lac Inc.*, 2011 CarswellOnt 14578 (December 23, 2011); *B.G. High Voltage Systems Limited* (2012), 217 CLRBR (2d) 209 (Ont.); *Limen Group Ltd.*, [2012] OLRB Rep. May/June 498 ("*Limen #1*"); *Limen Group Ltd.*, 2014 CarswellOnt 7903 (June 5, 2014) ("*Limen #2*"); *Board of Governors of Exhibition Place*, [2016] OLRB Rep. September/October 736. Counsel for the Carpenters added the following decisions to the mix: *Findlay-Jones Insulation Limited*, [1999] OLRB Rep. January/February 34; *Avery Construction Limited*, [2012] OLRB Rep. November/December 943 ("*Avery #1*"); *Avery Construction Limited*, 2013 CanLII 56611 (ON LRB) (August 30, 2013) ("*Avery #2*").

What This Case Is About

10. The two remaining grievances both pertain to work performed by Hayman at the Toyota West Plastics Plant located at Woodstock, Ontario (the "Project"). All work at the Project was performed under a Project Agreement (the "PA") concluded under section 163.1 of the Act.

11. Toyota is the "proponent" of the PA, and is not bound by any collective agreement as a result thereof, pursuant to subsection 163.1 (17) of the Act. Under the terms of both subsection 163.1(14) of the Act and the PA, on the Project, Hayman is bound to the terms of the Provincial Industrial Commercial and Institutional Sector ("ICI") Construction Collective Agreements of both the Labourers and the Carpenters. Outside the confines of the Project, Hayman is not bound to any collective agreement with the Carpenters. However, outside the confines of the Project, Hayman is bound to two collective agreements with the Labourers: the Labourers Provincial ICI Agreement, and the collective agreement between the Formwork Council of Ontario and the Ontario Formwork Association (the "Formwork Agreement"). The Formwork Agreement is an "all employee" collective agreement whereby Hayman employs members of the Labourers not only to do the work of construction labourers, but also to do the work of other trades such as carpenters and iron workers.

12. A mark-up meeting was held at the Project for the purpose of assigning work to the various building trades. Both the Labourers and the Carpenters claimed the performance of what the Carpenters call "the carpentry portion of concrete formwork". Hayman awarded this work to the Labourers, and performed it with members of the Labourers under the terms of the Formwork Agreement. That has been Hayman's consistent practice since 2010, when Hayman first became bound by the Formwork Agreement. That practice developed after the bargaining rights of the Carpenters were terminated for Hayman's carpenters earlier in 2010. Prior to that Hayman assigned the work disputed herein to members of the Carpenters working under the Carpenters' Provincial ICI Agreement.

13. The Carpenters grieved the work assignment by Hayman to the Labourers under the Formwork Agreement in the two remaining grievances at issue here. Both grievances were adjourned pending the outcome of a jurisdictional dispute.

14. This panel conducted a consultation into the jurisdictional dispute. After considering all the relevant factors, the documentary materials and the submissions of the parties, the Board determined that the following work should have been assigned to members of the Carpenters (the Board's decision is reported at *Hayman Construction Inc.* 2018 CanLII 114586 (ON LRB) (November 26, 2018):

(a) concrete forming;

(b) concrete stripping;

(c) installation of tarping and hoarding connected to demolition;

(d) the setting of anchor bolts;

(e) the installation of foundation insulation; and

(f) site trailer set up.

15. Hayman and the Labourers sought reconsideration of the Board's decision. The Board denied the reconsideration request in a decision reported at *Hayman Construction Inc.*, 2019 CanLII 35625 (ON LRB) (April 12, 2019).

16. Hayman and the Labourers now accept the correctness of the Board's jurisdictional dispute decision. However, they say that Hayman's decision to assign the work to the Labourers under the Formwork Agreement was a reasonable one, and that accordingly this is not an appropriate case for damages under the Board's jurisprudence. The Carpenters disagree. The Carpenters claim that Hayman acted unreasonably and that this is a case where damages are warranted. Hence, another battle is joined in the long-running labour relations war between the Carpenters and the Labourers.

