

IN THE MATTER OF THE ARBITRATION BETWEEN

BRICKLAYERS AND ALLIED)	FEDERAL MEDIATION AND
CRAFTWORKERS,)	CONCILIATION SERVICE
LOCAL 1,)	CASE NO. 13-59139
)	
)	
)	
Union,)	
)	
and)	
)	
MORTENSON MASONRY, INC.,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

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On June 10, 2014, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning two grievances brought by the Union against the Employer. This is a complex case. It raises issues relating to an allegation that the Employer "double-breasted" masonry work to an "alter-ego" entity, created and controlled by the Employer, its officers and owners, in order to

avoid payment of the wages and benefits established by two labor agreements between the Employer and the Union.

One of those labor agreements recognizes the Union as the collective bargaining representative of employees of the Employer who perform bricklaying and masonry work (Bricklayers, Cement Masons, Plasterers and "Allied Craftworkers") in the State of Minnesota. In form, that labor agreement is a multi-employer agreement between unions and two employer groups -- the Associated General Contractors of Minnesota and the Minnesota Concrete and Masonry Association. Hereafter, I refer to that multi-employer agreement as the "Minnesota Labor Agreement." The version of that agreement that was in effect when the Minnesota Grievance (described below) was initiated has a stated duration from May 1, 2013, through April 30, 2016. The Employer is bound to its terms through execution of what the parties refer to as an "Independent Agreement" with a different stated duration -- from May 1, 2013, through April 30, 2014. I refer to that agreement as the "Independent Minnesota Agreement," and I refer to the grievance that alleges a violation of the Minnesota Labor Agreement as the "Minnesota Grievance."

The other grievance at issue alleges a similar double-breasting of work by the Employer in the State of North Dakota in violation of a separate labor agreement between the Union and the Employer, which covers operations in eastern North Dakota (the "Eastern North Dakota Labor Agreement"). That agreement has a stated duration from May 1, 2011, through April 30, 2014. Hereafter, I refer to the grievance that alleges its violation as the "North Dakota Grievance."

The primary allegation made by each of the grievances is, in substance, the same -- that the Employer violated each labor agreement by using another entity under its control -- Mortenson Masonry, LLC, an employer of non-union workers receiving wages and benefits lower than those required by the Employer's labor agreements with the Union -- to do work that should have been done by employees receiving the higher wages and benefits required by those labor agreements.

Hereafter, I sometimes refer to Mortenson Masonry, Inc, as "Mortenson Inc." or as the "Employer," and I sometimes refer to Mortenson Masonry, LLC, as "Mortenson LLC."

FACTS

The Employer operates a construction business, contracting to install brick and masonry work primarily in northwestern Minnesota and eastern North Dakota. The Union is the collective bargaining representative of employees who perform such work for the Employer, including Bricklayers, Cement Masons, Plasterers and "Allied Craftworkers."

The Minnesota Grievance. On August 13, 2013, Michael J. Ganz, a Union Field Representative, sent Jeff Mortenson, President of Mortenson Inc., a letter stating the Minnesota grievance:

Re: Double Breasting Grievance under Northwest Area Agreement [the Minnesota Labor Agreement]:

It has come to our attention that [Mortenson Inc.] is violating [the Minnesota Labor Agreement] by operating double-breasted as [Mortenson LLC], which is supposedly a non-union company. Specifically, Mortenson Inc. and Mortenson LLC have common ownership, the same operating

address, same office building, same office staff, same policies and procedures, same management and chain of command, same estimator, centralized control over labor relations, and regularly interchange tools, and vehicles, and are operationally interrelated in other relevant respects.

Mortenson Inc. has violated [the Minnesota Labor Agreement] because it is performing work covered by [that agreement] non-union at the site of construction projects under the name of Mortenson LLC wherein Mortenson Inc. exercises either directly or indirectly (such as through family members) a significant degree of ownership, management, or control. Accordingly, Mortenson Inc. is using Mortenson LLC as a device or subterfuge to avoid the protection and preservation of the work of our bargaining unit. This violates our PRESERVATION OF WORK (Anti-Double-breasting) clause [Article 26, Section A] of the Minnesota Labor Agreement], as well as any other contract provisions that may apply.

