

IN THE MATTER OF ARBITRATION BETWEEN

**Construction and General Laborers, Local
563**

And

**Opinion and Award
FMCS Case No. 130919-59150-3**

Ramsey Excavating Company

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of Construction and General Laborers, Local 563

Justin D. Cummins, Esq.

Cummins and Cummins

Minneapolis, MN

On behalf of Ramsey Excavating Company

Phyllis Karasov, Esq.

Andrew D. Moran, Esq.

Larkin Hoffman Daly & Lindgren Ltd.

Minneapolis, MN

JURISDICTION

In accordance the Labor Agreement between Metropolitan Builders Division of Associated and General Contractors of Minnesota and Minnesota Concrete and Masonry Contractors Association and Laborers District Council of Minnesota and North Dakota 2010,

2011, 2012, expires April 30, 2013; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, DC, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on May 5 and May 6, 2014, at the offices of the Federal Mediation and Conciliation Service, Minneapolis, Minnesota. After the arbitration hearing, the parties requested a delay in an attempt to resolve the matter. The matter was not resolved. Consequently, post-hearing briefs were filed by the parties on September 15, 2014. The decision was rendered by the arbitrator on November 11, 2014.

ISSUES AT IMPASSE

The union states the issues as:

1. Whether the employer violated Article 3 of the Collective Bargaining Agreement by unilaterally imposing the CRT/MOH Test on bargaining-unit applicants;
2. Whether the employer violated Article 6 and 24 by subjecting bargaining-unit applicants to a discriminatory pre-employment test and denying workforce diversity to existing bargaining-unit employees;
3. If the employer violated the CBA in any respect, the nature and extent of the appropriate remedy? [Post-hearing brief of union at 3].

The employer states the issues as:

1. Has the union met its burden of proving its claims of gender, age, and disability discrimination?
2. Has the union met its burden of proving that Ramsey Excavating Company violated the parties' agreement or the National Labor Relations Act by failing to bargain? [Post-hearing brief of employer at 3 and 28].

RELEVANT CONTRACT LANGUAGE

ARTICLE 3

Union Recognition

The Employers hereby recognizes the union as the exclusive collective bargaining representative of the Employees in the craft signatory to this Agreement, in respect to rates of pay, wages, hours of employment, fringe benefits, vacations where applicable, and other conditions of employment. The representative Union is hereby recognized hereunder by the Employers as the sole and exclusive bargaining representatives of the Employees represented by them. The respective Union represents that they are qualified for such recognition.

ARTICLE 6

Hiring Employees

There shall be no discrimination or harassment against any Employee because of affiliation or non-affiliation with the Union, race, color, age, sex, creed, political or religious beliefs.

Nothing in this Agreement shall be deemed to constitute a hiring hall or to require the Employees to call only the Union for Employees, or to hire only Employees referred by the Union.

When called and the Union fails to provide qualified workers within twenty-four (24) hours, the Employer shall be free to employ anyone to perform the work at the appropriate scale as contained herein.

The employer shall inform Employees that the Employer is a Union Contractor and as such, Employees on or before the eighth (8th) day of employment must become and remain members in good standing as a condition of employment.

On May 1, 1995, the Construction Craft Laborer Apprenticeship Program was established. The Apprenticeship Committee is made up of an equal number of Employer Trustees and Union Trustees. The parties incorporate by reference and terms and conditions of the Minnesota Laborers' Apprenticeship Program. Copies of the Apprenticeship Standards are available upon request.

A. **Journey Laborers and Enrolled Apprentices.** The Employers agree to give the Union the first opportunity when hiring Journey Laborers and Enrolled Apprentices. First opportunity shall be defined to mean that the Employer shall call the Union for not less than the first 50% of their Journey Laborers and Enrolled Apprentices.

ARTICLE 11

Settlement of Disputes

C. **Arbitration.** Should the Disputes Board, as established, be unable to reach a decision on the matter before it, or because of a deadlock (lack of majority) or

if either party refuses to use the Disputes Board, then the matter may be referred to Arbitration. Within ten (10) working days after the dispute is referred to arbitration, the parties shall ask the Federal Mediation and Conciliation Service for a list of five (5) Arbitrators from which the aggrieved party shall elect which party shall first strike one (1) name and the other party shall then strike one (1) name, and the parties will alternately strike names until there is one (1) name left. The final name shall be selected as the Arbitrator. The Arbitrator thus selected shall set the time and place for hearings, which shall begin no later than ten (10) working days after his or her selection, with the final decision to be handed down in not more than ten (10) working days after the last hearing is held. The time may be extended by mutual agreement between the parties.

The decision of the Arbitrator shall be final and binding on the parties to this Agreement who are the parties to the dispute; provided, however, that the Arbitrator shall have no power to add to, delete, or modify any provision of this Agreement.

The Employer and the Union will share equally all fees and expenses of the Arbitrator.

All work and other conditions prevailing immediately prior to the raising of the question to be decided under this Article shall remain unchanged until final decision has been issued.

Article 12 Management

Management reserves the right to manage its jobs in the best interest of Management; the right to retain or dispense with Employees; to reduce or increase the number of Employees needed on each project, crew, activity or piece of equipment. Under no condition will Union representatives make demands for more Employees in a crew on specific projects, insofar as it does not conflict with this Agreement.

Article 13 Safety

A. Accident and injury free operations shall be the goal of all Employers and Employees. To this end, the Employer and Employee will, to the best of their ability abide by, and live up to the requirements of the several State and Federal Construction Safety Codes and Regulations.

b. To this end, the Employer shall from time to time issue rules or notices to its Employees regarding on the job safety requirements. Any Employee violating such rules or notices shall be subject to disciplinary action. No Employee may be discharged for refusing to work under unsafe conditions. Further, the Employer

will encourage Employees to attend safety training available through the Construction Laborers Education, Apprenticeship & Training Fund of Minnesota & North Dakota.

C. Such safety equipment as required by governmental regulators, shall be provided without cost to the Employees. At the Employer's option, the Employees may be required to sign for safety equipment and shall be obligated to return same upon discharge, layoff, quit or other termination in comparable conditions as when issued providing reasonable wear and tear. The Employer shall have the rights to withhold the cost of such safety equipment if not returned. Employees will be compensated for attending safety meetings conducted by the Employer on the job site.

D. The Labor User Contractor Committee Joint Labor-Management Uniform Drug/Alcohol abuse Program, copies of which are on file with the Laborers District Council and the AGC of Minnesota, is incorporated herein by reference and is made a part of this Collective Bargaining Agreement.

Employers may require drug and alcohol testing of employees and applicants for employment including random testing if the Employer has adopted a written drug and alcohol testing policy complying with the provisions of the LUC program and applicable statutes. This program is available to any signatory Employer on a non-mandatory basis.

Article 23

Worker Readiness

The Union and Employers recognize the value of a skilled and motivated workforce. To this end, Labor and Management agree as follows:

A. During the term of this Agreement, all workers covered by this Agreement should attend and successfully complete the OSHA 10-hour and the Scaffold Certification courses at the Construction Laborers Education and Training Center.

B. During the term of this Agreement, all workers covered by this Agreement should attend a minimum of sixteen (16) hours of skill improvement classes sponsored either by the Employer or the Education and Training Fund at the Laborers Training Center.

C. Scheduling of these Courses shall be the responsibility of the Employee in collaboration with the Employer, Union and the Education and Training Fund.

ARTICLE 24

Saving Clause

This Agreement is intended to be in conformity with all applicable and valid State and Federal laws, rules and regulations. Any conflict between the provisions of this Agreement and the terms of any such laws and regulations shall cause the provisions of this Agreement so in conflict to be superseded or annulled but shall not supersede or annul the terms and provisions of this Agreement which are not so in conflict.

INTRODUCTION

The Construction and General Laborers Local 563 (Union) filed this grievance against Ramsey Excavating Company (Employer) on behalf of Ms. Rita Berger and all other bargaining-unit employees and applicants to address the employer's use of a pre-employment physical machine test created by Cost Reduction Technologies, LLC (CRT) and administrated by Minnesota Occupational Health (MOH), a private company, for the employer. The union alleges that the employer's use of the CRT/MOH test violates the collective bargaining agreement: 1) because the employer unilaterally imposed the test on bargaining-unit applicants without giving the union notice or an opportunity to bargain; and 2) because the test is discriminatory as to disability status, age, and sex.