OTHER RELEVANT FACTS

17. The mark-up meeting for the Project was held on June 12, 2017. Prior to that meeting, on or about June 8, 2017, the Carpenters put Hayman on notice that the Carpenters would be claiming "the carpentry portion of concrete forming" under the Carpenters ICI Agreement. On June 9, 2017, the Labourers put Hayman on notice they would seek "the assignment of all formwork".

18. The mark-up meeting was held as scheduled. Both the Carpenters and the Labourers made the claims they said they would.

19. Hayman made its final assignments of work on June 23, 2017. Hayman assigned all the formwork to the Labourers, and subsequently performed it with members of the Labourers under the Formwork Agreement. Hayman assigned other carpentry work to the Carpenters. That work was the installation of doors and hardware, and wood blocking/rough carpentry. This work was performed by members of the Carpenters working for a carpentry subcontractor, McKay-Cocker, under the terms of the Carpenters ICI Agreement.

Brief Summary of Legal Argument

20. Hayman and the Carpenters did not seriously disagree on the test the Board should apply in exercising its discretion whether to award damages in grievances where a jurisdictional dispute determination has been made. Indeed, they rely on almost all the same cases. The Board will elaborate on the test below, but generally speaking, the test is one of reasonableness on the part of the Employer in making the work assignment it did.

21. For their part, the Carpenters emphasize that this is the first time an employer attempted to use a collective agreement other than a Provincial ICI Agreement on a construction project where work was being performed pursuant to a Project Agreement concluded under section 163.1 of the Act. The Carpenters also point to the significant margins of area and employer practice the Board found they enjoyed over the Labourers in the jurisdictional dispute decision. They also submit that Hayman made minimal efforts to "get the assignment right". All of these factors taken together amount to Hayman acting unreasonably in the view of the Carpenters.

22. Hayman of course disagrees. Hayman submits that it was faced with claims from two competing unions for the carpentry portion of concrete formwork – a classic jurisdictional dispute scenario. Hayman was going to be grieved by one union or the other. Hayman elected to assign the disputed work to the Labourers under the Formwork Agreement as the Labourers suggested Hayman should do, and as Hayman had done "consistently since 2010 on all its projects". While Hayman now concedes that its decision was wrong, nevertheless Hayman asserts it acted reasonably based upon all the facts and arguments it had before it at the time.

ANALYSIS AND DECISION

23. The Board finds that its analysis in this matter should start from first principles.

24. This case involves two grievances filed under the Carpenters Provincial ICI Agreement. A collective agreement is a contract. This panel described how the Board analyzes and interprets collective agreements in *Bruce Power LP*, [2004] OLRB Rep. May/June 479 at paragraph 14:

> 14 The Board is thus required to analyze and interpret the language of the collective agreement. A collective agreement is a contract. As described in *Canadian Labour Arbitration Third Edition* (D.J.M. Brown and D.M. Beatty, Aurora: Canada Law Book, 2003) at p. 4-42, an arbitration tribunal's task in interpreting a collective agreement is no different than that faced by other adjudicators in applying statutes, private contracts and other authoritative directives. The general principle for interpreting contracts is that the tribunal should "search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract": *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Ins. Co.,* (1979), 112 D.L.R. (3d) 49 (S.C.C.) at p. 58; see also *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57. *Hamilton and District Sheet Metal Contractors Inc.*, [1981] OLRB Rep. June 672, *The Corporation of The City of Sault Ste. Marie*, [1994] OLRB Rep. April 496. The contract should be construed as a whole, giving effect to all of its terms, so long as this does not result in an absurdity: *Holt v. Corporation of The City Of Thunder Bay*, (2003) 65 O.R. (3d) 257 (C.A.) at p. 263. *Belleville Police Services Board* (2000), 91 L.A.C. (4th) 99 (Goodfellow). The contract must also be interpreted with a view to the labour relations considerations involved, and in particular, the practical realities of the construction industry: *Provincial International Cranes Inc.*, [1998] OLRB Rep. Nov./Dec. 1004.

25. The approach taken in *Bruce Power, supra*, has been consistently followed in subsequent cases: *Hydro One Inc.*, 2011 CanLII 35854 (ON LRB) (June 17, 2011); *Hydro One Inc.*, 2013 CanLII 36158 (ON LRB) (June 17, 2013); *Modern Niagara Toronto Inc.*, 2018 CanLII 44801 (ON LRB) (May 14, 2018).