As a remedy, the Union requests that Mortenson Inc. and the individuals, partners, officers, or stockholders of Mortenson Inc. who are personally bound by [the Minnesota Labor Agreement] (1) pay to affected employees covered by [that labor agreement], including registered applicants for employment, the equivalent of wages lost as a result of the violations and (2) pay into the affected joint trust funds established under [that agreement] any delinquent contributions to such funds which have resulted from the violations, including such interest as may be prescribed by the trustees or by law. The Union further requests that Mortenson Inc. abide by the [Minnesota Labor Agreement] for all work performed or subcontracted within the scope of [the Minnesota Labor Agreement], including work performed or subcontracted by "Mortenson Masonry, LLC," and make whole all affected employees in every respect. . . .

I set out below relevant parts of Article 26, Section A, of the Minnesota Labor Agreement, to which the Minnesota Grievance refers; I note that the term "Chapter" is a term the parties use to designate geographic areas of Minnesota:

The following Preservation of Work (Anti-Double-Breasting) language provision shall not apply to Chapters 1 and 8, but shall apply to Chapters 3, 4, 11 and 15.

In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them and in order to prevent any device or subterfuge

to avoid the protection and preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any work of the type covered by this Agreement at the site of a construction project, under its own name or under the name of another, as a corporation, company, partnership or any other business entity, including a joint venture, wherein the Employer (including its officers, directors, owners, partners or stockholders) exercises either directly or indirectly (such as through family members) a significant degree of ownership, management, or control, the terms and conditions of this Agreement shall be applicable in all such work.

The North Dakota Grievance. Also on August 13, 2013, Ganz sent Jeff Mortenson, President of Mortenson Inc., a letter similar to the one that stated the Minnesota Grievance. In its first and third paragraphs, this letter states that the Employer violated the Eastern North Dakota Labor Agreement in its operations in North Dakota, making allegations similar to those made in the first and third paragraphs of the Minnesota Grievance.

The Eastern North Dakota Labor Agreement, however, does not include a provision similar to Article 26, Section A, of the Minnesota Labor Agreement -- which expressly defines "double-breasting" and requires the Employer to pay wages and benefits established by the labor agreement when it occurs. Consequently, the North Dakota Grievance does not allege the violation of such an express requirement, as does the second paragraph of the Minnesota Grievance. Instead, the second paragraph of the North Dakota Grievance, which I set out below, alleges violation of particular provisions of the Eastern North Dakota Labor Agreement, including those that state the Employer's recognition of the Union as the bargaining representative of its employees and require payment of wages and benefits established by the Eastern North Dakota Labor Agreement:

Your company's use of Mortenson LLC as a non-union alter ego to avoid [the labor agreement] violates Article 3 (Union Recognition), Article 5 (Hiring), Article 7 (Conflicting Agreements), Article 19 (Wages and Pay Day), Article 21 (Fringe Benefits), Schedule 1 (Classification of Wages), Schedule 5 (No Discrimination), and any other provisions that may apply of the applicable Eastern North Dakota Agreement between [the Union] and [Mortenson Inc.]

Unfair Labor Practice Charge. On August 26, 2013, the Union filed with the National Labor Relations Board ("NLRB") the following charge that the Employer had engaged in an Unfair Labor Practice ("ULP"):

During the past six months, the employer has evaded the obligations of its collective bargaining agreement by operating double-breasted and using a non-union alter ego employer.

On September 6, 2013, the Union filed with the NLRB a similar charge, the text of which was not presented in evidence, directed against Mortenson LLC.

On December 20, 2013, after investigation, the NLRB issued its order consolidating the two cases and issued a Consolidated Complaint and Notice of Hearing, parts of which are set out below:

It is ordered that Case 18-CA-112053 and Case 18-CA-112733, which are based on charges filed by [the Union] against [Mortenson Inc.] (INC) and its Alter Ego/Single Employer [Mortenson LLC] (LLC) (collectively, Respondent) be consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act 29 U.S.C. 151 et seq. (the Act) and Section 102.15 of the Rules and Regulations of the [NLRB], and alleges that Respondent has violated the Act as described below: . . .

