Rules, Policy and Practice

The *Jurisdictional Assignment Plan of the BC Construction Industry* (the "JAplan" or just "the plan") has many rules. There are rules for contractors, rules for unions, rules for the Umpire, and rules for the J.A.P. Appeal Board (the "Appeal Board"). It can all be a bit intimidating.

Most of the plan's rules are found in the "*Procedural Rules of the Jurisdictional Assignment Plan*" (the "Procedural Rules"). There are, however, a few in the "*Memorandum of Understanding Establishing the Jurisdictional Assignment Plan*" (the "Memorandum"). And one is most important.

Here and there, the plan is less than clear. Wording is in places confusing, almost misleading. But the plan, as it operates in practice, is simple and straightforward. The Umpire has set policy and adopted procedures that make it that way. What is lacking, at least until now, is a document that sets out that policy and practice. Too much of it is in the minds of people that have left the industry or, like the Umpire, are about to. Or it lies buried in the Umpire's small mountain of annual reports and decisions. That is not a lot of help to anyone that is new to the plan.[1]

This is an attempt at pulling everything together, so that the plan is made much easier to understand. There are the rules just as they are written. But rules are rearranged so that seemingly disparate parts of the plan are read together, as they should be. Now and then rules are explained. Policy and practice is placed alongside the rules and there are references to particular decisions. By itself, especially on first reading, the plan can be a bit overwhelming. But don't worry. The plan, in practice, is just as I have said, simple and straightforward.

Objects and Definitions

At the outset of the Procedural Rules, Article II, "*Objects*", is a statement of goals and objectives.[2] Many more of the plan's purposes are found in the

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[1] Available from the Umpire is a DVD containing all decisions in the period 1978 to and including 2010, nearly a thousand rulings in all. It also contains the plan itself, appeal rulings, and other useful documents like the application form that unions are to use when applying for work assignment decisions.

[2] Article II
OBJECTS

The parties to this Agreement dedicate their efforts to improving the construction industry by providing machinery for the handling of disputes over work assignments without strikes or work stoppages, thus stabilizing employment in the industry and at the same time increasing both its efficiency and capacity to furnish construction services to the public at reasonable cost.

- To provide a qualified and competent service to both Contractors and Unions within the Province of British Columbia to facilitate resolving jurisdictional disputes at the source.
- To provide ways and means to expeditiously process jurisdictional disputes and enable the parties to fulfil their responsibilities as required herein.
- To prevent jurisdictional disputes from arising on projects.
- To eliminate unnecessary delay and expense.

plan's Memorandum. All are important. They provide the Umpire and the Appeal Board with guidance and general direction.

For a detailed analysis of the purposes and objectives of the plan, read "*The Plan and Its Purposes*". It is available from the Umpire.

Article III of the Procedural Rules, "*Definitions*", contains a number of definitions that are vital to understanding the plan.[3] It is, for example, absolutely essential that one understands the difference between a *"job decision"* and a *"Decision of Record"*, the latter being so very much more important because they apply to all trades, not just those disputing work on a particular project.

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Article III
DEFINITIONS

In this Agreement:

"**Agreement between Unions**" – There are three types of Agreements: Agreements of Record, Attested Agreements and Non-Attested Agreements. These Agreements are not binding on other crafts not signatory to the Agreements and, insofar as the Impartial Jurisdictional Disputes Board is concerned, they do not affect the claims or rights of work jurisdiction of Unions not parties to the Agreement.

"**Agreements of Record**" – are those Agreements between Building Trades Unions which have been recorded with the Impartial Jurisdictional Disputes Board and are binding on the signatory Unions. These are the only Agreements contained in the "Green Book".

"**Attested Agreements**" – are those Agreements signed by the General Presidents of two International Unions and attested to by the Impartial Jurisdictional Disputes Board. These Agreements have the same standing as an Agreement of Record.

"**Chairman**" – means Chairman of the Impartial Jurisdictional Disputes Board.

"**Decision of Umpire**" – means the decision of work assignment made by the Umpire.

"**Decisions of Record**" – Decisions of Record are those which appear in the publication commonly referred to as the "Green Book" published and approved by the Building and Construction Trades Department, AFL-CIO, (current issue), and are international or national in scope. They are applicable to all trades even though a dispute which resulted in a Decision of Record may originally have involved only two trades.

They are not to be confused with job decisions rendered by the Impartial Jurisdictional Disputes Board which apply only to the SPECIFIC JOBS and crafts named in the job decisions. However, the Impartial Jurisdictional Disputes Board is required to give due consideration to Decisions of Record in arriving at job decisions.

Decisions of Record in the "*Green Book*" do not appear in chronological order and are always referred to by dates.

"**Impartial Jurisdictional Disputes Board**" -- means the Impartial Jurisdictional Disputes Board in Washington, D.C., the international appeal board, the international *Plan for the Settlement of Jurisdictional Disputes in the Construction Industry* (approved June, 1984), or its successor.

"**Intended Work Assignment**" -- means the initial step wherein the Contractor declares his intention to assign certain work to a certain trade(s).

"**Joint Administrative Committee**" -- means that committee, also known as the "Board of Trustees", which is to be appointed under the Plan's memorandum for the purpose of establishing through the trust deed such procedural regulations and administrative practices as may be required for the effective administration of the Plan.

"**J.A.P. Appeal Board**" -- means the local appeal board which is established under this Plan, as amended April 1, 1987, for the purpose of hearing appeals of assignments by the Umpire.

"**Jurisdictional Dispute**" -- means dispute between Unions and/or Unions and a Contractor over the assignment of work, or a difference between two or more Unions as to which trade or which workmen will do certain work.

But Article III is not just a set of definitions. It is here that the parties remind us that two parties cannot through an agreement bind a third party. And we are told that Agreements of Record and Decisions of Record are found in something called the "***Green Book***", a publication of the Building Trades Department of the AFL/CIO.

With few exceptions, the definitions stand on their own. One of the exceptions is the definition of *"Prevailing Practice"*, one of five criteria that the Umpire is to consider when reviewing a contractor's *"intended work assignment"*.

Given Article III, one might think that the Umpire will accept Yukon evidence as evidence of **prevailing practice**. He will not. And that is for reason of Article VII, 2(g) of the Procedural Rules. There the parties are clearly referring to prevailing practice evidence in that they speak of "… *the locality from which evidence will be received"* and then say that the *"The Umpire will consider only evidence which identifies projects within this locality …"*. And the evidence to be considered? The parties exclude Yukon evidence in saying that *"… the locality from which evidence will be received … **shall be the Province of British Columbia**"* (my emphasis). (See JAplan Decision No. 07-1.)

The parties, in defining *"prevailing practice"*, say that it is the practice of a union that submits *"valid evidence"* that it has *"performed more of the work in the area"*. But, elsewhere, the parties speak of a *"predominant practice"*. (See Article V, 3(c). Relatively few cases have been decided on the basis of prevailing practice but the Umpire has decided that whatever prevailing practice is, it is not just a numbers game where a union need only show

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3 (Article III, *"Definitions"*, cont'd)

"**Local Appeal Committee**" – means that committee which is established under this Plan for the purpose of hearing appeals of decisions by the Umpire from unions having no access to the Impartial Jurisdictional Disputes Board, or any union disputing a work assignment with such a union. (The operation of this committee is suspended while the J.A.P. Appeal Board is in place).

"**Non-Attested Agreements**" -- are those which have not been filed with the Impartial Jurisdictional Disputes Board nor attested by the Chairman of the Impartial Jurisdictional Disputes Board.

"**Participating Contractor**" -- means a Contractor (Employer) having a Collective Agreement with a participating Union, or working under the terms and conditions of such a Collective Agreement.

"**Participating Union**" -- means a Building Trades Union having a Collective Agreement with a participating Contractor.

"**Prevailing Practice**" – Prevailing Practice is the practice of that craft which submits valid evidence indicating that its members have performed more of the work in the area where the dispute exists than have members of other crafts.

The area, for the purpose of determining the Prevailing Practice, shall be defined ordinarily to mean the geographical jurisdiction of the British Columbia and Yukon Building and Construction Trades Council.

"**Specific Work Assignment**" -- means the assignment of work as determined by the Umpire.

The "intended assignment" of the work shall be considered the specific assignment where the assignment remains unchallenged before the Umpire.

"**Umpire**" – means the Jurisdictional Assignment Umpire of the British Columbia Construction Industry, or such other (person(s) who may be appointed from time to time to act and assist in that capacity.