26. Hence, general principles of contract law apply to the instant case. However, those principles are subject to both the labour relations considerations involved, and the practical realities of the construction industry.

27. Damages are but one of many remedies that can be ordered by a court or tribunal when a contract, including a collective agreement, is violated. Other types of remedies include rectification, rescission, specific performance (particularly reinstatement in a labour relations context), declarations and orders.

28. In this case, the Board is sitting both as the Board under the Act and as an arbitrator under the Carpenters ICI Collective Agreement. As such, the Board has the power to interpret and apply any sections of the Act it finds are relevant: *R. v. Ontario Labour Relations Board ex parte Genaire Ltd.*, [1958] O.R. 637 (H.C.), affirmed (1958), 18 D.L.R. (2d) 588 (Ont. C.A.); *Gata General Contractors Ltd.*, 2010 CanLII 46856 (ON LRB) (August 16, 2010).

29. Furthermore, it has long been the case in Canada that arbitrators and arbitration boards have been granted and have exercised a wide-ranging remedial jurisdiction. This proposition can be traced back as far as the decision of then Professor Bora Laskin (later Chief Justice of the Supreme Court of Canada) in *Polymer Ltd.* (1959), 10 L.A.C. 51 where he found an arbitrator's remedial authority can arise either expressly or by implication from the terms of the applicable collective agreement. Later on, the Ontario Divisional Court decided that an arbitrator had the jurisdiction to make an order in the nature of a mandatory injunction in *Re Samuel Cooper and Co. Ltd. And International Ladies Garment Workers' Union*, [1973] 3 O.R. 841. The Supreme Court of Canada confirmed the trend in the above-noted jurisprudence in *Heustis v. New Brunswick Electric Power Commission*, [1979] 2. S.C.R. 768, wherein it stated "there is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers". The Supreme Court of Canada confirmed the *Heustis, supra*, approach in *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455 and *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727.

30. Arbitrators can issue a broad range of other remedies, including: interest (*Beckett Elevator Company Limited*, [1983] OLRB Rep. September 1391); in-kind orders (*Regional Municipality of Peel Public Works*, 2017 CanLII 66352 (ON LA) (Sheehan)); cease and desist orders (*Newrest*, 2018 CanLII 76447 (ON LA) (Newman)); and compliance orders (*Polax Tailoring Ltd.*, [1972] O.L.A.A. No.9 (Arthurs)).

31. What remedy is appropriate will of course vary with the particular circumstances of the case and the labour relations context, including, in this case, the particular features of the construction industry.

32. With those principles in mind, the Board turns to consider its jurisprudence on the appropriateness of granting damages in grievances where there has been a jurisdictional dispute determination.

33. The first case cited by the parties, and arguably still the leading case, is *Sayers, supra*. In that case, the Board explained the nature of competing work jurisdiction claims in the construction industry, and formulated a fairly narrow test for the granting of damages in the following passage:

> 12 Conflicting claims to work jurisdiction are a fact of life for employers in the unionized construction industry, particularly for employers like Sayers and Associates, Stark and English and Mould who are bound, together with the competing trade unions, to provincial agreements and who employ their members. Contractors make work assignment decisions in a variety of situations, such as when they are bidding for work; when pre-job mark-up meetings are held for the purpose of informing the trade unions (and considering their responses) about whose members will perform particular packages of work on a project; and, during the execution of jobs when one trade union perceives that "its work" is being done by members of another trade union.
>
> 13 When a conflict arises between trade unions about an employer's assignment of particular work, the employer does not have the luxury of unlimited time in which to consider the relative merits of the competing claims before making the assignment. Therefore, when employers in circumstances such as were present here make their best decision, but on challenge under section 93 of the Act are found to have made the "wrong" assignment, the appropriate remedy is a direction to "correct" the assignment; in other words, direct the employer to assign the work to the members of the trade union which the Board found to have the better claim to the work.
>
> 14 That has been the Board's usual remedy in section 93 applications whenever it has concluded that an employer has assigned work to members of one trade union, trade or craft when it should have assigned it to members of another trade union, trade or craft. When that happens to an employer in circumstances like those present with these applications, where the employer considered the relevant factors and made a reasonable assignment (albeit one found by this Board to be incorrect), the employer should not then be subject to damages for lost wages because its incorrect assignment has put it in apparent breach of hiring hall, sub-contracting, or other work protection provisions of a collective agreement to which the employer is bound. That

would result in the employer having to pay twice for the same work because of a contest between two trade unions over which one's members should do the work, and in a context where the assignment was reasonably made and the work in question was covered by both collective agreements.