2.(a) At all material times, INC has been a corporation with an office and place of business in Glyndon, Minnesota and has been engaged in providing masonry

contractor services in connection with commercial construction projects.

(b) At all material times, LLC has been a corporation with an office and place of business in Glyndon, Minnesota and has been engaged in providing masonry contractor services in connection with commercial and residential construction projects.

(c) At all material times, Respondents INC and LLC have been affiliated business enterprises with common officers, ownership, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have interrelated operations with common customers; and have held themselves out to the public as a single-integrated business enterprise.

(d) Respondent INC established Respondent LLC, as described above in paragraph (c), for the purpose of evading its responsibilities under the Act.

(e) Based on the operations and conduct described above in subparagraph (c), Respondents INC and LLC constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(f) Based on the operations and conduct described above in subparagraphs (c) and (d), Respondents INC and LLC are and have been at all material times, alter egos within the meaning of the Act.

. . . [I omit jurisdictional allegations.]

4. At all material times, the following individuals occupied various positions in Respondents INC and LLC and have been supervisors of those entities and of Respondent within the meaning of Section 2(11) of the Act and agents of those entities and of Respondent within the meaning of Section 2(13) of the Act:

Jeff Mortenson - President and Partial Owner
David Mortenson - Partial Owner
Connie Mortenson - Partial Owner

5.(a) The following employees of Respondent (Unit A) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by Respondent within the jurisdiction described by the Union's Eastern North Dakota Agreement; excluding all other employees, guards and supervisors as defined in the Act.

(b) Since at least 2001 and at all material times, INC has recognized the Union as the exclusive collective-bargaining representative of Unit A. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is the Eastern North Dakota Agreement, effective from May 1, 2011 through April 30, 2013 [sic].

(c) At all times since at least 2001, based on Sections 8(f) and 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of Unit A.

(d) The following employees of Respondent (Unit B) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by Respondent within the jurisdiction described by the Union's Minnesota Statewide Agreement [the Minnesota Labor Agreement]; excluding all other employees, guards and supervisors as defined in the Act.

(e) Since at least 2001 and at all material times, INC has recognized the Union as the exclusive collective-bargaining representative of Unit B. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is the Independent Agreement binding Respondent to the [Minnesota Labor Agreement] from May 1, 2013 through April 30, 2014.

(f) At all times since at least 2001, based on Sections 8(f) and 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of Unit B.

6. Since about February 26, 2013, Respondent has failed to apply, and has evaded its obligations under the collective-bargaining agreements described above in paragraph 5, subparagraphs (b) and (e).

7. . . . [I omit paragraph 7, which alleges a failure of Respondent to provide information requested by the Union.]

8. By the conduct described above in paragraphs 6 and 7, Respondent has been failing and refusing to bargain collectively with the limited exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) of the Act.

. . .

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 6 and 7, the General Counsel seeks an order directing Respondent to

mail a Notice to Employees to all current and former employees who were employed by Respondent at any time since February 26, 2013.

. . . The General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

The Consolidated Complaint and Notice of Hearing required that Respondent present an answer by January 3, 2014, and set February 5, 2014, as the date for hearing.

In January of 2014, the NLRB negotiated a settlement of the issues raised by the Consolidated Complaint with Mortenson Inc. and Mortenson LLC, collectively referred to in the settlement as the "Charged Party." That settlement became effective on January 31, 2014, when it was approved by an Acting Regional Director of the NLRB. Below, I set out relevant parts of the Settlement Agreement:

NO ADMISSION OF LIABILITY -- By entering into this settlement agreement, the Charged Party does not admit that it violated the National Labor Relations Act.

BACKPAY -- Within 14 days form the approval of this agreement, the Charged Party will make whole all current and former employees who were employed by the Charged Party at any time since February 26, 2013 by payment to the NLRB of: \$96,798. This amount will be apportioned by the NLRB between employees' wages and fringe benefit funds pursuant to the parties' collective bargaining agreement.

SCOPE OF AGREEMENT -- This agreement settles only the allegations in the above captioned cases, and does not settle any other cases or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. . . .