"**Work Stoppage**" – means a cessation of work or refusal to work or a refusal to continue work in combination or in concert or in accordance with a common understanding for the purpose of compelling an Employer to assign work or to change an assignment of work

that it has performed a bit more work than any other. No, the Umpire looks for evidence of an enduring area practice that is overwhelmingly in a union's favour. Prevailing practice is not established, nor does it flip from one union to another, on the basis of just a few new work assignments.

The Umpire has decided that a prevailing practice can exist for a region of the Province: That it is not necessarily province-wide.

The Umpire has decided that there can be different prevailing practices for general contractors and trade contractors. And he found that the practice of one group of contractors cannot be allowed to overwhelm the practice of the other, even though it is less prevalent. (See JAplan Decision No. 10-3 and the Reconsideration of 10-3.)

The Umpire and the Law

The plan was once required by the *Labour Relations Code* but today it is a form of voluntary arbitration. Contractors and unions become bound to the plan by agreement. Unless there is an agreement which provides that a dispute is to be settled under the plan, the Umpire does not have the authority to deal with the dispute. (See *Dillingham Construction Ltd. and Operative Plasterers and Cement Masons International Association, Local 919,* BCLRB Decision No. 55/86.)[4] (Also see, *PCL Construction Pacific Inc., Midway Glass & Aluminum Ltd. et al*, BCLRB Decision No. B382/95.)

Project agreements are one way that contractors and unions become bound to the plan. More commonly, it is through the industry's standard collective agreements or an understanding which binds parties to those agreements. At least **one union** and the "assigning contractor"[5] must have a collective agreement (or the equivalent) that provides for the plan.

The Umpire does not fit neatly within the law of British Columbia. Where the plan is part of a collective agreement, it has been found to be a term of the collective agreement which is legally binding and enforceable just like

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[4] In this decision, the board found the following:

> *"We agree with the Umpire's conclusion that in the circumstances of this case he did not have the authority to resolve this jurisdictional dispute between the Labourers and the Cement Masons. The circumstances in this case were different from those in Koplin Enterprises Ltd., BCLRB Decision No. 48/82, where the assigning contractor had agreed in his collective agreement with one of the trade unions involved in the jurisdictional dispute, i.e., the BC Provincial Council of Carpenters, to be bound by the Jurisdictional Assignment Plan. In this case, Polycrete, the assigning contractor, was not a party to a collective agreement with either the Labourers or the Cement Masons by which it agreed to be bound by the Jurisdictional Assignment Plan. This case is analogous to the circumstances in Jack Cewe Ltd., BCLRB No. 38/82 [1982] 3 Can LRBR 192, and Sigma Steel and Engineering Ltd., BCLRB No. L217/81, where the assigning contractor was in a similar position and the Board concluded that the Umpire did not have the jurisdiction to resolve the particular jurisdictional disputes."*
>
> (page 7, of the decision)

[5] The contractor that is actually undertaking the disputed work.

any other obligation contained in the collective agreement.[6] But the plan is more than that. For one thing, it is clearly and obviously an agreement between trade unions.[7]

Long ago, it was decided that the Umpire is a form of arbitration board under the law. In 1982, the Supreme Court of British Columbia declined to review a decision by the Umpire under the *Judicial Review Procedure Act*, finding that the Umpire is an arbitration board and that as such, it is either the Labour Relations Board, or the Court of Appeal that have jurisdiction over an appeal, not BC's Supreme Court. (Citation is below.)

In 1984, the Labour Relations Board decided that the Umpire is a specialized form of arbitration board. The board had this to say:

> *"In the present case, the (JAplan) is specifically incorporated into and forms part of the collective agreements. Hence, in our opinion, the Umpire constitutes a specialized arbitration board with jurisdiction to resolve a particular kind of dispute, namely, work assignment jurisdictional disputes. The Umpire has jurisdiction under the collective agreement to resolve this specialized form of dispute arising between trade unions and their employer. Our conclusion on this point is consistent with the decision in International Brotherhood of Painters and Allied Trades, Local 138 v. United Brotherhood of Carpenters and Joiners of America, Local 1541, and Jordans Contract Sales (BC) Limited et al, BCSC, Vancouver No. A821601, Meredith, J., June 17, 1982 (unreported), where the British Columbia Supreme Court accepted the submission of counsel for the Umpire and declined jurisdiction under the* Judicial Review Procedure Act*, RSBC 1979, c.209 to review the Umpire's decisions made under the (JAplan).*
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> page 10, BCLRB Decision No. 156/84

In 1984, the Court of Appeal was asked to consider the matter of the appropriate forum for appeals. A panel of the court, chaired by the late Honourable Chief Justice Nemetz, found the following:

> *"The question … for us to decide is whether this appeal involves the interpretation of general law or the interpretation of a collective agreement. If it concerns the collective agreement then that is the end of the matter and the aggrieved party must look to the Labour Relations Board for relief.*

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6 A panel of the Labour Relations Board put it this way in British Columbia Provincial Council of Carpenters et al, BCLRB Decision No. 77/79:

> *"For the foregoing reasons, and pursuant to Section 38 of the Labour Code (as it was then), the declaratory opinion sought by the applicants is granted. It is declared that the (JAplan) is part of the collective agreements between CLRA on behalf of its member companies and the building trades unions signatory to those collective agreements; and further, that the (JAplan) is legally binding ad enforceable under the Labour Code in the same manner as any other obligation contained in a collective agreement. More particularly, the parties to the collective agreements aforesaid are required to take all jurisdictional disputes to the Umpire under the (JAplan) and to comply with his decisions in accordance with the local Procedural Rules."*
>
> (page 18)

7 *"The (JAplan) is, however, more than merely a collective agreement component. It is also an agreement between trade unions. It is not even apparent that the Umpire's interpretation of the plan in that sense is an issue which comes with the Board's jurisdiction under Section 99."*

(page 26, BCLRB Decision No. B382/95)

The Court of Appeal went on to find that the plan is part of the industry's collective agreements, noting that the Labour Relations Board had reached the same conclusion, and that it does not have jurisdiction to consider a matter of whether the Umpire has or has not exceeded his jurisdiction.[8]

Where the Umpire's authority stems from a single collective agreement, he may dismiss an application.[9] The Umpire will review a contractor's intended work assignment where he is satisfied that the applicant is a "fully participating union", a union whose general building and construction collective agreements provide for the JAplan. All of them. But he will in most cases dismiss an application for a work assignment decision which is by a "partially participating union", a union with numerous general building and construction sector agreements (and understandings) that do not provide for the JAplan. The exception is where the union is able to show that it has a collective agreement or understanding with the 'assigning contractor' that does require that the disputed work is to be assigned as the plan provides. In JAplan Decision No. 04-3, the Umpire put it this way:

> *"The Umpire really has no choice in these matters. Assigning work would be unfair to fully participating unions … and it would at least undermine the plan if not be fatal to it. Assigning work in a case like this one would allow unions like the Labourers to have their cake and eat it too. They could block others from using the plan through agreements like the Labourers' agreement, yet they could use the plan where other unions have done the right thing, namely, provide for the plan in a collective agreement. If I were to allow that, the partially participating unions would have a very significant advantage over fully participating unions and the only way that the fully participating unions could level the playing field would be to remove the plan from their collective agreements. By not assigning work in cases like this one, the Umpire acts to level the playing field in a way that supports the plan and the full participation of unions in the plan. It gives no one reason to take the plan out of collective agreements and it provides a disincentive to any union that might consider doing that."*

Where the applicant union has a collective agreement with the assigning contractor which provides for the plan, and the application is valid in other respects, the Umpire will always proceed to review the contractor's work assignment no matter whether the plan is in the collective agreement between the contractor and the union awarded the disputed work, or not. (See JAplan Decision No. 81-67 and *"Koplin Enterprises et al"*, BCLRB Decision No. 76/81 and BCLRB Decision No. 48/82. Also, see *Wells Consultants Inc. et al"*, BCLRB No. B271/2003.)

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[8] *International Union of Elevator Constructors, Local 82 and Foundation Company of Canada Ltd, International Association of Bridge, Structural and Ornamental Ironworkers, Local 97, and L. Collingwood, in his capacity as Jurisdictional Assignment Umpire*, Court of Appeal, Vancouver, CA 001236, Nemetz, CJBC, Hinkson, J.A. and MacFarlane, J.A., May 10, 1984.

[9] See JAplan Decision No. 04-3, BCLRB Decision Nos. B3/2005 and B59/2005, BCLRB Decision Nos. B101/2006 and B204/2006 and Supreme Court of British Columbia decision on judicial review, *"Construction & Specialized Workers' Union, Local 1611, BC Labour Relations Board et al"*.