15 The Board recognizes fully that paying twice for the same work is the natural consequence befalling the employer who attempts to circumvent its collective agreement obligations by hiring outside the hiring hall provisions or subcontracting contrary to the requirements of the agreement and is found in breach of the collective agreement. Such provisions are there to prevent employers from avoiding their obligations to pay the wages, benefits and other terms of a collective agreement. Therefore, when an employer knowingly or carelessly breaches those protections and, as a result, members of the union lose wages or opportunities to earn wages, damages in the form of compensation for the losses are appropriate even though the damages represent a second payment for the work done in breach of the collective agreement.

16 Those are materially different circumstances than where an employer has rationally considered the relative merits of competing claims for the disputed work, decided that it should be assigned to the members of one disputing union instead of another one, and then later is found by a tribunal, like the Board, which adjudicates such disputes to have made the wrong assignment. In the latter circumstances, it would not be in the long term labour relations and economic interests of construction industry employers, trade unions and their members to require employers to pay twice for work performed during incorrect assignments.

17 The Board is not overlooking the fact that members of the trade union to whom the work should have been assigned, and who were available to do the work, have lost an opportunity to earn wages as a result of the incorrect assignment. It well may seem something of a hollow victory for the "winning" union and its members to be told that the work should have been assigned to them, and then not be redressed for lost wages. However, the successful union and its members do benefit from the precedent setting nature of the award respecting future assignments by that employer of the same kind of work in the same Board area. It also has precedential value respecting other employers when assigning the same work in circumstances which are materially similar.

> 18 One of the major problems for construction industry unions during the decade or more prior to the recent amendments to section 93 of the Act and the Board's Rules of Procedure applicable to work assignment disputes has been the substantial length of time it has usually taken to hear and decide an application. It was rare, if ever, that an application was decided before the disputed work was completed. Therefore, when a union succeeded in having a work assignment changed in favour of its members, they did not get to do the work on the project where the dispute had arisen. This situation has been improved substantially because of the expedited procedures currently available under the Act and the Board's Rules of Procedure applicable to work assignment complaints. The Board is responding quickly in resolving work jurisdiction disputes brought under that section. This means that parties to timely applications can expect normally to get a resolution to a dispute while the work is still being performed. Therefore, if the Board alters an assignment, there will be work for the beneficiaries of the assignment to perform. Therefore, when the Board decides to correct an employer's assignment, a Board direction that the employer forthwith make the correct assignment is the appropriate way to remedy the "incorrect" assignment. Conversely, it would be an inappropriate remedy and not in the best interests of labour relations in the construction industry to award damages under a grievance which alleges that the employer's "incorrect" assignment had resulted in breaches of the collective agreement of the "winning" trade union.
>
> 19 That is not to say, however, that there could be no circumstances in which damages in the form of compensation for lost wages and/or relief in the form of cease and desist and other declarations would be appropriate remedies where an employer makes an incorrect assignment. Such remedies might well be appropriate where an employer acts arbitrarily in making an assignment, or disregards established area practice, and/or ignores or fails to properly consider other commonly accepted criteria for making work assignments, and is found to have breached a collective agreement because of the incorrect assignment.

34. In *Robertson Yates, supra*, the Board confirmed the reasoning in *Sayers, supra* and stated pithily:

> 28 Damages should be restricted to those circumstances in which the Board concludes that a contractor/employer did not act reasonably, not those circumstances in which an employer reasonably was wrong.

35. The decision in *Ellis-Don, supra*, continued the same approach and gave its own spin as follows:

> The view expressed in these decisions is that unless the assignment is unreasonable in some fashion (for example, because it is made in clear violation of a Board ruling, or made *mala fide*, or contrary to the established practice in an industry or where there was no opportunity or procedure for the union to make a claim for the work), there will be no damages.