Though the Settlement Agreement does not identify the masonry projects that formed the basis for the settlement, the

parties presented evidence at the hearing before me that three commercial masonry projects performed by employees of Mortenson Inc. and by employees of Mortenson LLC formed the basis for the settlement. Those three projects, the Concordia College project, the Skaff Apartments project and the Sam's Club project were all performed in Morehead, Minnesota (within Chapter 15). In this arbitration proceeding, the Union alleges that the Employer violated Section 26, Section A, of the Minnesota Labor Agreement, which is an express prohibition of double-breasting. In addition, though the Eastern North Dakota Labor Agreement does not include a similar express prohibition, the Union argues that the Employer is bound through Article 3, its Recognition provision, to pay its employees, including those nominally employed by its alter ego entity, Mortenson LLC, the wages and benefits established in other provisions of the Eastern North Dakota Labor Agreement.

The Union seeks three kinds of relief;

One. The Union seeks an award requiring the Employer to pay to, and in behalf of, employees of Mortenson LLC, the difference between the wages and benefits they received and the amounts they would have received if they had been paid in accord with the two labor agreements between the Union and the Employer.

Two. The Union seeks an award requiring the Employer to pay, in behalf of employees of Mortenson Inc. who worked on "residential" masonry projects (homes and small apartment buildings) in Minnesota and North Dakota. the wages and benefits required by the two labor agreements.

Three. The Union seeks an award requiring the Employer to pay the "full amount" of the make-whole relief that was required to be paid under the Employer's Settlement Agreement with the NLRB, which, according to the Union, was set at only 80% of the relief warranted for the use by Mortenson LLC of lesser paid employees on the three

"commercial" projects covered by that agreement -- the Concordia College project, the Skaff Apartments project, and the Sam's Club project.

DECISION

As the Employer points out, a provision of the Settlement Agreement states that, by entering into that agreement, the Charged Party "does not admit that it violated the National Labor Relations Act." I recognize that in this grievance proceeding, the issues raised are different from those raised in the ULP proceeding. Here, I must decide whether the two labor agreements require the Employer to provide the relief the Union seeks, as described just above.

The part of Article 26, Section A, of the Minnesota Labor Agreement on which the Union predicates the Employer's liability is set out below:

If and when the Employer shall perform any work of the type covered by this Agreement at the site of a construction project, under its own name or under the name of another, as a corporation, company, partnership or any other business entity, including a joint venture, wherein the Employer (including its officers, directors, owners, partners or stockholders) exercises either directly or indirectly (such as through family members) a significant degree of ownership, management, or control, the terms and conditions of this Agreement shall be applicable in all such work.

First: Is work on residential projects included in "any work of the type covered by this Agreement"? The excerpt above from Article 26, Section A, of the Minnesota Labor Agreement applies "to any work of the type covered by this Agreement at the site of a construction project." The Employer argues that "residential" masonry work -- work on houses and small apartment projects -- is not included in the phrase, "work of the type

covered by this Agreement." The Union argues that the following provision from Article 4 of the Minnesota Labor Agreement establishes what is covered by the agreement:

This Agreement shall cover the entire State of Minnesota. The work jurisdiction for employees covered by this Agreement shall include, but not be limited to, the Codes of the International Union as outlined in the 2010 International Union of Bricklayers and Allied Craftworkers Constitution and attached to this contract as Addendum C. The work jurisdiction provision shall not apply to Chapters 1 and 8, but shall apply to Chapters 3, 4, 11, and 15.

Addendum C contains descriptions of types of work, such as brick masonry, stone masonry, cement masonry and plastering. Nothing in these detailed descriptions states that work done on residential projects is excluded from the work jurisdiction being described.

The Employer argues that this provision should, nevertheless, be interpreted as excluding residential projects from "any work of the type covered by this Agreement," arguing that residential work is beyond the work historically performed by Mortenson Inc.'s bargaining unit. The Employer notes that wage rates listed in the Minnesota Labor Agreement do not establish a separate rate for residential work, indicating, as the Employer argues, an intention not to have the agreement apply to such work.

The Union argues that there is no ambiguity in the work jurisdiction language of Article 4 and Addendum C -- that they clearly include all the kinds of masonry work listed, without making a distinction between work on commercial projects and work on residential projects. In addition, the Union argues

that the absence of a separate wage schedule for work on residential projects is consistent with its interpretation -- that only one wage schedule is necessary because it applies to residential and commercial work, i.e., all work within the work jurisdiction defined clearly in Article 4 and Addendum C.