Powers of the Umpire

Turning back to the plan itself, the Umpire will decide "*all questions and matters relating to (the) jurisdiction of work assignments*" … "*including but not limited to*" disputes that arise prior to the start of work and when work is underway. The Umpire will also decide whether or not a union has jurisdiction over the handling and installation of new products.[10]

Quite a few years ago, a panel of the Labour Relations Board decided, wrongly, that the Umpire has the power to make final work assignments and little more than that. (See *"PCL Constructors et al"*, BCLRB Decision No. B168/93) But that decision was then overturned in a landmark ruling on the plan.[11] (See *"PCL Construction Pacific Inc., Midway Glass & Aluminum Ltd. et al"*, BCLRB Decision No. B382/95.) The board reached a great many conclusions in that decision, including the following:

> "*We read the language of Article IV, Section 3 of the Procedural Rules rather differently than the original panel in the PCL/Midway Decision. We do not consider the words of the section to confine the Umpire to making decisions which constitute the final work assignment. It would have been easy for the parties to the (JAplan) to so restrict the Umpire had they intended such a narrow scope of authority. They did not. Instead, they empowered the Umpire to "decide all questions and matters relating to jurisdiction of work assignments … including but not limited to" disputed "assignment of work prior to commencement" and disputed "work in progress". Each of the emphasized portions off this quotation from Article IV, Section 3 is a warrant for the Umpire to do more than make the final work assignment. We agree with the Ironworkers that this language extends the scope of the Umpire's authority beyond disputes over intended assignments. …*"
>
> (page 27, BCLRB Decision No. B382/95)

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Article IV
ADMINISTRATION AND UMPIRE

…

3. The Umpire shall, upon application by either party to this Agreement or a participating Contractor or his agent or a participating Union or its agent, decide all questions and matters relating to jurisdiction of work assignments affecting the participating trades including but not limited to:

   (a) A dispute as to the assignment of work prior to commencement.

   (b) A dispute as to work in progress.

   (c) The handling and installation of new products.

   The Umpire shall provide full opportunity for all parties affected by work in dispute to be heard and to present evidence before rendering a decision. He shall prepare and supply all complaint and other forms required to process jurisdictional claims and other matters related to herein.
   The Umpire shall distribute his findings or decisions to all the parties involved in a dispute and to the parties to this Agreement.

11 In this far reaching decision, the board concluded that only the Legislature has the power to eliminate the structural defect that prevents the Umpire from asserting a comprehensive jurisdiction (and which stems from the failure of some unions to include the plan in their collective agreements). And it recommended legislation which would provide the Umpire with a sufficiently comprehensive jurisdiction on being persuaded *"that all interests in and served by the sector of the construction industry performed by members of building trades unions would benefit from the legislated insertion of the plan into every collective agreement signed by the building trades unions."*

Contractors and the Plan

Article V of the Procedural Rules, "*Contractor's Responsibility*", sets out a number of contractor responsibilities. First and foremost is a duty **not to stop work**. (See Article V, 1.) There is to be no stopping work for any reason.[12]

Contractors make *"intended work assignments"*. It is their **duty** to make intended assignments. And the intended work assignment is to be made by the contractor that is responsible for the *"performance and installation"*, i.e. the contractor with control over the work force that will undertake the work.

Contractors are to make intended assignments without delay once they are asked to do so. Contractors who drag their feet in making intended work assignments, may be ordered to make an intended assignment.

Article V, 3 of the Procedural Rules provides contractors with a bit of **guidance on how to make intended assignments**. But it is important that contractor's realize that Article V, 3 is only a rough guide. Article V, 3 must be read within the context of the plan as a whole, sections of the plan that govern the Umpire in particular.

Contractors are instructed in Article V, 3 to make intended assignments on the basis of Decisions of Record, Agreements of Record and other agreements, local agreements included. Where none apply, the contractor

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Article V
CONTRACTOR'S RESPONSIBILITY

1. Pending a decision by the Umpire or such settlements as may be arrived at through the office of the Umpire, there shall be no stoppage of work for any reason arising out of any jurisdictional dispute.

2. The Contractor who has the responsibility for the performance and installation shall make an intended assignment of the work. For instance, if Contractor "A" subcontracts certain work to Contractor "B", then Contractor "B" shall have the responsibility for making the intended assignment for the work included in his contract. If Contractor "B" in turn shall subcontract certain work to Contractor "C", then Contractor "C" shall have the responsibility for making the intended assignment for the work included in his contract.

   In any event, the responsible Contractor shall upon request, and without delay, make an intended assignment of the work when an element of conflicting interests prevails and upon failing to do so, shall be so directed by the Umpire.

3. The intended assignment by the Contractor shall be made on the following basis:

   a) Where a Decision of Record applies to the disputed work, or where an Agreement of Record between the disputing trades applies to the disputed work, the Contractor shall assign the work in accordance with his interpretation of such Agreement or Decision of Record. Agreements and Decisions of Record are compiled in the "Green Book" published by the Building and Construction Trades Department, AFL-CIO, ("Agreements and Decisions Rendered Affecting the Building Industry"). Where an agreement between the disputing trades applies that has been filed with the Impartial Jurisdictional Disputes Board and attested by the Chairman, even though not an Agreement of Record, the Contractor shall assign the work in accordance with such agreement Where a local trade agreement between two unions has been filed with the Jurisdictional Umpire, the contractor shall assign the work in accordance with such trade agreement providing such trade agreement does not affect another trade.

   Decisions of Record are applicable to all trades. Agreements of Record are applicable only to the parties signatory to such Agreements.

is then to consider prevailing practice. Where the contractor finds that there is no predominant practice, "*best judgment*" is to be used.[13]

Given the rules that govern the Umpire, common sense dictates that, in exercising best judgement, a contactor will want to consider decisions by the Umpire, decisions by the J.A.P. Appeal Board and decisions by the Impartial Jurisdictional Disputes Board (the "Impartial Board") and its successor, in particular, numerous decisions on the very same kind of work. The Impartial Board issued more than two thousand job decisions on craft union jurisdiction and they are important for a number of reasons. They identify *"established international trade practice"*, one of the criteria that the Umpire is to apply when reviewing intended work assignments. (See Article VII, 1 of the Procedural Rules.) They are important because the Umpire is required to follow the *"precedents and systematic decisions"* of the Impartial Board. (See Part VII of the plan's Memorandum.) And, finally, they are important because of they have much to say about the extent and circumstances where Decisions of Record, Agreements of Record and other agreements govern the assignment of work. Simply put, a contractor that ignores rulings by the Umpire, the J.A.P. Appeal Board or the Impartial Board, especially where there is an obvious pattern to the decisions, will risk having its intended work assignment overturned.

Moving on to Article V, 4 of the Procedural Rules, it provides that, once an intended assignment has been made, the **contractor may not change the work assignment** except where the contractor is directed to do so by the Umpire, or where the disputing unions are subsequently able to reach an agreement on the disputed work.[14]

A contractor can issue an intended work assignment that is in writing or verbally. But that is not the only way that work gets assigned. If a trade starts work on its volition, and the contractor does not stop the work, and the work proceeds for one entire shift, the intended assignment will be deemed to have been made by default. That is the “eight hour rule”. (See JAplan Decision No. 96-18 and also, JAplan Decision No. 00-5.)

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13 (Article V, 3, cont'd)

b) Where no decision or agreement under (a) applies, the Contractor shall assign the disputed work in accordance with the Prevailing Practice in the Province of British Columbia.

c) If a dispute has arisen prior to the specific assignment of work where no decision or agreement under (a) applies, or where there is no predominant practice in the Province, the Contractor shall nonetheless make an intended assignment according to his best judgment after consulting the representatives of the contesting trades and considering any argument or facts the trades may wish to present regarding the applicable Decisions or Agreements of Record or Prevailing Practice. The Contractor should also consult any local association of Contractors in the locality regarding the established practice.

14 (Article V, *"Contractors Responsibility"*, cont'd)

4. When a Contractor has made an intended assignment of work, he shall continue the intended assignment without alteration unless otherwise directed by the Umpire or by agreement between the Unions involved.

Applications by Contractors

The practice is not generally recommended by the Umpire, but a contractor can refer a dispute to the Umpire where the disputing unions fail to do so. Article V, 5 of the Procedural Rules provides for that.[15] All that it takes to make such an application is a simple letter, one that outlines the reason for the application and the relief sought, and provides the Umpire with all of the information prescribed by Article VII, 2(a) of the Procedural Rules, "*Procedures to be Used by the Umpire*". (See footnote on page 12.)