36. In *Findlay-Jones, supra*, the Board considered whether to inquire into a jurisdictional dispute in circumstances where it was argued that the parties were stipulated to a private settlement mechanism, known as the "Canadian Plan for Settlement of Disputes in the Construction Industry". The Board's discussion of when damages are the appropriate remedy is instructive:

> 30 Mr. Benson also said that the Plan operates to prevent costly work stoppages, and that it does not award damages. The *Labour Relations Act, 1995,* the public law which governs all labour relations of all construction industry parties in Ontario, also prohibits work stoppages while a collective agreement is in effect. Indeed, the Board (currently) acts even more quickly than the Plan does in response to allegations that an unlawful strike or lock-out has been threatened or is taking place, and under section 99 (the jurisdictional dispute complaint provision) of the Act, the Board can make any interim order it considers appropriate in a jurisdictional dispute proceeding. Further, the Board's general approach is not to award damages in jurisdictional dispute complaints either. However, the Board does not consider a blanket prohibition against damages to be appropriate. The Board retains the discretion to award damages. This can act as a deterrent to the few employers who might otherwise ignore a clear and well established jurisdictional separation between trades, and recognizes that there may be circumstances, however rare, in which damages are an appropriate remedy.

37. The Board's decision in *Bétons Préfabriqués du Lac, supra*, simply continues the prevailing mode of analysis:

> 6 Although the Labourers acknowledge that the Board rarely permits a union to claim damages for an incorrect assignment of work (see *Robertson Yates Corporation Limited*, [1995] CanLII 10050 (ON LRB)) it relies on

> authority where the Board has found that an employer acted improperly, unreasonably or contrary to a previous Board determination as to work assignment. (see *The Roberts Group Inc.*, [2004] CanLII 35978 (ON LRB), *Bondfield Construction Co. Ltd.*, [2007] CanLII 16237 (ON LRB), *Sayers & Associates Limited*, [1994] O.L.R.D. No. 3212). The Labourers say that BPDL knowingly or careless or in bad faith breached its requirements under the collective agreement with the Labourers.

38. In *Roberts, supra*, the Board whittled the exception to the general rule of "no damages where there is a jurisdictional dispute" to "one narrow exception": where the employer makes an "unreasonable" decision.

39. As noted above, neither Hayman nor the Carpenters objects to the Board's general approach. There is good reason for this. The Board's approach is solidly grounded in the realities of the construction industry for the reasons articulated above in the lengthy passage from *Sayers, supra*. Construction contractors often have scant time to make decisions about assigning work between unions who both have substantive reasons for asserting their respective work jurisdictions. Contractors should not be punished by "paying twice" where they are making rational business decisions in good faith. However, they do not have absolute immunity. Where a contractor fails to act in good faith, or deliberately acts contrary to a prior Board decision, prior agreement or clearly established practice, then damages may follow.

40. The Board now turns to the facts of the instant case.

41. Here, there was no failure to heed a prior Board decision as there was in *Bondfield, supra*. Nor was there a failure to follow a previous settlement with the applicant union, as in *Exhibition Place, supra*. Nor is this a dispute involving multiple locals of the same international union as in *B.G. High Voltage, supra*.

42. Instead, at its core, this is a classic jurisdictional dispute between two competing trade unions. The Carpenters made a claim for the work in dispute in a written communication sent to Hayman on or about June 8, 2017. In that communication, the Carpenters asserted the legal basis for their claim. The very next day the Labourers made a claim for the very same work. Similarly, the Labourers asserted a legal basis for their claim. Then a mark-up meeting was held where the various trades made their jurisdictional claims.

43. Following the mark-up meeting, Hayman made its work assignments. With respect to the work in dispute, Hayman noted the competing jurisdictional claims of the Carpenters and the Labourers, but assigned the work in dispute to the Labourers. Hayman assigned other work to the Carpenters, which was subcontracted to McKay-Cocker, and performed under the Carpenters' ICI Agreement.