Ramsey Excavating Company contends that the union failed to meet its burden of proving its discrimination claim, which alleges that the employer violated Article 6 and/or Article 24 of the parties' collective bargaining agreement. The employer contends that the union's evidence, in its entirety, consists of the testimony of two witnesses who stated that they "believe" or "feel" that the pre-hire physical test implemented by the employer (the CRT Test) was "unfair" or "discriminatory". Further, the company contends that the union failed to meet its burden of proving that employer violated Article 3 of the agreement by unilaterally administering the CRT Test. The employer contends that it has the right to ensure that labor applicants are capable of performing the physically demanding requirements of the job without creating a risk of injury to themselves and to others. In addition, the employer contends that the union, by its own admission, has expressly approved of and acquiesced for many years to signatory contractors' use of pre-hire physical testing. The company contends that the union did not consider the CRT Test to be a mandatory subject of bargaining since the CRT Test has been used in the construction industry for many years with the union's knowledge.

The union contends that beginning in March 2013, the employer unilaterally decided to make passing the CRT/MOH test a job requirement. The employer did so without informing the

union about the change in employment terms and conditions or offering to bargain in that regard.
's written objections.

Ms. Rita Berger was referred by the union to the employer for hire under the collective bargaining agreement's mechanism established by Article 6(A). The employer asked Ms. Berger to take the CRT/MOH test on or about March 22, 2013. According to the consent form, which Ms. Berger signed before taking the CRT Test:

The CRT Evaluation is an isokinetic test, which can safely determine the physical capability of an individual. The CRT test is used to match your physical strength to the physical strength requirements of the essential functions of the job. You must give your **maximum effort** so a proper evaluation can be made. **You must push and pull as hard and as fast as you can throughout the entire motion on every repetition.** [Employer exhibit 113, emphasis in original].

Ms. Berger signed the document stating "**I, Rita Shumacher [now Berger by marriage], have given my maximum effort on the CRT Evaluation.**" [Id., emphasis in original].

Ms. Berger testified she signed the document with the understanding that this was a "practice run" of the entire CRT/MOH test and that the actual test would be conducted after the "practice run."

On or about March 22, 2013, the employer informed Ms. Berger that the employer would not hire her because she failed the CRT/MOH test. Ms. Berger asked what part of the test she failed, but the employer declined to provide that information. The employer then contacted the union and requested another female laborer. The union referred a female laborer named Sherri Pierce. Ms. Pierce successfully passed the drug test and successfully achieved the hiring score required on the CRT test. Ms. Pierce is two years older than Ms. Berger.

The union contends that Ms. Berger has attained and performed the exact work required by the employer in the same job classification during her 15-year career in the industry. She has successfully performed demolition and other laborer work that she would have done for the employer if the employer had hired her. Essentially, the union contends that the unilateral implementation of the CRT test violated the mandatory bargaining provisions of Article 3 of the CBA and further violated Articles 6 and 24 of the CBA in that both disparate treatment and disparate impact occurred.

The employer contends that the union has not met its burden of proving its claims that the company violated the CBA by failing to bargain, nor has the union met its burden of proving its claims of gender, age and disability discrimination.

POSITION OF UNION

1. The collective bargaining agreement establishes an exclusive hiring hall, so the employer's bargaining obligation and the CBA terms apply equally to job applicants and existing employees of the employer.

The union and the employer are parties to the CBA, a multi-employer collective bargaining agreement, negotiated between the union's district council and a multi-employer bargaining association, the Associated General Contractors. The CBA establishes, in fact, an exclusive hiring hall in the construction industry from which hundreds of signatory contractors must obtain applicant referrals for employment. Article 6 (A) states:

The employers agree to give the union the first opportunity when hiring journey laborers and enrolled apprentices. First opportunity shall be defined to mean that the Employer shall call the Union for not less than the first 50% of their Journey Laborers and Enrolled Apprentices.

The union recognition provision in Article 3 of the CBA designates the union as "exclusive collective bargaining representative" and, consequently, incorporates the employer's legal duty under the National Labor Relations Act to bargain with the union about employment terms and conditions. See 29 U.S.C. §158(a)(5); see also 29 U.S.C. §159(a).

Applicants referred through exclusive hiring halls are protected "employees" under the NLRA. See generally *Houston Chapter, AGC*, 143 NLRB 409 (1963), enfd. 349 S.2d 449 (5th Cir. 1965), cert. denied 382 U.S. 1026 (1966).

2. The union has long objected to the CRT/MOH test, successfully challenging the test through the CBA grievance procedure, and only a few of the hundreds of signatory contractors have ever used the test. Before the employer, in this case, unilaterally imposed the CRT/MOH test, the union made its objections clear in correspondence sent to multiple signatory contractors, during conferences with company leadership, and through the grievance procedure. Prior to the arbitration hearing in this case, the union knew of only two companies among the hundreds of signatory contractors that were using the CRT/MOH test: Olympic Companies, Inc. and the

employer. In response to the union's grievance filed against Olympic, which is virtually identical the grievance filed against the employer in this case, Olympic agreed via written settlement to stop using the test and never to resume using it unless a court determines that the test is not discriminatory. Most signatory contractors ordinarily do not use pre-employment testing besides contractually authorized drug- and –alcohol screening. To the extent testing other than drug- and –alcohol screening occurs, it ordinarily has been job-simulation testing that involves test takers doing actual job tasks under realistic working conditions. The union has not objected to the use of a job-simulation test because that testing, unlike the CRT/MOH test, typically evaluates a test taker's ability to perform essential job functions.

3. Starting in March 2013, and without giving the union notice or an opportunity to bargain, the employer unilaterally imposed the CRT/MOH test on bargaining-unit applicants as a condition of employment, triggering the union grievance. The employer did so without informing the union about the change in employment terms and conditions or offering to bargain in that regard. The employer also refused to stop using the CRT/MOH test in response to the union's written objections, which the union submitted to the employer through the union's district council as soon as the union learned about the employer's testing activity on or about March 26, 2013. In a letter from the employer's owner, the employer responded to the union's objection as follows:

Our company firmly believes that we are in compliance with all Federal, State and Municipal laws in administering our testing program and has no intention to cease testing per your request. [Union exhibit #3].

The employer maintained its position and otherwise failed to bargain directly or via the multi-employer bargaining with the union. The employer's refusal to bargain with the union is striking given the union has previously over, and agreed to, the use of pre-employment testing in the form of drug- and – alcohol screening adopted in Article 13 of the CBA.

4. The union requested information about the CRT/MOH test to investigate the grievance further and the union filed an unfair labor charge when the employer did not respond to those information requests in any respect.

5. While ignoring the information request, the employer also refused to rescind the CRT/MOH test or bargain over the use of the test, prompting the union to file an unfair labor practice that parallels the grievance here. At the same time, the employer continued not to comply with

the union's information request, the employer also insisted it will not cease using the CRT/MOH test and otherwise refused to bargain over the subject matter of pre-employment testing. Consequently, and at the invitation of the NLRB, the union filed a second unfair labor practice charge, this time to address the employer's imposition of the CRT/MOH test without giving the union notice or an opportunity to bargain. As directed by the NLRB, the union based the unilateral-change ULP charge on the same set of facts and legal principals that support the grievance against the employer.

6. The NLRB found merit to the information-request unfair labor practice charge. The NLRB ordered the employer to provide all requested information and deferred processing of the unilateral-change charge until after the arbitration process. The NLRB investigated the union's first-filed ULP charge that which concerned the employer's refusal to provide anything in response to the union's information request. The NLRB found merit to that ULP charge and, to settle the claims against the employer, compelled the employer to comply with the union's information request. The NLRB postponed additional investigation of the union's second-filed ULP charge that which the NLRB invited the union to file and which parallels the grievance being arbitrated. Consistent with long-standing law, the NLRB has deferred final determination of the unilateral change ULP merits until after reviewing the arbitral proceedings to assess whether the arbitration decision comports with the duty to bargain imposed by federal labor law.

7. Over seven months after making the CRT/MOH test a condition of employment, and while still failing to provide all required information to the union, the employer purportedly, and for the first time, offered to bargain. In a letter dated October 15, 2013, the employer purported to offer the union an opportunity to bargain over the use of the CRT/MOH test. This was the first time that the employer had offered to bargain with the union about that subject matter. The employer made this supposed offer while still not providing all test-related information to the union that the NLRB had ordered the employer to produce. In correspondence dated October 17, 2013, the union responded through counsel as to why the employer's offer to bargain did not seem to be in good faith. In particular, the employer made this supposed offer long after the employer had already imposed the CRT/MOH test such that it was an offer to bargain about what was already fait accompli. Moreover, the employer made the purported offer while continuing to withhold from the union vital information about the test. Furthermore, the employer only offered to bargain over how best to use the CRT/MOH test, which the union

believes to be discriminatory in any case, rather than the use of pre-employment testing in general. The employer sent another letter dated November 18, 2013, making the same purported offer to bargain. The employer subsequently gave additional information to the union, but the employer still did not fully comply with union's information request as ordered by the NLRB. The union only obtained the balance of the required information after compelling production via arbitral subpoena. The employer produced that information in April 2014, shortly before the arbitration hearing in May 2014.