Where unions manage to reach an agreement on disputed work after the intended assignment has been made, the assigning contractor can either adopt the agreement (Article V, 4 allows for that) or the contractor can file a protest with the Umpire under Article V, 6 of the Procedural Rules. Applications under Article V, 6 have been rare but in one case the Umpire had this to say:

> *"... there is nothing in the Jurisdictional Assignment Plan which requires a contractor to revise an intended assignment, once one has been made, so that it conforms with a job agreement later reached between unions. If unions reach a job agreement the contractor may agree to comply with the job understanding or the firm may protest the understanding under Article V, 6."*
>
> JAplan Decision No. 83-20

Article V, 6 applications are also to be by letter. The contractor should explain the reason for the protest and provide all of the information demanded by Article VII, 2(a). (Again, see footnote on page 12.)

Article VII, 2(b) of the Procedural Rules calls for contractor's to file extra copies of their application, one more than the total number of unions involved in the dispute.

Order to Make an Intended Assignment

A party can request a contractor to make an intended work assignment and where no award is made, it can request that the Umpire order that an intended assignment be made. The ability to do that is buried in Article V, 2, "*Contractor's Responsibility*". To repeat, Article V, 2 is as follows: *"In any event, the responsible Contractor shall upon request, and without delay, make an intended assignment of the work when an element of conflicting interests prevails and upon failing to do so,* ***shall be so directed by the Umpire****."* (My emphasis.)

The plan is silent on how one applies for one of these orders. But clearly, someone has to request an order to make an intended work assignment or

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15 (Article V, *"Contractors Responsibility"*, cont'd)

5. Should two or more Unions make claim to specific work and for any reason neglect to refer the matter to the Umpire for resolution, then the Contractor responsible for the work assignment may refer the matter to the Umpire for resolution.
6. Should a Contractor be required to make an assignment for specific work as a result of two or more Unions deciding upon a work assignment, the Contractor may protest such an assignment to the Umpire. The Contractor may appeal the decision under Article X.

none will be issued. A simple letter will do, one that describes the work that you want assigned, indicates the name and location of the project and provides the name, mailing address and phone number of the contractor that appears to be quite unwilling to make an intended work assignment.

Applications by Unions

Turning to Article VI of the Procedural Rules, "*Union's Responsibility*", there are to be **no work stoppages**, ever. Not for any reason.[16]

Where a union stops work after applying for a work assignment decision, the Umpire will either postpone his hearing or delay his decision, whatever is most appropriate. That practice stems from the wording of the second part of Article VII, 2(d), namely, that *"processing ... shall not start until the Union has returned its members to work"*. The Umpire has decided, moreover, that he is to take equivalent action where there is a work stoppage in a case that is being processed under the far more important Article VII, 2(g). Where processing is under 2(d), *"the usual twenty-four (24) hours for position and information"* is to apply. Where processing is under 2(g), processing is delayed by five days because, in 2(g) cases, that is the *"usual (period) for position and information"*. (See JAplan Decision No. 92-26.)

At the **heart of the plan**, and most important, is Article VI, 3 of the Procedural Rules.[17] It allows local unions to apply for work assignment decisions. Local unions were not allowed to do that before the plan was established and the office of the Umpire was up and running in 1978.

16

Article VI
UNION'S RESPONSIBILITY

1. Pending a decision by the Umpire or such settlements as may be arrived at through the office of the Umpire, there shall be no stoppage of work for any reason arising out of any jurisdictional dispute.
2. When a Contractor has made an intended work assignment, all Unions shall remain at work and process any complaint over a jurisdictional dispute in accordance with the procedures herein established by the parties to this Agreement. Any Union which protests that a Contractor has failed to assign work in accordance with the procedures specified above, shall direct its members to remain at work and process the complaint through its officers.

17 (Article VI, *Union's Responsibility*, cont'd)

3. A Union may file with the Umpire a protest against the intended work assignment of a Contractor on a particular project. Such protest of assignment shall indicate the project, the disputing trades, an account of events leading to the work assignment, and a full and detailed description of the work in dispute. The Union shall also indicate the basis of its protest of the assignment by the Contractor. The Union shall cite any Decision or Agreement of Record on which its protest is based. When no Decisions or Agreements of Record are applicable, the Union shall cite the basis for its protest of assignment. Any Union may also notify the Umpire of a work stoppage engaged in by another Union. The Union before filing a request for a decision shall advise the Contractor and the Union in possession of the disputed work of its claim for the disputed work and seek to settle such dispute prior to filing the case with the Umpire.

   When the Union filing a request for a decision is directed to comply with the requirement of notification to the Employer of a jurisdictional dispute, a compliance notice shall be forwarded to the Umpire, who shall forward a copy of such notice to the other Union or Unions involved in the dispute prior to consideration and decision of the Umpire.

The Umpire has developed an application form which is designed to help unions apply for work assignment decisions. It asks for all of the information that is required by Articles VI, 3 and also all of that required by Article VII, 2(a) of the plan.[18] **Unions must use the form**. And unions must provide **complete information**. A failure to do that can delay proceedings. Provide wrong information and the Umpire might even have to cancel his hearing: All of the parties to a dispute have to be notified of the dispute and the hearing.

Applications can mailed, faxed to (604) 294-9533, or emailed to **japlan@telus.net**. The Umpire recommends that unions contact the Umpire by email or telephone if you do not in a day to two receive notice of a hearing from the Umpire. Telephone (604) 294-6561.

Article V, 3 requires the applicant union to *"advise"* the assigning contractor and the union(s) awarded disputed work of its claim for the work. It must also make an attempt to settle the dispute. There must be **some attempt to settle the dispute.** (See JAplan Decision No. 80-37.)

Article VII of the Procedural Rules, *"Procedures to be Used by the Umpire"*, contains additional instructions for unions. Article VII, 2(b) states that a union must file one copy of each request for a decision. It is, however, recommended that unions send one copy of their application to each of the disputing parties because that is an excellent way of "advising" others of your claim. (Required by Article VI, 3.) It is also the courteous thing to do and a good labour relations practice.

Rules for the Umpire

An extensive set of rules and policies govern the Umpire. A most important policy is the Joint Administrative Committee's **policy on the use of lawyers**. The policy is as follows:

> *"The policy of the plan is broad. No party may have a lawyer prepare or make a*

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Article VII
PROCEDURES TO BE USED BY THE UMPIRE

1. …
2. Decisions on Assignment of Work – When the Umpire has received a protest of work assignment from a Union or a request for a decision from a Contractor, he shall proceed to make a decision as outlined below:

   (a) Any request for a decision shall contain the following information:
   Name and address of the Contractors
   Name and location of the project
   Disputing trades
   The assignment of work made by the Contractor, and
   A full and detailed description of the disputed work.
   When the request is made by a Union, it shall also state the basis of its claim for the work.

   (b) A Union shall file one copy of each request for a decision. A Contractor shall file an original and three copies of each request for a decision when two Unions are involved, and an additional copy for each additional Union involved, if any.

   (c) Notice of such request for a decision when made by a Union shall be promptly sent by the Umpire to the other Union (or Unions) directly involved in the dispute.

submission, nor may they be assisted in the making of a submission, be it verbal or written, on a matter of trade jurisdiction or any other matter that comes before the Umpire or the J.A.P. Appeal Board" (Letter to the industry dated Sept. 16, 1989.)

The Joint Administrative Committee established the policy because they believe it necessary if the Umpire is to provide extremely fast acting and exceptionally inexpensive dispute settlement machinery. The policy has been tested and found to be fair and reasonable (*"Voth Bros. Construction et al"*, BCLRB Decision No. 260/85).

Article IV, 3 of the Procedural Rules calls for disputing parties to be given a "**full opportunity to be heard**" and to present evidence. Of course, "fairness" and the principles of natural justice demand that as well.

The Umpire will almost always hold an **oral hearing**. He will seldom proceed on the basis of written submissions alone because that is a less satisfactory way to 'hear' from the parties. It also takes longer to hear from the parties in that way. And so it is that the Umpire will only proceed on the basis of written submissions where there appears to be no other practical way to proceed.

As noted above, Article VII of the Procedural Rules, "*Procedures to be Used by the Umpire*", provides that the Umpire may either proceed as Article VII, 2(d) provides or as Article VII, 2(g) provides.[19] In practice, however, the Umpire will only proceed as set out in 2(g). That has been the Umpire's

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19 (Article VII, *"Procedures to be Used by the Umpire"*, cont'd)

(d) When notice of a request for a decision has been sent to a Union directly affected, such Union shall be allowed twenty-four (24) hours (except as provided below) in which to state its position to the Umpire. The Union shall be notified of this period at the same time it is sent notice of the request for a decision.

When a Union requests a decision and its members remain off the job or hold up disputed work, processing for such decisions shall not start until the Union has returned its members to work. Upon notification to the Umpire that the members have returned to work, the usual twenty-four (24) hours' request for position and information will apply.