44. In making the assignment of the work in dispute, Hayman considered its past practice since 2010, the practice of other contractors in performing the work in dispute under the Formwork Agreement, and economy and efficiency.

45. In its jurisdictional dispute decision in Board File No. 1271-17-JD, the Board found that Hayman's work assignment was incorrect. The primary basis for that finding was the Board's determination that the use of the Formwork Agreement was not permitted under the PA. This determination led to the Board in turn finding that area and employer practice strongly favoured the Carpenters. Hayman and the Labourers now accept the correctness of the Board's decision.

46. However, Hayman argues that its initial decision to assign the work in dispute to the Labourers was reasonable, although it was wrong.

47. The Board agrees. Hayman was faced with claims from two competing unions on a project governed by a PA concluded pursuant to section 163.1 of the Act. There has only been one other jurisdictional dispute under a section 163.1 project agreement decided by the Board: *Industrial Trade Solutions*, [2014] OLRB Rep. May/June 485. That case did not consider all the issues arising herein, and in particular did not address whether the use of the Formwork Agreement was permitted on a section 163.1 project. Accordingly, this is a case of first instance. Hayman had to make a difficult decision in virtually uncharted territory. In these circumstances, Hayman decided to award the work in dispute to the Labourers. In doing so, Hayman was acting on what it believed was its own applicable employer practice, and applicable area practice.

48. The Carpenters argue, nevertheless, that Hayman was acting unreasonably and cite the following excerpt from the Board's reconsideration decision:

> 34. Finally, as noted above, this case involves the first attempt by any party to use a collective agreement other than a Provincial ICI Agreement on a section 163.1 project. There is a good reason for that. The Ontario legislature was quite clear in specifying that Provincial ICI Agreements apply

> on each section 163.1 project, regardless of what collective agreements a party may be bound to outside the parameters of the section 163.1 project. The purpose of the section is to promote ICI construction in Ontario by means of a clear and well-understood set of terms and conditions of employment that apply on such projects. The goal is to encourage construction by creating a level playing field with stable and clearly defined wages and working conditions. To allow a different collective agreement onto a section 163.1 project would be disruptive to this scheme and defeat the intent of the legislature. This legislative initiative has parallels with the very effective model that has operated since the mid 1970s on projects undertaken by Ontario Hydro and its successors in the electrical power systems sector. There, as here, the trade unions and employers must leave their collective agreements that are not the EPSCA Agreements or Provincial ICI Agreements respectively "at the door". The Provincial Collective Agreements of the designated trades on section 163.1 projects are then put on an equal footing as in *Industrial Trade Solutions, supra,* and in the instant case.

49. The Board stands by what it said in the paragraph set out above. Hayman was wrong. Hayman incorrectly tried to use a collective agreement other than a Provincial ICI Agreement on a section 163.1 project. However, the fact that Hayman was wrong does not mean its work assignment was unreasonable. Hayman did not have a precedential decision to guide it. Even if one were to characterize Hayman's argument as weak (a characterization with which the panel would not agree on the facts of this case), there is a difference between a weak or unlikely argument and a position which has no reasonable basis: *2373512 Ontario Corporation o/a RRCR Contracting* (2019), 34 CLRBR (3d) 282 (Ont.), reconsideration denied (2019) 34 CLRBR (3d) 292 (Ont.). Herein Hayman considered the claims of the two competing unions, held a mark-up meeting, weighed the claims and awarded the work in dispute to the Labourers. The award, while wrong, had a rational basis. It was not made arbitrarily. It was not implausible. Nor was it unreasonable. Nor was it made "to cut the Carpenters out of the project" as Carpenters' counsel suggested. Hayman awarded other work to the Carpenters thus cutting the legs from under the Carpenters' *mala fides* agreement.

50. In short, while Hayman's conduct was wrong, it was not so unreasonable or so implausible such as to make this a case where damages are appropriate. Disputes between the Carpenters and Labourers over concrete formwork are hardly novel, as they can be traced back as far as the Board's decision a half-century ago in *Fraser-Brace Engineering Company, Limited*, [1969] OLRB Rep. January 1087.

51. On the other hand, this decision has precedential value. Should Hayman or any other contractor in the future attempt to use the Formwork Agreement on a section 163.1 project, this decision may well serve as a springboard to a claim for damages: *Bondfield, supra*.