8. Use of the CRT/MOH test, which is based on pre-employment medical examination, and is not job related, but does identify disabilities, effects workforce diversity concerning the disability status, age, and sex of employees. The CRT/MOH testing forms show that the CRT/MOH testing process constitutes a pre-employment medical examination designed to identify whether test takers have a disability. For starters, test takers must complete "patient registration form." Then the test takers must complete "physical examination questionnaire" which seeks information that is not job related but indicates whether a test taker may have a disability. Bargaining-unit applicants who develop "injuries" during their career as identified through this CRT/MOH process also are likely to be disproportionately over the age of 40. In addition, as acknowledged by the "legal monograph for employers" prepared by CRT and posted on CRT's website, "it is difficult to avoid the disparate impact on females when the requirements for the job is lifting a very heavy amount of weight." Importantly, the CRT/MOH test supposedly measures job requirements that involve heavy lifting. In short, the use of CRT/MOH tests affects workforce diversity and, therefore, affects the employment terms and conditions of existing bargaining-unit employees.

9. The CRT/MOH test measures only the strength of an isolated muscle group at a constant speed rather than evaluating the performance of the body as a whole working with the experience-based judgment and technique to do the job tasks. The president of CRT, Mr. Brett Crosby, testified that the CRT/MOH test involves strapping a test taker into a machine and then testing the strength of an isolated muscle group such as one arm or one leg at a constant rate of speed and along a certain plain or range of motion. The CRT/MOH test outcome form states, "other physical and mental factors that may affect job performance are not within the scope of this report." Mr. Crosby also admitted that the CRT/MOH test does not evaluate body

mechanics, that is, how the body works together as a unit, to perform essential job functions, the experience-based judgment to perform essential job functions, or the techniques used to perform essential job functions. Significantly, body mechanics, judgment, and technique have enabled bargaining-unit employees who have physical limitations, are over 40, and/or are female to perform as well or better than members who have no physical limitations, are under 40, and are male. The CRT/MOH test does not evaluate performance of essential job functions. The CRT/MOH test does not change to account for the essential job functions of a given job. It is a one-size-fits-all approach. As a result, the employer predicated to CRT/MOH tests on a job task analysis concerning a different work project on a separate job site and with different working conditions than that for which Ms. Berger applied. Notably, the CRT/MOH test is an “isokinetic” test that originated in the sports-medicine industry to consider when athletes may return to the playing field after suffering a sports-related injury. Like other “isokinetic” tests, the CRT/MOH test does not predict future work injuries or job performance. Even the paper posted on CRT’s website to justify the use of the CRT/MOH test acknowledges that peer-reviewed studies of “isokinetic” testing published in scientific journals have found no meaningful relationship between test scores and workplace injuries or, by extension, work performance. The CRT paper, which was written by the father of CRT’s legal counsel, is not itself a peer-reviewed study published in a scientific journal. Thus, the CRT paper’s discussion about test results were a small sample from one company, Gypsum Management and Supply, Inc., and has no authoritative weight.

10. Based solely on Ms. Berger’s purported failure to pass the CRT/MOH test, the employer denied Ms. Berger the opportunity to perform work she has done well for 15 years and for which the union referred her to the employer. At the outset, and while directing Ms. Berger simply to sign the top of a one-page document, which has a purported consent form, the test administrator of the employer told Ms. Berger that they will do a “practice run” of the entire CRT/MOH test first and then conduct the actual test. Therefore, Ms. Berger signed the consent form without carefully reading it. At the conclusion of the “practice run,” Ms. Berger asked to undergo the CRT/MOH test while giving her maximum effort as the test administrator had discussed at the outset. The test administrator did not comply, however, stating something like “women just don’t do as good as the guys to.” The test administrator then instructed Ms. Berger to sign the bottom of the one-page document Ms. Berger had already signed at the direction of the test

administrator, which was her purported effort declaration, and then leave the facility. Ms. Berger dutifully followed those instructions believing that she would ultimately have the chance to do the actual CRT/MOH test. On or about March 22, 2013, the employer informed Ms. Berger that the employer would not hire her because she supposedly failed the CRT/MOH test. The employer denied Ms. Berger's request to do the CRT/MOH test while giving her maximum effort as opposed to doing a "practice run."

After the employer refused to hire her, Ms. Berger obtained and performed work in the same job classification that she would have performed for the employer and, in fact, has performed for many other employers during her 15-year career in the industry. She has successfully performed the demolition and other laborer work she would have done for the employer if the employer had hired.

The union did an analysis of the situation in its post-hearing brief. In its analysis the union stated: 1. The employer failed to give the union notice or an opportunity to bargain over the imposition of the CRT/MOH test on bargaining-unit applicants even though such pre-employment testing is a mandatory subject of bargaining. The employer's conduct violates Article 3 because the employer did not notify the union or provide an opportunity to bargain over a mandatory subject of bargaining: the use of pre-employment testing. The use of pre-employment testing on bargaining-unit applicants is a mandatory subject of bargaining because the union operates an exclusive hiring hall and, in addition, because such testing affects workforce diversity and violates existing CBA terms. Arbitrators routinely rely on statutory and administrative authority when interpreting contract provisions that underlie labor disputes like the union's grievance against the employer. See, e.g., Elkouri and Elkouri, *How Arbitration Works* 945 (7th ed. 2012) ("Arbitrators often construe collective bargaining agreements in light of statutes and case law, and may treat applicable regulations as implied terms of the contract"). Not surprisingly, arbitrators regularly rely on NLRB precedent when interpreting and enforcing contract provisions that contain the same or similar protections as the NLRA. The NLRB has consistently held that the NLRA prohibits an employer signatory to a collective bargaining agreement from unilaterally imposing an employment term or condition on bargain-unit employees.

Applicants referred through exclusive hiring halls are protected “employees” under the NLRA. See generally *Houston Chapter, AGC*, 143 NLRB 409 (1963), enfd. 349 F.2d 449 (5th Cir. 1965), cert. denied 382 U.S. 10 26 (1966).

Because job applicants in an exclusive hiring hall systems are employees under the NLRA provisions governing the duty bargain, then, the term “employees” in Article 3 of the CBA must be interpreted to include applicants as well. Accordingly, mandatory subjects of bargaining include pre-employment testing of job applicants, including pre-employment medical tests such as the CRT/MOH test, when a union operates an exclusive hiring hall as the union does here.

Mandatory subjects of bargaining also involve any employer policy or practice that affects workforce diversity. See, e.g., *US Postal Service*, 309 NLRB 1305, 1309 (1992) (reiterating that a term or condition implicating potential discrimination is a mandatory subject of bargaining). Similarly, an employer policy or practice that arguably conflicts with an existing term of a collective bargaining agreement is a mandatory subject of bargaining. Since the CBA requires the employer to obtain the first 50% of workforce through union referrals, then the union operates an exclusive hiring hall under settle NLRB precedent that guides the interpretation of the CBA. The NLRB has consistently recognized that collective bargaining agreements obligating the employer to hire a certain percentage of employees through the union, as the CBA does, establishes an exclusive hiring hall. See, e.g., *Carpenters Local 608*, 279 NLRB 747, 754 (1986), enfd. 811 F.2d 149 (2d Cir. 1987) (Ruling that an exclusive hiring hall exists when an employer retains a contractual right to select a certain number of employees for hire. Indeed, the NLRB has expressly held that an exclusive hiring hall exists where, like here, the collective bargaining agreement requires the employer to obtain the first half of its workforce through the union: “There is no question that [the union’s] hiring hall is an exclusive hiring hall notwithstanding that the employer has the right to select 50% of the workforce on the job.” *Carpenters Local 17*, 312 NLRB 82, 84 (1993).

The statement in the second paragraph of Article 6 suggesting that the collective bargaining agreement somehow does not create a hiring hall is legally inaccurate and irrelevant. “Exclusive hiring hall” is a term of art established by the NLRB to describe a system that requires referring a certain percentage of applicants to an employer for hire pursuant to a collective bargaining agreement. The stray phrasing in the second paragraph in Article 6 (A)

does not nullify the fact that consistent with well-established NLRB authority, an exclusive hiring hall has been established under the CBA because Article 6 (A) requires the first half of the workforce to be hired through the union.

Importantly, the past practice under the CBA has been to bargain over pre-employment testing and to apply any such testing adopted in the CBA to both existing employees and job applicants, consistent with the union operating an exclusive hiring hall. Article 13 (D) of the CBA states, in pertinent part: “Employers may require drug and alcohol testing of employees and applicants....” For all these reasons, the employer’s use of the CRT/MOH test is a mandatory subject of bargaining.