(e) Where a request for a decision has been filed with the Umpire by a Union, the affected Contractor (or Contractors) shall be notified and shall be requested to furnish a full description of the disputed work.

(f) Where two Unions have established procedures for the adjustment of jurisdictional disputes without resorting to the procedures set out herein, they shall be allowed a reasonable length of time as determined by the Umpire in which to effect a settlement. If the Unions are unable to reach agreement, they shall jointly render a statement of facts of the dispute to the Umpire for a decision. This subsection shall only apply providing there is no stoppage of work while utilizing this procedure.

(g) When the Umpire has decided to process a dispute on a basis other than, or in addition to consideration of Decisions of Record or Agreements of Record, the Unions involved shall be notified and allowed five (5) working days from receipt of such notice in which to submit evidence. The Unions shall be notified by registered mail of this period in each case processed.

Such notice must also include a clear definition of the dispute on which evidence is to be secured, and the locality from which evidence will be received which shall be the same for both trades and shall be the Province of British Columbia. The Umpire will consider only evidence which identifies projects within this locality and indicates the Contractor on the project. It is desirable wherever possible for the evidence to show the year the work was performed and the amount of work involved.

practice since 1978, a practice adopted for several reasons, including the need for 'fairness', a desire for decision making that is seen to be open and transparent, a belief that oral hearings are the best way to hear from contractors and unions, and a conclusion that 2(d) is a cumbersome way to proceed because it comes loaded with a boatload of administrative problems..

Article VII, 2(d) appears to provide for quicker decision-making than 2(g) but that is misleading. Parties have five days in which to prepare submissions and collect evidence under 2(g) while the union that is awarded the work in dispute has only *"twenty-four (24) hours ... in which to state its position to the Umpire"* under 2(d). But the Umpire must provide the contractor with a full opportunity to make submissions and the applicant is entitled to respond to the statement of position. That takes more time, another three or four days. And that is where no other issues surface. Should that happen, the Umpire must stop right there and give the parties time in which to make submissions on that new issue, that being required by 2(g). And as 2(g) and 2(h)[20] make clear, 2(d) is for matters which are solely to do with Decisions of Record and Agreements of Record, no other criteria. Only 2(g) puts the Umpire in a position where he is immediately able to deal with whatever issues arise.

And so it is that the Umpire will always proceed as 2(g) provides. As noted above, he will almost always hold an oral hearing and that hearing will be five or six working days after the application for a work assignment decision is received, and notice of a hearing is sent out. That is the simple, tried and true practice of the Umpire.

Working days are Monday through Friday, statutory holidays and industry holidays excepted.

As noted above, the Umpire will rarely choose to proceed on the basis of **written submissions** because it takes longer to hear from the parties in that way. And it is a less satisfactory way to 'hear' the parties. That said, to proceed on the basis of written submissions is sometimes the only practical way to proceed.

The Umpire will **expedite** the process where parties agree to his doing so.

No matter how the Umpire decides to proceed, the Umpire is not inclined to **postpone** a hearing, or grant additional time for filing written submissions. That is because time is of the essence in most jurisdictional disputes. Wait too long and the job may be over.

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20 (Article VII, *"Procedures to be Used by the Umpire"*, cont'd)

(h) If the Umpire finds that the dispute is not covered by an appropriate or applicable decision or agreement of record, he shall render a job decision in which he shall consider the established international trade practice or the prevailing practice in the locality, and such job decision shall be effective on the particular job only on which the dispute occurred.

(i) The affected Unions and Contractors shall promptly comply with each decision of the Umpire.

So long adjournments are almost always out of the question. But, that said, it is not as if the Umpire will never grant a postponement. It is just that a party has to provide a very good reason for the postponement. And the fact that a person is away or has other commitments is not in itself reason to postpone a hearing. Contractors and unions are expected to make other representatives available for hearings and written submissions, should a particular person be tied up with some other matter or be away on vacation or travelling for some other reason.

Criteria for Making Work Assignments

Right off the bat, in Article VII of the Procedural Rules, "*Procedures to be Used by the Umpire*", the parties set out the criteria by which the Umpire is to judge intended work assignments.[21]

Equally important instructions for the Umpire are found in Part VII of the plan's Memorandum. The Umpire in that part of the plan is directed to *"closely follow the precedents and systematic decisions"* of the Impartial Board, or its successor.[22] A great many of the Umpire's decisions are based on Impartial Board rulings. The Umpire looks to see whether there is a pattern to the rulings and for rulings that are consistent with one another.

These two sections of the plan require that the Umpire give reasonable consideration to efficiency and the ability of union construction to furnish its services at reasonable cost. And so it is that the Umpire, like the Impartial Board, is not inclined to assign work that is virtually complete. Like the Impartial Board, the Umpire has in a few cases refused to apply Decisions of Record because of the intermittent nature of work. (See JAplan Decision No. 78-20. Also see JAplan Decision No. 81-49: Reconsidered) The Umpire has also declined to reassign work covered by a Decision of Record on finding that there was very little work to do each day, a bit at the beginning of the work day and a bit more at the end of the work day.

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Article VII

PROCEDURES TO BE USED BY THE UMPIRE

1. Decisions of Record and Agreements of Record established by or recorded by the Impartial Jurisdictional Disputes Board, established international trade practice, Prevailing Practice as defined, together with a reasonable acceptance of considerations for efficiency and capacity to furnish construction services to the public at reasonable cost, shall be accepted by the Umpire as factors in assigning work, (see also Article VII, 2(h) of the Procedural Rules and Article VII of the Memorandum of Understanding).

22

Part VII

There is agreement by both parties that a local board of adjudication, operating on a basis independent of the central Impartial Jurisdictional Disputes Board, or its successor, has inherent dangers that are unacceptable to either party. Firstly, such a Board would run contrary to the expressed wishes of larger National or International organizations. Secondly, such a Board, working singly here or followed by similar Boards in other political jurisdictions would have the ultimate effect of splintering the "work jurisdiction" of all Trades and would hence lead to subsequent complexity of assignment for other than possibly local Contractors. It is understood that the office of Umpire will closely follow the precedents and systematic decisions of the Impartial Jurisdictional Disputes Board, or its successor, in order that systematic, orderly and unified progress will take place in British Columbia that is not in conflict with the greater jurisdictions of the International Unions or National or International Contractor Associations.

(See JAplan Decision No. 10-3.) That said, a claim that a union has a much lower wage rate is bound to fall on deaf ears, that having so little to do with efficiency. And, most importantly, the need for considerable skill and training will often be found to outweigh all other considerations and the amount of work will just not matter, nor will the fact that the disputed work is intermittent or nearly complete. In JAplan Decision No. 10-3, the Umpire put it this way:

> *"The Umpire must consider efficiency and the capacity of union construction to furnish its services at reasonable cost (Section 1 of Article VII of the Procedural Rules, page 18 of the plan). The Umpire is also directed to closely follow the precedents and systematic decisions of the Impartial Jurisdictional Disputes Board, the board that decided jurisdictional matters under the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (Article VII of the Memorandum of Understanding on the plan, page 3 of the plan). That board operated almost continuously from 1973 to 1981 and it issued numerous decisions based on what are in effect efficiency and the capacity of union construction to furnish its services at reasonable cost. And the Umpire's decisions are not vastly different than those decisions.*
>
> *The Umpire has said that efficiency and reasonable cost have nothing to do with wage rates. It is, on the other hand, about the ability to compete with the non-union sector and the thinking that a contractor is entitled to receive a day's work for a day's pay, or at least something close to that, just as a worker is entitled to a day's pay in return for a day's work.*
>
> *In considering efficiency and the capacity of union construction to furnish its services at reasonable cost, the Umpire will consider the nature of the work. There are some jobs that require a high degree of skill and knowledge that only one trade offers and that is all there is to it. The Umpire in other cases will consider the practical circumstances of the job and steps taken by the contractor so that agreements on jurisdiction, decisions of record, trade practice rulings and area practice in BC are followed."*

The Umpire follows J.A.P. Appeal Board decisions and the Appeal Board has said that it will issue new decisions on craft union jurisdiction where Impartial Board decisions are found to be out of date because of technological change. (See J.A.P. Appeal Board Decision No. 7, a decision dated May 18, 1993).

A Word on Agreements

The Umpire is required to consider local agreements on jurisdiction that are with unions that are not members of the Building Trades Department of the AFL-CIO.[23]

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[23] Part IX of the Plan's Memorandum makes that clear.