52. At the end of the day, the facts of this matter are such that it does not constitute one of those "rare" cases falling within the "narrow exception" to the general rule that damages do not flow from a jurisdictional dispute determination.

53. For all the foregoing reasons, the Board finds that damages are not an appropriate remedy herein.

54. Should the Carpenters wish to have this case re-listed for hearing, the Board directs the Carpenters to so advise the Board within 10 business days of the date of this decision, and should in that correspondence identify the purpose for the hearing.

55. This panel is seized.

"Jack J. Slaughter"
for the Board

APPENDIX A

CaleyWray, Labour/Employment Lawyers
65 Queen Street W
Suite 1600
Toronto ON M5H 2M5
Attention: Douglas J. Wray
Counsel
Tel: 416-775-4673
Fax: 416-366-3293
Email: wrayd@caleywray.com; lask@caleywray.com

United Brotherhood of Carpenters and Joiners of America, Local 1946
3800 Highbury Avenue S
London ON N6N 1P3
Attention: James Hueston
Business Representative
Tel: 519-649-1200
Fax: 519-649-1208
Email: james@local1946.ca

United Brotherhood of Carpenters and Joiners of America, Local 1946
3800 Highbury Avenue S
London ON N6N 1P3
Attention: John Moszynski
Senior General Counsel
Tel: 416-749-7440
Fax: 905-652-5930
Email: jmoszynski@thecarpentersunion.ca

Filion Wakely Thorup Angeletti LLP
620 A Richmond Street
2nd Floor
London ON N6A 5J9
Attention: Brian P. MacDonald
Counsel
Tel: 519-433-7270
Fax: 519-433-4453
Email: bmacdonald@filion.on.ca; cclackett@filion.on.ca

Hayman Construction Inc.
636 Wellington Street
London ON N6A 3R9
Attention: Peter Hayman
Tel: 519-433-3966
Fax: 519-433-8351
Email: phayman@haymanconstruction.com

Goldblatt Partners LLP
Attention: L. A. Richmond, Counsel
Tel: 416-979-6407
Fax: 416-591-7333
Email: lrichmond@goldblattpartners.com; sgreco@goldblattpartners.com

Labourers' International Union of North America, Local 1059
635 Wilton Grove Road
London ON N6N 1N7
Attention: L. Donohue
Tel: 519-455-8083
Fax: 519-455-0712
Email: ldonohue@liuna1059.ca

Labourers' International Union of North America, Local 1059
635 Wilton Grove Road
London ON N6N 1N7
Attention: B. MacKinnon
Tel: 519-455-8083
Fax: 519-455-0712
Email: bmackinnon@liuna1059.ca

Labourers' International Union of North America, Local 1059
635 Wilton Grove Road
London ON N6N 1N7
Attention: Mr. Brandon MacKinnon
Business Representative
Tel: 519-455-8230 Ext 241
Fax: 519-455-0712
Email: bmackinnon@liuna1059.ca

Carpenters' Employer Bargaining Agencyc/o: Construction Labour Relations Association of Ontario
6299 Airport Road
Suite 703
Mississauga ON L4V 1R8
Attention: Joe Keyes
General Manager
Tel: 905-671-0888
Fax: 905-671-8212

Carpenters' Employee Bargaining Agencyc/o: United Brotherhood of Carpenters and Joiners of America
222 Rowntree Dairy Road
Woodbridge ON L4L 9T2
Attention: Tony Iannuzzi
Executive Secretary-Treasurer
Tel: 905-652-4140
Fax: 905-652-4139

United Brotherhood of Carpenters and Joiners of America, Local 1946
3800 Highbury Avenue S
London ON N6N 1P3
Attention: John Moszynski
Senior General Counsel
Tel: 416-749-7440
Fax: 905-652-5930
Email: jmoszynski@the carpentersunion.ca

Hicks Morley Hamilton Stewart Storie LLP
77 King Street W
39th Floor
Toronto ON M5K 1K8
Attention: Scott T. Williams
Counsel
Tel: 416-864-7325
Fax: 416-362-9680
Email: scott-williams@hicksmorley.com; nina-polyakova@hicksmorley.com