Use of the CRT/MOH test affects workforce diversity and violates existing CBA terms. Bargaining-unit applicants who have a disability and/or are over 40 apparently are more likely to have “disorders” and other “defects” identified through the CRT/MOH test.

The union has repeatedly made clear to signatory contractors like the employer that the union objects to the CRT/MOH test. The union, on its own behalf and through the union’s district counsel, has consistently reiterated its opposition to the use of the CRT/MOH test. Prior to the arbitration hearing in this case, the union knew of only two companies among the hundreds of signatory contractors that were using the CRT/MOH test: Olympic and the employer. Without giving the union notice or the opportunity to bargain, the employer imposed the CRT/MOH test as an employment term and condition for bargaining-unit applicants.

The employer’s after-the-fact offer to bargain over how to use the already imposed CRT/MOH test, while still withholding test information from the union that the NLRB ordered to be produced, does not somehow remedy the employer’s failure to bargain in good faith. The employer’s “offer” to bargain through letters dated October 17, 2013, and November 18, 2013, were merely notice of a fait accompli. The employer made the alleged offers long after the employer had already imposed the CRT/MOH test and while the employer continued to withhold from the union essential testing information compelled by the NLRB.

The CRT/MOH test unilaterally imposed by the employer on bargaining-unit applicants is discriminatory based on disability status, age, and sex. It undermines the diversity of the workforce for bargaining-unit employees in violation of Articles 6 and 24. As with the unilateral-change portion of the grievance, the union pursues this second part of the grievance on behalf of all bargaining-unit employees and applicants, not only on behalf of Ms. Berger.

The CBA authorizes the union through the grievance procedure to challenge an employer policy or practice that affects bargaining-unit employees and applicants as a whole even if no individual member has been harmed by the policy or practice. Under long-standing Supreme Court law, the union recognition provision of a given collective bargaining agreement enables a union to pursue grievances despite no adverse action against any bargaining-unit employee. *NLRB v. Katz*, 369 US 736, 743-46 (1962). Article 3 of the CBA constitutes the union recognition provision that authorizes the union to pursue grievances despite no adverse action against any bargaining-unit employee or applicant. In addition, Article 11 of the CBA authorizes the union to challenge the employer's interpretation of contract language and related legal obligations. Accordingly, the union's grievance does not depend on the complaint from an individual grievant from the bargaining-unit to be meritorious. This grievance is based in part on the employer's treatment of Ms. Berger, but it is also based on the action of the employer as it affects the entire bargaining-unit.

The CRT/MOH testing process explicitly seeks to identify whether the test taker has a disability, and the test disproportionately screens out test takers based on disability status, age, and sex. The CRT/MOH test is not job related or consistent with business necessity because it does not evaluate the ability to perform essential job functions. Virtually no signatory contractors have found it necessary to use the CRT/MOH test, which does not evaluate the ability to perform essential job functions or predict the likelihood a test taker will suffer a workplace injury. Multiple witnesses testified that, in their 10-20 years of work in the industry, they have been subjected to a job-simulation test only a couple of times, on average. More to the point, CRT/MOH test does not evaluate body mechanics, that is, how does the body work together as a unit to perform essential job functions, the experience-based judgment to perform essential job functions, or the techniques used to perform essential job functions. In addition, the outdated and irrelevant studies from two decades ago offered by the employer at the hearing either do not address "isokinetic" testing like the CRT/MOH test, or the studies involved inapposite test subjects and test parameters. Even the paper posted on CRT's website to justify the use of CRT/MOH tests confirms that peer-reviewed studies of "isokinetic" tests published in scientific journals have identified no actual connection between test scores and workplace injuries or work performance.

Courts have rejected the argument made by the employer that pre-employment tests are a valid hiring tool for employers, even when employers use the testing after making an employment offer. *City of LaCrosse Police and Fire Com'n v. Labor and Industry Review Com'n*, 407 N.W. 2d 510, 521-22 (Wisc. 1987) (Analyzing the employer's reliance on "isokinetic" testing and concluding that there was no evidence a female test taker could not perform essential job functions and, moreover, determining that the "isokinetic" testing on which the employer relied was not rationally related to essential job functions). The employer has an alternative that is less discriminatory than the CRT/MOH test to advance the employer's purported interest in promoting workplace safety. Job simulation testing can actually evaluate the ability to perform essential job functions and, by implication, the ability to work safely.

Through its agents, the employer used the CRT/MOH test in a discriminatory manner regarding Ms. Berger to deny her work that she has performed both before and after she "failed" the test. The employer declined to tell Ms. Berger what part of the CRT/MOH test she supposedly failed or to let her do the test again even when she offered to pay the cost of taking the test. Both before and after the employer refused to hire her because she "failed" the CRT/MOH test, Ms. Berger has performed precisely the work she would have done for the employer, and she has done that work well for 15 years. The employer had no legitimate reason to deny Ms. Berger the job for which the union referred her. The employer has violated Articles 6 and 24 of the CBA by subjecting bargaining-unit applicants to a discriminatory pre-employment test and undermining workforce diversity for existing bargaining-unit employees.

As a remedy the union requests that grievance be sustained in full and, that the employer be directed to cease violating the CBA as established and provide make-whole relief to all affected bargaining-unit applicants and employees, including Ms. Berger. The union further requests that the arbitrator retain jurisdiction over implementation of remedy for 90 days.

POSITION OF EMPLOYER

The union did not present a single piece of evidence to support its meritless and boilerplate allegations of discrimination against Ramsey Excavating Company. The union failed to meet its burden of proving its discrimination claim, which alleges that Ramsey Excavating Company violated Article 6 and/or Article 24 of the parties' collective bargaining agreement. The union's evidence, in its entirety, consisted of the testimony of two witnesses stating that they

“believe” or “feel” that the pre-hire physical test implemented by Ramsey Excavating Company, the CRT test, was “unfair” or “discriminatory.” Upon cross-examination, these same witnesses admitted they have no factual basis for their beliefs and feelings other than the simple fact that Ms. Berger was unable to achieve a satisfactory score on the CRT test.

After Ms. Berger’s conditional offer of employment was revoked, Ramsey Excavating Company hired Ms. Sherri Pierce to the vacant laborer position. Ms. Pierce is two years older than Ms. Berger and is also female. While the union alleges that Ramsey Excavating Company’s use of the CRT tests constitutes intentional discrimination and has a disparate impact, on the basis of disability, this allegation is without any basis in fact. Ms. Berger affirmatively stated that she was not disabled at the time of her application to Ramsey Excavating Company. Further, the union has not identified a single disabled individual who has taken the CRT test, much less failed to achieve the satisfactory score.

The union has also failed to meet its burden of proving that Ramsey Excavating Company violated Article 3 of the agreement by unilaterally implementing the CRT test. The parties’ agreement and the National Labor Relations Act reserve to Ramsey Excavating Company the right to ensure that laborer applicants are capable of performing the physically demanding requirements of the job without creating the risk of injury to themselves and to others.

The union, by its own admission, has expressly approved of and acquiesced to signatory contractor’s use of pre-hire physical testing for many years. Now, after years of making clear that it does not consider pre-hire physical testing to be a mandatory subject of bargaining, the union ineffectually attempts to narrow the scope of its acquiescence by arguing that its unequivocal approval of pre-hire physical testing was actually limited to “job-simulation”.

Ramsey Excavating Company is justified in concluding that the union did not consider the CRT test to be a mandatory subject of bargaining, as the CRT test has been used in the construction industry for many years with the union’s knowledge. In fact, Ms. Berger herself has taken the CRT test on at least three other occasions without objection and without the union raising issue during contract negotiations.

Despite the union’s claim that Ramsey Excavating Company failed to bargain regarding its use of the CRT test, the union has actively prevented Ramsey Excavating Company from doing just that. The evidence demonstrates that Ramsey Excavating Company has not only

repeatedly attempted to bargain with the union concerning the decision to use the CRT test, but also voluntarily and unilaterally agreed to postpone any further testing of labor applicants in an effort to engage in good faith and constructive bargaining with the union. The only reason bargaining has not occurred is the union's unjustified refusal to bargain in good faith, despite Ramsey Excavating Company doing everything that union has asked. As such, on the basis of the evidence introduced at the arbitration, Ramsey Excavating Company requests that the arbitrator deny the union's grievance in its entirety. Why?

1. The union has not met its burden of proving its claim of gender, age and disability discrimination. In its grievance, the union alleges that Ramsey Excavating Company denied employment to Ms. Berger based on physical testing or "isokinetic" testing that "this denial of employment constitutes discrimination based on sex, age, disability and any other protected class that apply in violation of Article 6 and 24." The union asserts that Ramsey Excavating Company's use of the CRT test constitutes discrimination under a disparate treatment theory and a disparate impact theory. Under both theories, the union has failed to meet its burden of proof. The union offered no evidence in support of a claim for intentional discrimination. The union wholly failed to demonstrate that the CRT test disparately or disproportionately impacts members any protected class. The law is clear that unless and until the union establishes a *prima facie* case of disparate treatment or disparate impact discrimination, Ramsey Excavating Company bears no burden of proof of validity or job-relatedness. Because the union did not introduce any evidence of discriminatory treatment or discriminatory impact, the allegations of discrimination should be denied.