> Part IX
>
> It is understood by both parties that within the construction industry in British Columbia there are unions (Teamsters, Culinary Workers and Machinists) having no access or obligation to the Impartial Board, or its successor for settlement of jurisdictional disputes, nor do they have bi-lateral trade agreements that are "attested" or registered in the Green Book.
>
> It is understood that the Umpire will give due consideration to local agreements involving these organizations (or their momentary opponents in a given dispute) that do not have recourse to the Impartial Jurisdictional Disputes Board, or its successor, or the international appeal board.

Part X of the plan's Memorandum calls for the Umpire to consider other kinds of local agreements on craft union jurisdiction. There are many excellent local agreements that govern the assignment of construction work in British Columbia. And so it is that the Umpire will encourage the agreements but, a word of caution, the plan requires that the agreements be reached *"in consultation"* with appropriate trade associations.[24]

Domestic Dispute Settlement Procedures

Article VII, 2(f) calls for the Umpire to suspend processing where the disputing unions have established domestic procedures for settling jurisdictional disputes through a joint committee or some other means. (See footnote on page 13. Also see JAplan Decision Nos. 84-33 and 92-6.) Where there is a failure to settle a dispute, or it is shown that the domestic dispute settlement procedures are inadequate, the Umpire will proceed to assign work just as he normally would in the case of the common garden variety of jurisdictional dispute. In JAplan Decision No. 83-24, the Umpire put it this way:

> *"It would not be reasonable to delay for even a moment, upon receipt of a proper application, if a party can document that despite a few repeated attempts and its best efforts nothing is resolved under the (domestic dispute settlement procedures)."*

Hearings & Submissions

Hearings are very informal. The Umpire will do his best to make you feel comfortable.

As each and every Notice of Hearing now explains, the contractor is asked, at the outset of the hearing, to describe the disputed work in detail. The Umpire will also seek to determine the stage to which the disputed work has progressed, in particular, whether it has started or it is complete or nearly so. The contractor is asked to explain why the work was awarded as it was. And each of the disputing unions is then given an opportunity to present evidence and arguments that show that the disputed work falls within their jurisdiction or, at least, explain why the Umpire should not change the intended work assignment of the contractor. Once that is done, each party is given a chance to respond to the evidence that has been submitted and the arguments that have been made. Hearings normally take 2 or 3 hours.

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24 That is required by Part X of the Plan's Memorandum.

Part X

It is agreed that the Umpire will give due consideration to existing bi-lateral or multilateral jurisdictional agreements that are unattested and which exist either on a Local or International level, providing always that such agreement cannot be considered as definitive in a dispute where there is another organization involved who is not party to the agreement.

It is further agreed that no jurisdictional agreements will be entered into locally after the ratification of this Memorandum unless such agreements have been made in consultation with the appropriate Trade Associations.

The Umpire's Notice of Hearing, and invitations for written submissions, are designed so that they meet all of the requirements of the plan. For example, today's Notice of Hearing will stipulate that only BC evidence will be considered as evidence of prevailing practice. (Necessary for reason of Article VII, 2(g).)

As written, the plan requires that the Umpire notify parties by registered mail in certain instances. A policy of the Joint Administrative Committee amended that requirement so that the plan could continue to operate during strikes and lockouts at Canada Post. Now even Canada Post offers superior ways to know whether notice was in fact served on a party.

The disputing parties are asked to bring to hearings any photographs, drawings or brochures which would help the Umpire understand the nature of the work that is in dispute and the circumstances of the work. And the parties are asked to bring extra copies of written submissions and whatever materials they want the Umpire to consider – be it an agreement, decision of record, J.A.P. Appeal Board decision, decisions by the Umpire, area practice evidence and/or decisions issued by the Impartial Board, or its successor. You will in all cases want to bring one copy for the Umpire and at least one copy for each of the other parties that are involved in the dispute.

Investigative Powers of the Umpire

The Umpire is required to conduct an investigation when faced with a *"material question of fact"* or a *"material question of technological change"*.[25] And, when necessary, the Umpire will make a reasonable, impartial effort to understand the facts, in particular, the products, materials, machinery and equipment that are in dispute. That said, it is the Umpire's experience that he is very rarely lacking in the information that is required for a decision, once he has heard from the assigning contractor and the disputing unions at an oral hearing. And, the Umpire will never, ever, seek to discuss a dispute with any of the parties to the dispute, nor any other party that has a direct interest in the dispute, after the close of a hearing.

The Umpire always tries to issue his decision before work is to start. (See Article VII, 2 (l).) But that is not always possible. The application for a

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25 (Article VII, 2, *"Procedures to be Used by the Umpire"*, cont'd)

(k) If, during the course of consideration of a dispute, the Umpire should decide that there is a substantial and material question of fact which cannot be resolved on the basis of the available evidence, the Umpire shall temporarily suspend the deliberations and make such investigation as he deems necessary to avail himself of all facts and evidence bearing on the dispute.

(l) If, during the course of consideration of a dispute, any party to the dispute or the Umpire should decide that there is a substantial and material question of technological change attendant to a dispute which cannot be resolved on the basis of available evidence, the Umpire shall temporarily suspend the deliberations and make such investigation as he deems necessary to avail himself of all facts and evidence bearing on the dispute and shall in any event make a job decision prior to the scheduled commencement of work.

work assignment decision could have been filed after work started, and work can start before the Umpire has been able to hold a hearing.

Decisions

Decisions normally take a day or two.

A decision by the Umpire is a *"job decision"*. Job decisions are for the particular work in dispute. (Again, see Article VII, 2(h).) They apply only to the work that is being undertaken by the assigning contractor on the particular project in question. And they have no force or effect in respect to any union or contractor except those invited to the Umpire's hearing.

Where there is a valid application for a work assignment decision, the Umpire decides **one basic question**: Is there or is there not a compelling reason to change the contractor's intended work assignment? Depending on evidence submitted in support of the parties' claims, the Umpire will either uphold the intended assignment, change it, or find no reason to change the contractor's intended assignment. In the case of the latter, an applicant union will either have failed to show that the disputed work should be assigned to it for reason of a Decision of Record, an agreement, a prevailing practice, and/or established international trade practice, or the Umpire will have found that his need to consider efficiency and union construction's capacity to furnish its services at reasonable cost outweighs all other considerations.

The plan was established so that work gets performed by the craft that is entitled to perform such work. An application to the Umpire is not intended to be an academic exercise. The Umpire will not as a matter of policy decide a purely **hypothetical question.** And so it is that the Umpire will not normally rule on the matter of craft union jurisdiction where work is complete: Only in those rare instances where he is shown that there remains a compelling reason to rule on the jurisdictional issue.

Each work assignment decision by the Umpire will summarize conclusions reached in respect to the work in dispute and the material work assignment issues. In 1987, the parties to the plan decided that it was important that the Umpire be as brief as possible.[26] And so it is that the Umpire will not as a general rule recite positions of the parties. And he will not issue a full explanation of the basis for a decision except where the complexity of the issues and the probability of an appeal demand it.

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26 (Article VII, 2, *"Procedures to be Used by the Umpire"*, cont'd)

(m) In addition to all other requirements in these Rules and Regulations with respect to the form of a decision rendered by the Umpire, it is also required that any such decision shall include a brief statement of the description of the work in dispute and the conclusions of the Umpire with respect to the principal material issues which are involved in the dispute. The Umpire's written decision shall be as brief and concise as possible.

Reconsideration

Where a union is unsatisfied with a decision, it has five working days, from the day that it received the decision, in which to request reconsideration.[27] Some people have found Article VII, 2(j) confusing. They trip over the wording that indicates that unions have an option, *"(a) to request reconsideration … upon submission of additional written evidence"* or *"(b) to request an oral hearing"*. Fear not, the Umpire will reconsider any decision just so long as there is a written request for reconsideration in the five day period that exists for the applications. A simply letter will do. Supporting materials can come later. The Umpire recognizes that reconsideration is a union's last chance to submit new evidence, at least it should be, and that a union must apply for reconsideration if it wants to file an appeal with the J.A.P. Appeal Board.

In practice, Article VII, 2(j) provides unions with an opportunity to submit new evidence, make new arguments or even reargue a case either through further written submissions or at an oral hearing. Normally, there will already have been an oral hearing and the request for reconsideration will lead the Umpire to hold a second oral hearing.

