

Hot Topic

Ground Heater Dispute With Operating Engineers Ends With Favorable Decision By Arbitrator

From The Arbitrator...

The text of a decision rendered by an arbitrator, stating that the Building Agreement with Operating Engineers Local 150 DOES NOT require the assignment of an operator to Ground Heaters, provided by Bob Casey of Ogletree Deakins:

“This language is permissive in that it does not require that Local 150 members must operate Ground Heaters. Instead, the Contract indicates that when Bargaining Unit members are assigned to service and maintain Mechanical Heaters, certain requirements must be met.

However, the contract does not mandate that Local 150 members must be employed to operate Ground Heaters.

The assignment to man Ground Heaters is at the reasonable discretion of the Company based on the individual circumstances of the situation. If the Company does assign employees to operate the Ground Heaters, then certain requirements are set forth in the Contract.

In these cases, the company made the determination that it was unnecessary to assign Local 150 members to the operation of the Ground Heaters. This determination is consistent with the language of the Contract. It is also consistent with the evidence showing that it is clear that the Ground Heaters at issue required little, if any, ongoing servicing during operations.”

Long after the winter of 2007-2008 had passed, an issue involving temp heat during that winter hung around. Late last year, contractors involved finally got the answer they were looking for.

Operating Engineers Local 150 informed a handful of contractors that it saw monitoring automatic temporary heaters as falling under the scope of their contract. After a Joint Grievance Committee hearing in May of 2008 failed to produce a solution, the matter headed on a long path to arbitration. In a November case involving Scurto Cement Construction, an arbitrator concluded that Local 150 did not have a mandatory claim to monitor the heaters based on contract language. Scurto was represented by Rachel Cowen and Terrence Smith of Drinker Biddle & Reath LLP.

In these cases, the heaters were unmanned and only needed to be “operated” when the thermostat was being set or the devices were being moved by Laborers. Contractors and their representatives framed the matter as a jurisdictional dispute. While the arbitration decision didn’t indicate a jurisdictional dispute, the bottom line was that the Building Agreement with Local 150 did not require the assignment of an Operator to the ground heaters.

“I was surprised in a sense that he concluded it wasn’t a jurisdictional dispute, but the end result was what we wanted,” said Rick Samson, Shareholder at Ogletree Deakins, who represented some of the other contractors involved in the dispute.

“From what I understood, the companies in question had never used Union members to work these machines, because there wasn’t much to do outside of turn them on and off. I think the arbitrator had to at least consider precedent, so it absolutely helped that these contractors hadn’t used Operators for that work in the past.”

The field executive for one contractor agreed that – even with the arbitrator’s view that the dispute was not jurisdictional – the final result was brought about by contractors setting a strong precedence.

“The devices themselves are pretty much self-contained and you pretty much just set them and walk away until it was time to move them,” he said. “What the Operators wanted in this case was for us to pay both the Laborers for moving the heaters and the Operators for monitoring them. It was definitely worth putting up a fight.

“The Builders Association got involved right up front, which

helped matters. There were a lot of conference calls that I think helped get everyone on the same page. Those helped us coordinate with each other and come up with a unified message.”

That unified front became more important as the issue dragged on, according to Samson. Contractors began sharing information with the Builders Association in January of 2008. From there, two companies were able to utilize the National Plan to get grievances dismissed before the rest went to arbitration.

The Operating Engineers contract is one of many that will be renegotiated this Spring. Samson doesn't expect the decision to have a big impact on those negotiations, but says that may be up to the Operators.

“From MARBA's position, it shouldn't have much of an impact,” Sampson said. “It's a negotiation and you have to give something to get something, so the burden would be on (Local 150) to determine how important changing that contract language would be to them.

“I think the Builders Association's involvement in preparing for both the Joint Grievance Board and the arbitration was important. There were some great things that came out of just having all the lawyers sit down and bounce ideas off of each other.”

The current Operating Engineers contract expires May 31, as do the contracts with a number of other Unions. Also being negotiated this spring:

- Bricklayers District Council Local 1
- Chicago Regional Council of Carpenters
- Cement Mason Locals 502, 803 and 11
- Laborers District Council

- Technical Engineers Local 130

Builders Association members should review the contracts to which they are signatory and submit suggestions for negotiations to Director of Labor Denise Herdrich at 847-318-8585 or dherdrich@bldrs.org.

Review Your Contract Termination Options

In a recent issue of *The Builder Blast*, member firm Ogletree Deakins pointed out that there's no reason to be signatory to a contract if you do not use the trade it applies to. Three scenarios for contract termination were listed:

- A contractor has not directly employed members of a particular trade (including non-Association trades) for a substantial amount of time. The contractor can continue to subcontract the covered work pursuant to its normal practices without itself being signatory to the agreement.
- A contractor is signatory to an agreement in a geographic area where it is not performing and does not intend to perform work in the foreseeable future.
- A contractor signatory to a Builders Association agreement is also signatory to a “short-form” agreement with the same Union. The “short-form” contract can be terminated as long as the contractor remains bound to the Union through the BA contract.



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Two First National Plaza, 25th Floor • Chicago, Illinois 60603 • 312.558.1220 • www.ogletreedeakins.com