In the early months of 2013, Ramsey Excavating Company was experiencing a high rate of work-related injuries, with seven employees suffering injuries while performing the physically demanding tasks required of Ramsey Excavating Company's laborers. The Ramsey Excavating Company's workers' compensation insurance carriers called for a meeting with Ramsey Excavating Company. At this meeting the insurance agent stated that Ramsey Excavating Company needed to reduce its workplace injuries or else Ramsey Excavating Company would either become uninsurable or the cost of workers' compensation insurance would become prohibitive. Agents recommended that Ramsey Excavating Company begin conducting pre-hire physical testing, and specifically recommended the CRT test as the test that was successful in

eliminating injuries for many of their respective clients. Mr. Ramsey, the owner of Ramsey Excavating Company, spoke with a number of other contractors who were using the CRT test, each of whom recommended the CRT test and stated that it helped them eliminate workplace injuries. One of the agents informed Mr. Ramsey that there were “a couple hundred companies” which were using the CRT test and had successfully eliminated a substantial number of injuries that Ramsey Excavating Company’s fieldworkers were experiencing. Ramsey Excavating Company decided to implement the CRT test for laborer and operator positions and engaged Minnesota Occupational Health to perform a job task analysis of these positions. The job task analysis was conducted by Ms. Susan Unger, an occupational therapist and Certified Ergonomic Assessment Specialist. The purpose creating a job task analysis is to conduct a detailed analysis of the physical demands required for a particular position, as that position is performed at a particular company, and to create a written report that details those physical demands and the frequency with which they are performed. Ms. Unger visited an actual Ramsey Excavating Company job-site in order to interview and observe multiple employees working in the field as laborers. The purpose of these interviews is to obtain maximum input on the job tasks performed by laborers. Ms. Unger also conducted a variety of on-site measurements, including weights, push pull force measurements, distances and heights, in order to analyze the strength required to perform particular tasks. Ms. Unger analyzed the tasks performed by laborers over an eight-hour day, averaged over a three to six month period, in order to account for variation between jobs.

After completing her field analysis, Ms. Unger consulted the US Department of Labor’s Dictionary of Occupational Titles (DOT), a resource originally developed by the United States Employment Service, which expands on the psychological components of job classifications. CRT and MOH went one step further and supplemented the DOT’s strength ratings with intermediate levels in order to provide a more exacting, detailed analysis of the strength required for a particular job. Based upon Ms. Unger’s analysis of the laborer position at Ramsey Excavating Company, including on-site interviews, observations, and force measurements, the corresponding job classifications in the DOT and Ramsey Excavating Company’s description of laborers’ job tasks, Ms. Unger classified the laborer position at Ramsey Excavating Company as “heavy.” Once Ms. Unger completed her job task analysis, it was presented in final form to Ramsey Excavating Company supervisors of field workers who actually work as laborers and

those employees attested to its accuracy. The “heavy” definition corresponds to a Body Index Score (BIS) of 226-253 on the CRT test. An individual’s BIS, which measures the physical output or force of an applicant, is developed using a proprietary algorithm based on CRT’s database of test takers, as well as a study of test subjects. CRT’s proprietary database, which is based in part on normative data contains torque or force values for the knees, shoulders, and back, and is used to assign a BIS to an individual’s output on the CRT test, which is then compared to the corresponding job classification in the Department of Labor’s DOT and in the job task analysis. Individuals who take the CRT tests are not compared to one another, rather, an individual’s BIS is compared to requirements of the job for which they are applying. An individual’s gender, age, and weight have no factor in how a person performs on the test. “The machine doesn’t care if you are female or male or a younger person or an older person or a heavier person or a lighter person. You take the test. Isokinetics measures what the person can output. That is compared to the job they’re required to do.” The CRT test uses established, peer-reviewed science of isokinetics to measure a person’s force output, using “accommodating resistance” technology. “Accommodating resistance” means that the CRT test allows individuals to exert only the force they are capable of, as opposed to a weight lifting test where insufficient strength would prevent an individual from even beginning the test.

After completing the job task analysis and matching Ramsey Excavating Company’s laborer position with the appropriate job classification and strength rating from the Department of Labor’s DOT, Ramsey Excavating Company began to use the CRT tests in March of 2013. Ms. Berger was the first laborer to take the CRT test for Ramsey Excavating Company.

Ramsey Excavating Company had contacted the union and specifically requested a female laborer in order for diversity on the project to meet female and minority hiring goals. Ms. Berger was sent to Ramsey Excavating Company. Ms. Berger signed an acknowledgment of having read and reviewed Ramsey Excavating Company’s drug testing policy, a child support disclosure form, a W-4, and a form I-90. Ms. Berger was then extended an offer of employment by Ramsey Excavating Company conditioned on her successful passing of a drug test and the achievement of a satisfactory score on the CRT test.

After receiving a conditional offer of employment from Ramsey Excavating Company, Ms. Berger traveled to Minnesota Occupational Health on March 21, 2013, to take her drug test, which she passed. She then returned to MOH on March 22, 2013, to take the CRT test. Before

taking the CRT test, Ms. Berger reviewed and signed a form titled "Consent for Isokinetic Pre-hire Evaluation and Documentation of CRT Testing." The upper two-thirds of the consent, which Ms. Berger signed before taking the CRT test, provides in relevant part: "You must give your maximum effort so a proper evaluation can be made. You must push and pull as hard and as fast as you can throughout the entire motion on every repetition." When she signed the document under her signature was stated "I have read the above information and I understand that I will be asked to give maximum effort and that I will be performing bouts of strenuous exercise."

After taking the CRT test when she claimed she gave less than maximum effort, Ms. Berger reviewed and signed the bottom of the consent form, titled Declaration of Effort in which Ms. Berger certified: "I, Rita Shoemaker [Berger], have given my maximum effort on the CRT evaluation. I understand that the results from this test will be given to the company I am testing for, and that those results will have an effect on whether or not I will be hired."

Upon notification that Ms. Berger had failed to achieve a satisfactory score on the CRT test, Ramsey Excavating Company contacted the union and requested another female laborer. Ms. Sherri Pierce was sent by the union. She was extended a conditional offer of employment. Ms. Pierce successfully passed her drug test and achieved a BIS of 241.9 on the CRT test. Ms. Pierce is two years older than Ms. Berger and is also female. Ms. Berger and Ms. Pierce are the only laborer applicants who took the CRT test for Ramsey Excavating Company. Ramsey Excavating Company voluntarily and unilaterally agreed to postpone any further testing of laborer applicants in an effort to engage in good faith and constructive bargaining with the union.

The union presented no evidence to support its claim that Ramsey Excavating Company intentionally discriminated against laborer applicants based on gender or age through its use of the CRT test. Stated by the arbitrator during the arbitration hearing "since this is not a termination, the union carries the burden" of proof.

The only suggestion of discrimination proffered by the union are the opinions of Mr. Mackey, business manager of the local, and Mr. Brady, president of the union, that they "think" and "believe" the CRT test discriminates against women and older workers. This cannot be considered evidence. The union has not presented a *prima facie* case of gender discrimination. The union is unable to establish *prima facie* case of gender discrimination because it has produced no evidence indicating that the circumstances surrounding Ms. Berger's taking of the

CRT test gave rise to an inference of discrimination. It is based entirely on “belief” that the CRT test “discriminates against women.” The union’s belief that the CRT test is discriminatory has no basis in fact beyond the purported “beliefs” of Mr. Brady and Mr. Mackey. Ramsey Excavating Company, in a good faith effort to engage in bargaining with the union, postponed any further testing pending bargaining over its use of the CRT test.

In light of the hiring of Ms. Pierce, the absence of any similarly situated males who were treated more favorably, and the union’s complete failure to introduce any evidence of intentional discrimination by Ramsey Excavating Company, the union’s claim of intentional disparate treatment on the basis of gender is entirely without merit. For the same reasons, the union’s claim of disparate treatment under the Age Discrimination in Employment Act (ADEA) is also without merit. The union provided no direct evidence of age discrimination. Ms. Pierce, the woman who was hired in the vacant laborer position a few days after Ms. Berger failed the test, is nearly two years older than Ms. Berger. Mr. Brady’s sweeping generalization in his testimony at the arbitration hearing that “as you get older, you get weaker,” and as a result, the CRT test is somehow discriminatory as to individuals over the age of 40, does nothing to further the union’s baseless claims of discrimination. The union has not produced any an direct or circumstantial evidence sufficient to establish a prima facie case of gender or age discrimination, and has not produced any evidence to support its ultimate burden of proving that Ms. Berger was the subject of intentional discrimination.