Appeals

Article IX of the Procedural Rules, *"J.A.P. Appeal Board",* provides a way to appeal Umpire rulings. As noted above, the J.A.P. Appeal Board must dismiss an appeal if the union failed to apply for reconsideration. The appeal board must also dismiss appeals where there is a failure to comply with the Umpire's ruling.[28]

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27 (Article VII, 2, *"Procedures to be Used by the Umpire"*, cont'd)

(j) In the event any contending Union feels that a decision rendered by the Umpire has been in error, it shall be privileged, within five (5) working days of receipt of the decision, either (a) to request reconsideration by the Umpire of a decision upon submission of additional written evidence; or (b) to request an oral hearing on such decision by the Umpire, provided that the decision has been accepted and put into effect by the affected parties, and further that such decision remains in continuous effect until reconsidered or an oral hearing is held by the Umpire. The Umpire shall determine the matter of compliance with the decision in question and, if it is found to be in accordance with the decision, shall set a date for such reconsideration or oral hearing. The contending Unions shall be notified and given an opportunity to present written evidence or be heard in the event of an oral hearing. It is permissible at oral hearings for the affected parties to present witnesses. Requests for postponement of an oral hearing must be received by the Umpire a minimum of forty-eight (48) hours prior to the date scheduled for the hearing.

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Article IX
J.A.P. APPEAL BOARD

1. …

An actual appeal shall be heard by a panel of two (2) members and one (1) chairman, all of whom shall be “disinterested” in the particular dispute.
…

2. The J.A.P. Appeal Board shall hear appeals of the Umpire’s decisions and shall be governed by the following:

(a) The J.A.P. Appeal Board will not consider a disputed assignment that has not first been submitted to the Umpire for reconsideration.

There is a filing fee for appeals to the J.A.P. Appeal Board. The fee is set by the plan's Joint Administrative Committee and is currently $200.

Appeals are to be in writing. A simple letter that identifies the decision(s) appealed and the basis for the appeal is all that is required. Attach a copy of the decision(s) that you want to appeal.

The appeal board has a two stage process for deciding appeals. At the first stage, it will review the written application to appeal and the stated reasons for it. It will then decide whether the application is or is not frivolous. Where it is decided that the appeal appears to have merit, at least on its surface, the appeal board will arrange for a hearing where the appellant is given an opportunity to explain why a decision is wrong or unreasonable, and the other parties to the dispute are given an opportunity to respond.[29]

Presentations are limited to *"argument on the merits of the appeal."* The appeal board does not accept new evidence. As noted above, the last chance to submit new evidence is at the reconsideration stage.

Article IX, 3 of the Procedural Rules provides that the appeal board may establish rules and procedures that are in addition to those found in Article IX.[30] The additional rules of the appeal board are set out in what is called the *"Schedule of Additional Rules Governing Appeals to the Appeal Board"*. It is available from the Umpire.

Recourse

It was the hope of the parties to the plan that the Impartial Board would act as a kind of appeal board and so Article X of the Procedural Rules, *"Recourse"*, provides for applications to the *Plan for the Settlement of*

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29 (Article IX, 2, cont'd)

(b) The J.A.P. Appeal Board will not proceed with an appeal if there is a failure by the appellant union to comply with the Umpire's ruling.

(c) Upon receipt of a valid application a panel of the J.A.P. Appeal Board shall consider the request, especially the reasons for it and it will set a date, time and place for a hearing if it concludes that the request appears to warrant further consideration. The J.A.P. Appeal Board will dismiss those requests which it finds to have no merit.

A panel of the Board will be selected by a chairman of the J.A.P. Appeal Board.

(d) Presentations shall be limited to argument on the merits of the appeal.

(e) The decision of the J.A.P. Appeal Board shall indicate the finding of the majority only. The conclusion of individual members of the J.A.P. Appeal Board shall not be reported.

(f) A filing fee, as decided by the Joint Administrative Committee of the Plan, shall accompany each appeal submitted to the J.A.P. Appeal Board.

30 (Article IX, *"J.A.P. Appeal Board"*, cont'd)

3. The J.A.P. Appeal Board shall establish such other rules and procedures that are required, providing that same are reviewed and approved by the Joint Administrative Committee and are in conformity with the general meaning and intent of this Plan.

4. The Joint Administrative Committee shall ensure that all constituents of the Plan are provided with, or have access to, the written rules and procedures of the J.A.P. Appeal Board

Jurisdictional Disputes in the Construction Industry (the "International Union Plan").[31] And for a time, the Impartial Board did exactly that. But the board ceased to operate in 1981 and applications under the recourse section of the JAplan are now proving to be rather problematic. That stems from amendments that have been made to the International Union Plan.[32] They provide that work is to be assigned in a different way, different than the BC JAplan and different than the way that the Impartial Board was required to assign work. And today, instead of conducting appeals where it is decided whether a decision by the Umpire is or is not reasonable given the evidence before the Umpire and the rules that he is to apply, a *trial de novo* is conducted and a brand new decision is issued, one based on the new and different rules of the International Union Plan.

The JAplan and the International Union Plan are now inconsistent with one another and that has been found to be fatal to the use of the recourse section of the plan in one instance. (See *Columbia Hydro Constructors Ltd, and Allied Hydro Council of British Columbia*, arbitration award by Rod Germaine, May 24, 2011.) The arbitrator noted that the JAplan itself states that a decision under the International Union Plan is binding only *"so far as may be applicable"* and he decided that is, to use the words of the arbitrator, *"to the extent it is not based on standards or procedures which are inconsistent with those of the JAplan."*

Appeals to the Labour Relations Board and Court of Appeal

As noted above, there are additional ways to appeal decisions by the Umpire and the J.A.P. Appeal Board. Section 100 of the *Labour Relations Code* provides that the Court of Appeal may review a decision where the basis of the decision is a matter of the general law not included in section 99 (1) of the Code. Section 99 provides that the Labour Relations Board may set aside a decision, remit a matter back to the Umpire, stay proceedings, or substitute a decision of the board for the decision of the Umpire or J.A.P. Appeal Board.

31

Article X
RECOURSE

Any party or person bound by a decision of the Umpire may apply for a jurisdictional award to the Impartial Jurisdictional Disputes Board, or its successor, created by the Building and Construction Trades Department, AFL-CIO, and such person or party shall be bound by all of the Procedural Rules and Regulations of the said Impartial Jurisdictional Disputes Board, or its successor, so far as may be applicable, and shall be bound by any decision of the said Impartial Jurisdictional Disputes Board, or its successor, (including any decision of the international appeal board provided therein) as if such decision were a decision of the Jurisdictional Assignment Umpire of the British Columbia Construction Industry.

32 In 2002, the *Plan for the Settlement of Jurisdictional Disputes in the Construction Industry* was amended and factors like efficiency and union construction's ability to furnish its services at reasonable cost are no longer to be considered in the case of each and every dispute. It was again amended in 2007 and now "prevailing practice", as the term is defined in that plan, has been made more important than Decisions of Record in certain circumstances.

The Labour Relations Board has had this to say in regard to appeals of Umpire rulings.

> *"The Board will ensure that the parties have received a "fair hearing", that is, the Board will determine whether the parties received a hearing before a neutral arbitrator and that each side received a full opportunity to present its own case and to meet the case put by the other side: Section 108(1)(a)* (as it was then). *With respect to applications under Section 108(1)(b), the Board will determine whether the substance of the arbitrator's decision is one which is consistent with the principles of the statute and in particular, Section 92(3) of the Code:*
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> > "92.(3) An arbitration board, to further the intent and purpose expressed in subsection (2), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Act, and is not bound by a strict legal interpretation of the issue in dispute."
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> *The Board has stated that its jurisdiction under Section 108 of the Code does not allow the Board to second-guess an arbitrator. In this regard, the Board's analysis of its scope of review of decisions of arbitrators in Lornex Mining Corporation, BCLRB No. 96/76, (1977) 1 Can LRBR 377 is apposite:*
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> > "First, the Board should not assume that an arbitrator has failed to consider certain evidence, an argument of counsel, or a provision of the collective agreement, and then leap to a finding that a fair hearing has been denied, merely because the arbitrator has not specifically mentioned the same in his award."
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> (at 380-81)
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> *The Board gives an arbitrator's award a sympathetic reading. Likewise, the Board will give the Umpire's assignments the same sympathetic reading. We will not require an Umpire to exhaustively review the evidence before him nor will the Board require the Umpire in his decision to recite each and every argument placed before him by the parties. To require the Umpire to issue lengthy written analyses in all cases would defeat his ability to meet his more important mandate, namely, to issue his assignment decisions in a speedy fashion.*
>
> *...*
>
> *The Board will not second-guess the Umpire's decision to determine whether the Umpire made the correct assignment. The Umpire is a specialized arbitrator whose primary function is to resolve disputes concerning jurisdictional work assignments in accordance with the rules and procedures under the JAplan. In resolving these disputes the Umpire applies certain clearly articulated criteria set out in the JAplan: the Umpire has regard to Decisions and Agreements of Record established by or recorded by the Impartial Jurisdictional Disputes Board, evidence of established international trade practice, "prevailing" and "local" practice as defined by the JAplan. To adopt the language of the Board in Lornex Mining Corporation, supra, so long as the Umpire makes a genuine effort to reach his conclusions on the basis of the JAplan and in accordance with the procedures set out in the JAplan, this Board will not interfere with the assignment.*
>
> *...*
>
> *A party's assertion, then, that the Umpire has wrongly interpreted certain Decisions or Agreements of Record or has wrongly ascertained the relevant prevailing or local practice in respect of a particular dispute is not a ground upon which this Board will undertake a review of the Umpire's award. An error of this sort by the Umpire does not constitute an error of labour relations policy under the Code. Thus, this Board will not overturn an arbitrator's interpretation of the JAplan or any of the documents which come before him in accordance with the procedures thereunder simply because we might have interpreted them differently.. We will only review a decision of the Umpire to the extent that he wrongly decides a matter which raises an issue of labour relations policy under the Code. The question of whether a collective agreement is in*

force raises issues of fundamental importance under the Labour Code. An error by the Umpire on this point would support a review under Section 108(1)(b) of the Code."