Toyota Motor Manufacturing Canada Inc.
1055 Fountain Street N
P.O. Box 5002
Cambridge ON N3H 2K2
Attention: Rene Mulder
Construction Manager
Tel: 519-653-1111 Ext 3469
Fax: 519-653-9638
Email: rene.mulder@toyota.com

Mathews, Dinsdale & Clark LLP
155 Wellington Street W
RBC Centre, Suite 3600
Toronto ON M5V 3H1
Attention: Stephen A. McArthur
Tel: 416-869-2501
Fax: 416-862-8247
Email: smcarthur@mathewsdinsdale.com

Mathews, Dinsdale & Clark LLP
155 Wellington Street W
RBC Centre, Suite 3600
Toronto ON M5V 3H1
Attention: Sarah E. Smith
Tel: 647-777-8287
Fax: 416-862-8247
Email: ssmith@mathewsdinsdale.com; dtiller@mathewsdinsdale.com

Construction Labour Relations Association of Ontario
6299 Airport Road
Suite 703
Mississauga ON L4V 1N3
Attention: Joe Keyes
General Manager
Tel: 905-671-0888
Fax: 905-671-8212
Email: jkeyes@clrao.ca

CaleyWray, Labour/Employment Lawyers
65 Queen Street W
Suite 1600
Toronto ON M5H 2M5
Attention: Douglas Wray
Tel: 416-775-4673
Fax: 416-366-3293
Email: wrayd@caleywray.com; lask@caleywray.com

Carpenters' District Council of Ontario, United Brotherhood of Carpenters and joiners of America
222 Rowntree Dairy Road
Woodbridge ON L4L 9T2
Attention: John Moszynski
Sr. General Counsel
Tel: 416-749-7440
Fax: 905-652-5930
Email: jmoszynski@the carpentersunion.ca; lpittari@thecarpentersunion.ca

United Brotherhood of Carpenters and Joiners of America, Local 1946
3800 Highbury Avenue S
London ON N6N 1P3
Attention: Dustin Hare
Business Representative
Tel: 519-649-1200
Fax: 519-649-1208

United Brotherhood of Carpenters and Joiners of America, Local 1946
3800 Highbury Avenue S
London ON N6N 1P3
Attention: James Hueston
Local Coordinator
Tel: 519-649-1200
Fax: 519-649-1208
Email: jhueston@thecarpentersunion.ca

Filion Wakely Thorup Angeletti LLP
620 A Richmond Street, 2nd Floor
London ON N6A 5J9
Attention: Brian P. MacDonald
Tel: 519-435-6002; Fax: 519-433-4453
Email: brianm@filion.on.ca

Hicks Morley Hamilton Stewart Storie LLP
77 King Street W, 39th Floor
Toronto ON M5K 1K8
Attention: Scott Williams, Counsel
Tel: 416-864-7325
Fax: 416-362-9680
Email: scott-williams@hicksmorley.com; josephine-distefano@hicksmorley.com

Toyota Motor Manufacturing Canada, Inc.
1055 Fountain Street N, P.O. Box 5002
Cambridge ON N3H 2K2
Attention: Rene Mulder
Construction Manager
Tel: 519-653-1111 Ext 3469
Fax: 519-653-9638
Email: rene.mulder@toyota.com

Goldblatt Partners LLP
20 Dundas Street W, Suite 1100
Toronto ON M5G 2G8
Attention: Lorne Richmond
Tel: 416-977-6070
Fax: 416-591-7333
Email: sgreco@goldblattpartners.com; lrichmond@goldblattpartners.com

Carpenters' Employee Bargaining Agencyc/o: UBCJA
222 Rowntree Dairy Road
Woodbridge ON L4L 9T2
Attention: Tony Iannuzzi
Executive Secretary- Treasurer
Tel: 905-652-4140; Fax: 905-652-4139
Email: tiannuzzi@thecarpentersunion.ca

Carpenters' Employer Bargaining Agencyc/o: CLRAO
6299 Airport Road, Suite 703
Mississauga ON L4V 1N3
Attention: Tony Fanelli
Executive Director
Tel: 905-671-0888; Fax: 905-671-8212
Email: tfanelli@clrao.ca