The union presented no evidence to support its claim that the CRT test has a disparate impact on women or individuals over the age of 40. It has produced no evidence, statistical or otherwise, demonstrating a disproportionate negative impact on women or older individuals as a group. It is undisputed that Ms. Berger was the only union member who took the CRT test for Ramsey Excavating Company and was not hired. The only other union member to take the CRT test for Ramsey Excavating Company was Ms. Pierce who was hired to a laborer position despite also being female and being two years older than Ms. Berger. The union’s sample size of individuals who failed to achieve the satisfactory score on the CRT test is, quite literally, one. A sample size of one is statistically insignificant and cannot be deemed sufficient to demonstrate that the CRT test has a disproportionate adverse impact on women or individuals over the age of 40 as a group.

Although Ramsey Excavating Company is not required to prove that the CRT test is “job-related and consistent with business necessity,” the CRT test does satisfy that standard. The CRT test, with its corresponding job task analysis, is based on a comprehensive and individualized analysis of the tasks performed by laborers for Ramsey Excavating Company, including employee interviews, field observations, and various field measurements on force required for the laborer position. CRT’s algorithm, based on proprietary database of normative and test subject data, uses the peer-reviewed science of isokinetics to measure and evaluate the force an individual can output. It is undisputed that Ramsey Excavating Company’s purpose in implementing the CRT test was to reduce workplace injuries and lower its workers’ compensation costs. Without a reduction in workplace injuries, Ramsey Excavating Company could have become uninsurable or face entirely prohibitive costs on insurance. Protecting employees from workplace injuries is a goal that come as a matter of law, has been found to qualify as an important and legitimate business goal for Title VII purposes.

The union presented no evidence to support its claim that Ramsey Excavating Company intentionally and unintentionally discriminated against laborer applicants on the basis of disability through its use of the CRT test. At the time of her application to Ramsey Excavating Company, Ms. Berger affirmatively represented that she not disabled, a fact which the union does not dispute. Further, the union offered no evidence, and has never alleged, that Ms. Berger was “regarded as” having an impairment and thus was disabled under the ADA. The union failed to introduce any evidence, including any testimony from Ramsey Excavating Company’s representatives or from Ms. Berger herself, that Ms. Berger had “an actual perceived physical or mental impairment.” Ramsey Excavating Company’s use of the CRT test is permissible because the CRT test is required of all applicants for the job classification at issue. The union has not produced any evidence of discriminatory intent or discriminatory impact under Title VII, the ADEA, or the ADA, which is required for the union to meet its burden of proof on its discrimination claims.

2. The union has not met its burden of proving that Ramsey Excavating Company violated the parties’ agreement or the National Labor Relations Act by failing to bargain. Article 6 of the collective bargaining agreement specifically states in part “Nothing in this agreement shall be deemed to constitute a hiring hall or to require the employers to call only the union for employees, or to hire only employees referred by the union.” Mr. Dave Semerad, who has

served as the Chief Executive Officer for the Associated General Contractors of Minnesota for the past 14 years, and as Director of Employee Relations for six years before that, testified at the arbitration hearing that the union does not have an exclusive hiring hall nor has there been an exclusive hiring hall in the parties' previous collective bargaining agreements. Further, Mr. Ramsey testified that the first paragraph of Article 6 does not apply to applicants and, consistent with the second paragraph of Article 6, Ramsey Excavating Company has not used the union as an exclusive hiring hall. Mr. Semerad further testified that "qualified workers" does not mean every laborer referred by the union because some workers referred by the union are not capable of performing the work. Mr. Mackey admitted he does not dispute Ramsey Excavating Company's right to hire qualified workers. Mr. Semerad testified that Article 12 "sets forth that management has the right to manage its jobs, to the best interest of management, and the right to hire employees or terminate them or to increase or reduce the number of employees on their projects. It's a typical management rights clause."

Consistent with the parties' mutual interest in protecting the safety of laborers, Ramsey Excavating Company implemented the CRT test in March of 2013, at the recommendation of its insurance carriers, due to high volume of work-related injuries and physically demanding jobs. It is undisputed that Ramsey Excavating Company began using the CRT test in order to reduce workplace injuries, based on the fact that employees must have a certain amount of strength to safely perform the tasks of the laborer position.

Testimony from the union's witnesses demonstrates the widespread and longstanding use of the CRT test in the industry, as well as the union's knowledge of that use. Ms. Berger herself testified she had taken the CRT test on three prior occasions dating back to 1999, and that she was referred by the union for each of the jobs where the CRT test was required. Mr. Mackey testified that union members and agents have told "they have heard have had to take the test through the years." Mr. Semerad testified that 15-20 AGC members are currently using the CRT test and have done so for the last six or seven years. Mr. Mackey testified that the union has not opposed all pre-hire tests.

The union refused to bargain regarding the CRT test. After Ms. Berger took the CRT test for the fourth time and filed a grievance for the first time, Mr. Brady sent a letter to Mr. Ramsey demanding that Ramsey Excavating Company "cease and desist from the unlawful practice of screening out candidates based on physical 'machine' tests." Mr. Ramsey promptly responded

“we would be willing to discuss the possibility of a demonstration with our third party vendor or you can see the technology in question, and be given an opportunity to achieve an accurate understanding of our current testing practices.” The union’s response to this offer from Ramsey Excavating Company was to file a grievance. On May 31, 2013, the union also filed an unfair labor charge with the National Labor Relations Board for Ramsey Excavating Company’s failure to comply with its request for information. Then on July 19, 2013, the union filed another unfair labor practice with the NLRB for Ramsey Excavating Company’s failure to bargain with the union before implementing the CRT test. On August 1, 2013, counsel for Ramsey Excavating Company informed counsel for the union “of its desire to resolve the grievance in question through the bargaining process and implementation of Article 11 of the CBA.” On August 19, 2013, the NLRB approved a settle agreement between Ramsey Excavating Company and the union charge number one. On September 13, 2013, Ramsey Excavating Company provided additional responses to the union’s request for information, and reminded the union of its August 1, 2013, offer to bargain, and wrote that the Ramsey Excavating Company “remains interested in resolving this grievance through contractual mechanisms and bargaining.” On October 8, 2013, after the union had twice rejected Ramsey Excavating Company’s offer to bargain regarding the CRT test, and months after Ramsey Excavating Company had postponed its use of the CRT test for laborers, Ramsey Excavating Company arranged for the union’s counsel to meet with Mr.. Crosby and Ms. Unger and allow the union to ask questions and submit additional questions in writing regarding the CRT test, which the union did. Then on October 15, 2013, Ramsey Excavating Company again offered to bargain with the union regarding the CRT test. On November 18, 2013, Ramsey Excavating Company again offered to bargain with the union regarding the CRT test. In a good faith effort to bargain with the union regarding the CRT test, Ramsey Excavating Company responded to multiple requests for information, arranged for a presentation and inquiry session between the union, CRT and MOH, repeatedly offered to bargain, and voluntarily agreed to postpone any CRT testing of laborer applicants until the next round of collective bargaining with the union. The union flatly refused to bargain or even discuss the possibility.

The parties collective bargaining agreement and the National Labor Relations Act do not require Ramsey Excavating Company to bargain with the union regarding the application of the CRT test to job applicants. As the moving party the union had the burden of proving its contract

interpretation, which impermissibly asked the arbitrator to read non-existing language into the parties' agreement. The union's arguments are not supported by the plain language of the parties' agreement nor by applicable law.