(pages 8 to 11, BCLRB Decision No. 308/84)

Compliance

A complaint of non-compliance can be filed under Article VIII of the Procedural Rules, *"Implementation of Decisions"*.[33] The plan calls for the Umpire to hold a hearing within 3 days. That is clear. But less clear is the statement, in Article VIII, that *"... parties shall be given an opportunity to testify and present documentary evidence relating to the said matter of the hearing within forty-eight (48) hours after the conclusion thereof "*. Is there to be an opportunity to testify after the hearing, in the 48 hour period that follows the hearing, or is it that the opportunity to testify is at the hearing and the 48 hours is just for the submission of *"documentary evidence"* that is in support of a party's claim?

Faced with a need the answer that question, the Umpire decided that it is the latter interpretation which must be preferred: That it is as if a comma is missing after the word *"testify"*. The opportunity to testify has to be at a hearing where all parties are present or, at least, to which all parties have been invited. (See JAplan Decision No. 96-6: Compliance.) It is unlikely that the parties to the plan would call for a hearing in three days, then allow two more days for further testimony because that would require the Umpire to hold yet another hearing. Or, to put it another way, if the parties to the plan did want contractors and unions to have five days in which to testify, one would think that they would then have wanted the Umpire to hold a hearing in five or six days, not one after three, then another, two or three days later. That makes much more sense. And attending one hearing is not nearly so much of problem for all of those contractors and union officials that reside outside of Greater Vancouver.

Where a party decides to submit further documents in a matter of non-compliance, in the 48 hour period that follows the hearing, the other parties will be given a chance to respond to those documents, and the

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Article VIII

IMPLEMENTATION OF DECISIONS

Decisions as to jurisdictional claims and decisions determining whether or not such decisions have been violated as rendered by the Umpire shall be binding, final and conclusive on all of the parties agreeing to the operation of this Jurisdictional Assignment Plan of the British Columbia Construction Industry, except as otherwise provided in Articles IX and X.

To further implement the decision of the Umpire, any party and any of the members or affiliates and any Employer may at any time file a complaint in writing with the Umpire alleging a violation of a decision previously made. The Umpire shall thereupon set a hearing to be held within three (3) days of receipt of the complaint with respect to the alleged violation and shall notify, by registered mail, all interested parties of the time and place thereof. The Umpire shall conduct a hearing at the time and place specified in this notice. All parties shall be given an opportunity to testify and present documentary evidence relating to the said matter of the hearing within forty-eight (48) hours after the conclusion thereof. The Umpire shall render a written decision in the matter and shall state whether or not there has been a violation of his prior decision. Copies of the decision shall be mailed by registered mail to all parties thereto.

party that submitted the documents will also be given a chance for a reply. Fairness demands that.

Where it is found that a contractor and/or union has failed to comply with a decision, the Umpire will not act as Article VIII (a) appears to provide.[34] The Umpire has concluded that he does not, as an arbitrator in British Columbia, have the power to fine contractors or unions. The Umpire will consider an award of damages under Article VIII, (c). (See JAplan Decision No. 00-07: Compliance.)

Parties may take other steps to enforce Umpire rulings. One succeeded in enforcing a decision through use of the grievance process contained in their collective agreement. In *Partec Lavalin Inc. and International Union of Operating Engineers,* a 1983 arbitration award by Cameron Watson, Wayne Palmer and J.M MacIntyre, Chairman (unreported so far as we know), a union was awarded damages where there was a failure to comply with a decision by the Umpire.

Concluding Remarks

The plan is old. It was written in the 1960s or, to put it in perspective, it predates the personal computer and popular use of the fax machine. And here and there, that shows.

Several people had a hand in the writing of the plan but it was, for the most part, written by Cy Stairs, who later became President of the BC and Yukon Territory Building and Construction Trades Council, Co-chair of the plan's Joint Administrative Committee and even Relief Umpire on occasion. Cy was a learned man to be sure. But he was not a lawyer, nor did he seek the advice of lawyers in writing the plan. And he was less concerned with sentence structure and the dotting of this "i" and that "t", than the big picture: The industry's crying need for effective machinery for settling jurisdictional disputes. That shows too.

Yes, here and there, wording is ambiguous. But I continue to be impressed by the overall integrity of the plan and just how very clear the plan is when it is read as a whole. And as I have tried to explain, the plan

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34 (Article VIII, *"Implementation of Decisions"*, cont'd)

Should the Umpire determine that there has been a violation of his decision, he shall order immediate compliance by the offending party or parties.

The Umpire may take the following action to enforce compliance with his decision, including a directive to make a specific assignment of work:

(a) He may levy a fine of $50 to $250 per day for each violation against the offender; i.e. Employer and /or Union, represented by the parties hereto. The offender shall pay to the Umpire within fifteen (15) days any sum or sums so levied. Should a member of either party to this Agreement fail to pay the amount levied within fifteen (15) days, he shall be deprived of all benefits of the Umpire until such time as the matter is adjusted to the satisfaction of the Umpire.

(b) He may file an application in any Court of competent jurisdiction to have his decision confirmed and for entry of a judgment in conformity therewith.

(c) He may take any further or additional action he deems necessary to secure compliance with his decision.

is not nearly so ambiguous today, so many issues having been decided by the Umpire. I do hope that I have succeeded in making that clear to you: That the plan, in practice, is indeed simple and straightforward.

The plan is the longest surviving plan of its type. It has outlasted all plans like it, including all versions of the *Plan for the Settlement of Jurisdictional Disputes in the Construction Industry*, and all of the plans that preceded that plan. And that is because it has proven to be effective. Local unions have unrestricted access to machinery that is based in BC and entirely concerned with construction in BC. Work assignment disputes are settled quickly under the plan and that is through the force of argument and evidence, not brute force.

The BC JAplan is a model on how to resolve jurisdictional disputes in North America. It is, as I have been saying for years, *"a shining example of what labour and management can accomplish if and when they decide to work together for the purpose of achieving common goals"*.

Lorne Collingwood
Umpire
Jurisdictional Assignment Plan

June 21, 2012

THE RECOMMENDED WAY TO APPLY OF A DECISION ON A WORK ASSIGNMENT

No matter whether the applicant is a contractor or a union, filing an application for a work assignment decision is easy if you follow these simple steps. Follow the steps and you will have met all of the requirements of the plan.

1. Prepare your application. Contractors apply by letter, one that explains the purpose of the application and contains all of the information that is required by Article VII, 2 (a) of the Procedural Rules. Unions are to use the application form that has been developed specifically for the purpose of making an application for a work assignment decision. (It asks for all of the information required by Article VII, 2 of the Procedural Rules and also all of the information that is required by Article VI, 3 of the Procedural Rules.)

Note: Make sure that you supply correct information. A failure to supply correct names and addresses may cause the Umpire to notify the wrong party or send a notice to the wrong address. Those are critical mistakes and may force the Umpire to cancel a hearing and set a date for a new hearing. SO DOUBLE CHECK YOUR INFORMATION!

2. Send your application to the Umpire. **And please,** send a copy of the application to each of the other parties to the dispute. (The plan demands this of contractors.) And unions should also do that because it is the best way to advise the other interested parties of your claim for work. Applications can mailed, faxed to (604) 294-9533, or emailed to japlan@telus.net.

3. If you are a union, you must contact the other parties and seek to settle the dispute.

4. If you don't soon receive a Notice of Hearing from the Umpire, or a Notice Calling for Written Submissions, contact the Umpire. The application might not have been received and the reason can be a simple as a lack of paper in a fax machine. (Where the application is made by fax or email, you can expect to hear from the Umpire that very day or the next.) If you do not, contact the Umpire.