The parties' collective bargaining agreement reserves to Ramsey Excavating Company the right to implement the CRT test. Article 12 reserves to Ramsey Excavating Company "the right to manage its job in the best interests of management" and "the right to retain or dispense with employees." The principle that an employer, absent a contractual prohibition, may insure that job applicants are physically capable of performing the position in question is "so basic that it rarely has been an issue in arbitration." Consistent with that principle, arbitrators routinely affirm the right of employers to require pre-employment physical examinations of job applicants. ' agreement viewed against the inherent managerial right to ensure that applicants are physically fit to perform the job tasks at issue, affirms Ramsey Excavating Company the right to require applicants to take the CRT test. Article 6 of the parties' agreement requires the union to provide Ramsey Excavating Company with "qualified workers," but does not define the term "qualified." Although the union did not attempt to define the term "qualified" at the arbitration, Mr. Semerad testified that the term "qualified" means "workers who are capable of performing the job that's being offered by the employer." The union does not dispute Ramsey Excavating Company's right to refuse applicants who are not physically capable of performing the work, a point readily admitted by Mr. Mackey. The fact that the parties included the word "qualified" in Article 6 of the agreement indicates that the parties intend it to have some meaning. The only way to give meaning to the term "qualified" is to interpret the agreement as affording Ramsey Excavating Company the right to ensure that applicants are physically capable of performing that work. Ramsey Excavating Company's implementation of the CRT test is consistent with the agreement's emphasis on safety including Article 13, which identifies "accident and injury free operations" as the goal of all employers and employees. Consistent with the parties' mutual emphasis on safety, Ramsey Excavating Company implemented the CRT test in March of 2013. It is undisputed that Ramsey Excavating Company's goal in implementing the CRT test was to reduce workplace injuries and reduce workers compensation costs. The union produced no evidence demonstrating that a pre-hire physical test involving job simulations was practical or even feasible for the work performed by Ramsey Excavating Company's laborers. In light of the parties' express reservation of managerial rights to Ramsey Excavating Company, Ramsey

Excavating Company's contractual right to hire "qualified" workers, the corresponding right to assess those qualifications, and the parties' express emphasis on workplace safety, it is apparent that the parties' agreement affords Ramsey Excavating Company the right to implement the CRT test.

Ramsey Excavating Company is not required to bargain with the union regarding job applicants under the National Labor Relations Act. Ms. Berger and Ms. Pierce were applicants, not current employees. As a result, Ramsey Excavating Company's implementation of the CRT test as to those applicants is not a mandatory subject of bargaining. In an analogous case involving pre-employment drug testing, the National Labor Relations Board held that pre-employment drug testing is not a mandatory subject of bargaining. *StarTribune*, 298 NLRB 543, 131 LRRN 1404 (1989). In reaching this decision the National Labor Relations Board cited a US Supreme Court decision involving benefits for retired employees in which the Supreme Court noted that Sections 8(a)(5), 8(d) and 9(a) of the NLRA establishes the employer's obligation to bargain collectively with the terms and conditions of employment of the employer's employees. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). Consistent with the Court's analysis in *Pittsburgh Plate Glass*, the board in *StarTribune* concluded that the applicants for employment are not employees within the meaning of the collective bargaining obligation of the NLRA, as applicants perform no services for the employer, are paid no wages, and are under no restrictions as to other employment or activities. *StarTribune* at 1407. The Board rejected the union's alternative rationale, which was that drug-testing policy vitally affected the terms and conditions of employment and the working environment of the bargaining unit. While noting that safety in the workplace is a mandatory subject of bargaining, the board stated that the testing of applicants does not vitally affect workplace safety, and stated that the union's concern could be effectively addressed in union proposals that seek post-hiring testing of new employees. Ms. Berger's status as an applicant, not an employee, the union's grievance alleging failure to bargain should be denied. The union's argument that the agreement somehow contemplates a hiring hall, and therefore applicants referred by the union have heightened interest in pre-employment testing procedures such as the CRT test fails. In *StarTribune*, the board distinguished cases involving the establishment of a hiring hall based upon the intermittent nature of employment there in, noting "the involvement of all employees (those who are seeking employment as well as those who are currently employed)

with the hiring hall” and their heightened interest in opportunities for employment elsewhere. *Id.* at 1407. This argument will be asking the arbitrator to rewrite the parties’ agreement, which the arbitrator is without authority to do. Article 6 of the parties’ agreement unequivocally states “nothing in this agreement shall be deemed to constitute a hiring hall or require the employers to call only the union for employees, or to hire only employees referred by the union.” The plain meaning of the language must be followed without resort to extrinsic evidence. The union also argues that Ramsey Excavating Company is required to bargain regarding the CRT test because the elimination of discrimination in the bargaining unit is a mandatory subject of bargaining. While elimination of discrimination is a mandatory subject of bargaining, and is a goal which Ramsey Excavating Company fervently supports, the elimination of discrimination as a bargaining topic is not without limitation. An employer’s obligation to bargain over allegedly discriminatory hiring practices extends only to those practices “that the union has an objective basis for believing may discriminate against protected groups or otherwise vitally affect employees’ terms and conditions of employment. *US Postal Service*, 308 NLRB 1305, 1318 (1992). Bare suspicions of discrimination in hiring will not create an obligation to bargain.

Even if pre-hire physical testing were a mandatory subject of bargaining, the union has acquiesced and consented to the use of pre-hire physical testing for many years and is retroactively attempting to limit the scope of its acquiescence. For many years the union has acquiesced to, and affirmatively approved of, various forms of pre-hire physical testing. The union has long approved of pre-hire physical tests involving job simulations. The union expressly endorses and approved of pre-hire physical testing, so long as that testing involves job simulation. At the time Ramsey Excavating Company implemented the CRT test, Mr. Ramsey was aware that other contractors were performing per-hire physical testing without objection from the union. Now, the union attempts to backtrack and argue that its waver was actually limited to pre-hire physical testing involving job simulations, even though Ramsey Excavating Company had no notice of the union’s purported opposition to the CRT test before it was implemented by Ramsey Excavating Company. The union does not have license to acquiesce to some forms of pre-hire physical testing while simultaneously and silently opposing other forms of per-hire physical testing. The union acquiesced to the use of pre-hire physical testing for at least 14 years and cannot now retroactively limit the scope of its acquiescence and consent.

Furthermore it is apparent that the union was aware of the widespread and longstanding use of the CRT test in the industry. Ms. Berger herself testified that she had taken the CRT test on three prior occasions dating back to 1999, and that she was referred by the union to each of these jobs. The union's suggestion that it was unaware of the widespread use of the CRT test is dubious, particularly in light of Ms. Berger's past experience with the CRT test and Mr. Mackey's admissions. The union's failure to address pre-hire physical testing in bargaining further supports Ramsey Excavating Company's position.

Even if pre-hire physical testing were a mandatory subject of bargaining, the union has refused to bargain regarding the CRT test despite Ramsey Excavating Company's good faith efforts. Ramsey Excavating Company is not required to bargain with the union over its use of the CRT test. But even if it were, the arbitrator should deny the union's grievance because Ramsey Excavating Company has not only repeatedly attempted to bargain with regard to the CRT test, Ramsey Excavating Company has also made a substantial concession, i.e. the voluntary postponement of the CRT test in an effort to engage in good faith bargaining with the union. The only reason that bargaining has not taken place is the union's unreasonable refusal to do so despite Ramsey Excavating Company doing everything the union has asked. Simply put, because there is no actual refusal to bargain by Ramsey Excavating Company, there is no basis for finding a violation of Article 3 or Section 8(a)(5) of the NLRA.

In conclusion, the union has not produced any evidence of intentional or unintentional discrimination by Ramsey Excavating Company, and has failed to meet its burden of proof. Furthermore, the parties' agreement and the NLRA do not require Ramsey Excavating Company to bargain with regard to the CRT test. Even if Ramsey Excavating Company was required to bargain, the union's intentional and unilateral refusal to engage in good faith bargaining is the only reason such bargaining has not taken place, despite Ramsey Excavating Company's good faith effort and concessions.

DECISION AND RATIONALE

A. Exclusive Hiring Hall

Article 6 of the Collective Bargaining Agreement, in relevant part, states:
"Nothing in this Agreement shall be deemed to constitute a hiring hall or to require the

employers to call only the union for employees, or to hire only employees referred by the union.” Article 6 further states: “When called and the union fails to provide qualified workers within twenty-four (24) hours, the employer shall be free to employ anyone to perform the work at the appropriate scale as contained herein.”

Article 6 A. states: “The employers agree to give the union the first opportunity when hiring Journey Laborers and Enrolled Apprentices. First opportunity shall be defined to mean that the employer shall call the union for not less than the first 50% of their Journey Laborers and Enrolled Apprentices.”

The employer contends “the union does not have an exclusive hiring hall nor has there been an exclusive hiring hall in the parties’ previous collective bargaining agreements.” [Post-hearing brief of employer at 28-29]. The union contends “The CBA requires the Employer to obtain the first 50 percent of the workforce through Union referrals, so the union operates an exclusive hiring hall under the settled NLRB precedent that guides interpretation of the CBA.” [Post-hearing brief of union at 19]. The union argues that there is no question the hiring hall is an exclusive hiring hall, notwithstanding that the employer has the right to select 50% of the workforce on the job. “The stray phrasing in the second paragraph of Article 6(A)” says the union, “does not nullify the fact that consistent with well established NLRB authority, an exclusive hiring hall has been established under the CBA because Article 6(A) requires the first half of the workforce to be hired through the union.” Citing *Carpenters Local 17, 312 NLRB* at 84; see also *Evening News Ass’n, 50 LA 239, 254 (Platt, 1968)* (recognizing the existence of an exclusive hiring hall, despite language in the collective bargaining agreement denying creation of an exclusive hiring hall, because of conflicting contract language and the parties’ past practice). [Post-hearing brief of union at 20].

The union argues that the past practice under the collective bargaining agreement has been to bargain over pre-employment testing and to apply any such testing adopted in the CBA to both existing employees and job applicants-consistent with the union operating an exclusive hiring hall. For example, Article 13 (D) of the collective

bargaining agreement states (in pertinent part): “employers may require drug and alcohol testing of employees and applicants for employment...” If the union is acting as an exclusive hiring hall then “applicants referred through exclusive halls are protected ‘employees’ under the NLRA.” See generally *Houston Chapter, Agc*, 143 NLRB 409 (1963), *enfd.* 349 F.2d. 449 (5th Cir. 1965), *Cert. denied* 382 U.S. 1006 (1966); *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). The union argues that a time-honored principle is that job applicants are “employees” when the union operates an exclusive hiring hall. This, says the union, has clear application in the construction industry given the seasonal and intermittent nature of employment in the industry. Because job applicants in an exclusive hiring hall are “employees” under the NLRA provisions governing the duty to bargain, then the term “employees” in Article 3 of the collective bargaining agreement must be interpreted to include applicants. Accordingly, mandatory subject of bargaining include pre-employment testing of job applicants when a union operates an exclusive hiring hall as the union does here.

The employer contends that Article 12 “Management” sets forth that management has the right to manage its jobs, to the best interest of management, and the right to hire employees or terminate them or to increase or reduce the number of employees on their projects. Further the employer contends that the collective bargaining agreement and the National Labor Relations Act do not require the employer to bargain with the union regarding the application of the CRT Test to job “applicants.” “Arbitrators routinely affirm the right of employers to require pre-employment physical examinations of job applicants.” [Post-hearing brief of employer at 38]. Article 12 viewed against the inherent managerial rights to ensure that applicants are physically fit to perform the job tasks at issue affords the employer the right to require applicants to take the CRT Test. The employer is not required to bargain with the union regarding “job applicants” under the NLRA [See, *Star Tribune*, 295 NLRB 543 (1989).] The undisputed status of the grievant as an applicant, not an employee, shows that the grievance should be denied.

Further the employer contends that the language in Article 6 “Nothing in this agreement shall be deemed to constitute a hiring hall” is clear and unambiguous and not susceptible to more than one meaning. Its plain meaning shows that the referrals by the union are “applicants” not “employees”.

Basically, if the employer is correct and the referrals are “applicants”, then the pre-hire testing of an “applicant” is not a mandatory subject of bargaining. If the union is correct and those 50% referred to the employer by the union are “employees”, then the pre-hire testing is a mandatory subject of bargaining. The employer contends that the language “nothing in this agreement shall be deemed to constitute a hiring hall” makes clear that they are dealing with “applicants”. The union argues this language is “stray phrasing” and “does not nullify the fact that, consistent with well-established NLRB authority, an exclusive hiring hall has been established in the CBA because Article 6 (A) requires the first half of the workforce to be hired through the union.” [Post-hearing brief of union at 20].

Based on these seeming inconsistencies, the rules of interpretation of contracts must be applied. To make sense of inconsistent expressions in a contract, “one of the more helpful guides to interpretation is to discover the apparent purpose of the parties.” [Murray on Contracts, 3rd Ed. 421 (Michie Company 1990)] What was the purpose of the parties behind this contract? It is clear that the parties intended that the first 50% of those hired be referred by the union. Does referring 50% of the workforce make the union a hiring hall? Carpenters Local 17, 312 NLRB 82, 84 (1993) makes clear “there is no question that [the union’s] hiring hall is an exclusive hiring hall notwithstanding that the employer has the right to select 50% of the workforce on the job.” The NLRB has expressly held that an exclusive hiring hall exists where the collective bargaining agreement requires the employer to obtain the first half of its workforce through the union. [Id].

Consequently, there seemingly are inconsistent expressions in the contract. One clause states “nothing in this agreement shall be deemed to constitute a hiring hall” while

another clause in the same article states “the employers agree to give the union the first opportunity when hiring Journey Laborers and Enrolled Apprentices.” The “first opportunity shall be defined to mean that the employer shall call the union for not less than the first 50% of the Journey Laborers and Enrolled Apprentices.” How should these seemingly inconsistent expressions be interpreted?

Another rule of interpretation is “the transaction must be viewed as a whole.” [Murray on Contracts, 3rd Ed. 423]. “Numerous cases indicate that all the different parts of an agreement must be viewed together, i.e., as a whole, and each part interpreted in light of all the other parts.” [Id].

Further, “it is a general rule of interpretation that a reasonable interpretation of an expression is preferred to one that is literal, unusual, absurd, or of no effect.” [Id]. Professor Murray advises that “where one clause of the contract suggests one intention and another clause of the same contract suggests an inconsistent intention, the intention manifested in the principle or more important clause should be preferred. [Id at 427]. In this case, it is clear that the more important term in the contract is that the union be given the first opportunity to refer the first 50% of its members when the employer is hiring Journey Laborers and Enrolled Apprentices.

The subsequent conduct of the parties aids in this interpretation. The employer and the union have as a past practice focused on the 50% clause. While the language “nothing in this agreement shall be deemed to constitute a hiring hall” exists in the contract, it is not the principal purpose behind the contract. The intention of the parties has been to provide the union with an opportunity to place the first 50% of union members in the jobs. Further, past practice under the collective bargaining agreement has been to bargain over pre-employment testing and to apply such testing adopted in the collective bargaining agreement to both existing employees and job applicants, consistent with the union operating as an exclusive hiring hall. “Exclusive hiring hall” is a term of art established by the National Labor Relations Board to describe a system that requires referring a certain percentage of applicants to an employer for hire pursuant to the

collective bargaining agreement. The phrasing in the second paragraph of Article 6 (A) does not nullify the fact that, consistent with well-established NLRB authority, an exclusive hiring hall has, in fact, been established under the collective bargaining agreement because Article 6 (A) requires the first half of the workforce to be hired through the union. The language “nothing in this agreement shall be deemed to constitute a hiring hall” is simply inconsistent with the law, a reasonable and lawful and effective interpretation of the contract, the purpose and intention of the parties to the collective bargaining agreement, and the past practice of the parties regarding pre-employment testing. Consequently the referrals by the union to the employer are not “applicants” but are “employees”. Because by law and this contract the people referred by the union to the employers are “employees”, the change in “pre-employment testing such as the application of the CRT/MOH Test is a mandatory subject of bargaining.”

The union has repeatedly made clear to signatory contractors like the employer that the union objects to the CRT/MOH test. Without giving the union notice or an opportunity to bargain, the employer imposed the CRT/MOH Test as an employment term and condition for bargaining-unit applicants, including Ms. Berger. Because the employer, after the fact, offered to bargain over how to use the already imposed CRT/MOH Test, while still withholding test information from the union that the NLRB ordered the employer to produce, does not remedy the employer’s failure to bargain in good faith.

B. Is the CRT/MOH Test discriminatory based on disability status, age and sex?

The union has not met its burden of proving its claims of disability, gender and age discrimination by a preponderance of the evidence. The various proprietary databases, normative data such as torque, force values for the knees, shoulders and back, and an individual’s gender, age and weight are all factors in proving by a preponderance of the evidence whether the CRT/MOH Testing is discriminatory. This data were not shown by a preponderance of the evidence to all for proof that the testing is discriminatory. The

data behind “isokinetics” were not fully explained nor proven by a preponderance of the evidence during the arbitration hearing.

It is not surprising that the union could not by a preponderance of the evidence show that such testing is discriminatory. Neither the entire data nor experts to explain the data and the findings were offered during the arbitration hearing. This arbitrator could reach no conclusions based on the evidence he heard at the arbitration hearing regarding whether the testing was discriminatory.

Consequently, this arbitrator makes no findings regarding whether the bargaining-unit applicants were subject to a discriminatory pre-employment test.

AWARD

It is held that the employer’s conduct violated Article 3 of the collective bargaining agreement because the employer imposed the CRT/MOH Test without giving the union notice or an opportunity to bargain, even though the union operates an exclusive hiring hall. The test violates existing collective bargaining agreement terms. It is further held that the arbitrator could not make a decision based on the evidence whether the CRT/MOH Test discriminates against bargaining unit applicants as to disability status, age or sex.

The employer is directed to cease violating the collective bargaining agreement and provide an opportunity for the union to bargain over a term and condition of employment i.e. the application and implementation of the CRT/MOH Test. Until such bargaining occurs, the employer is ordered to cease using the CRT/MOH Test. The arbitrator shall retain jurisdiction over the implementation of the remedy for 180 days.

November 18, 2014 _____

Joseph L. Daly, Arbitrator _____