The Employer also argues that the following provision from the Independent Minnesota Agreement, the document by which the Employer agrees to be bound by the Minnesota Labor Agreement, expressly limits the work covered by that agreement to work on "commercial projects":

The Employer and the Union agree to comply fully with all of the provisions as set forth in said agreement [the Minnesota Labor Agreement] as if the same were fully set out herein. The obligation to pay fringe benefits extends to all persons performing work in employment covered by the collective bargaining agreement, regardless of the relationship between the Employer and the person performing the work, for all hours of work performed, on commercial projects. The trade jurisdiction shall be that which is set forth in the current constitution of the [International Union]. Employer may exempt one (1) person from its obligation for fringe benefit payments for residential work. Any exempted person shall be an individual with at least a 33% ownership interest in the Employer. The exemption shall be in a form and upon conditions approved by the fringe benefit funds.

As I interpret this provision, it is not a general limitation that makes the Minnesota Labor Agreement apply only to "commercial projects." Rather, its apparent purpose is to exempt one person with at least 33% ownership of the Employer from fringe benefit payments for "residential" work, thus implying that the Minnesota Labor Agreement applies to "residential" projects as well as to "commercial" projects.

I rule that the language of the Minnesota Labor Agreement is clear -- that work within the broad categories listed in Addendum C is within the work jurisdiction covered by the agreement, whether the work is done on a commercial or a residential project.

Second: Did Mortenson Inc. perform covered work under the name of Mortenson LLC, exercising a significant degree of control of Mortenson LLC? The Employer argues that Mortenson Inc. did not perform work covered by the Minnesota Labor Agreement "under the name of another, as a corporation, company, partnership or any other business entity, including a joint venture, wherein the Employer (including its officers, directors, owners, partners or stockholders) exercise[d] either directly or indirectly (such as through family members) a significant degree of ownership, management, or control." The Union argues that the evidence clearly shows that Mortenson Inc. used Mortenson LLC, which has been at least under its "control" if not under its imputed ownership, to perform work covered by the Minnesota Labor Agreement.

I note the following about the evidence I have used in determining the issues of fact raised in the paragraph just above. At the arbitration hearing, the parties presented in evidence the Consolidated Complaint of the NLRB, which I have set out above. I do not base my findings of fact relevant to this issue on the Consolidated Complaint because it makes merely allegations of fact -- even though, as the Union seems to argue, those allegations are presumably based upon conclusions reached

by the General Counsel after investigation of the Charges. Rather, I base my findings of fact on documentary evidence and testimony presented at the arbitration hearing. From that documentary evidence and testimony, I find that Mortenson Inc. did perform work covered by the Minnesota Labor Agreement under the name of Mortenson LLC and did so through its officers, directors, owners, or stockholders, who exercised either directly or indirectly (such as through family members) a significant degree of ownership, management, or control of Mortenson LLC.

In addition, Ganz and another Union Field Representative, Randy A. Carlson, testified about the following conversation they had with Jeff Mortenson. In July of 2013, when the Union was investigating the ULP Charge that eventually resulted in the Settlement Agreement, Ganz and Carlson talked to Mortenson about the use of non-union employees by Mortenson LLC. According to Ganz and Carlson, Jeff Mortenson asked them to let him finish the three jobs then at issue, the Concordia College, Skaff apartments and Sam's Club projects, using the non-union employees of Mortenson LLC. They testified that Jeff Mortenson told them that, if they would let him finish those projects with Mortenson LLC employees, he would in the future send those employees to Western North Dakota, outside of the Union's territorial jurisdiction.

I rule that, by force of Article 26, Section A, of the Minnesota Labor Agreement, Mortenson Inc. should be required to pay the wage rates and benefits established by that agreement to

those who performed work covered by that agreement while in the employ of Mortenson LLC, from the commencement date of the Minnesota Labor Agreement, May 1, 2013, through the end date of the Independent Minnesota Agreement, April 30, 2014 -- during the term of the Independent Minnesota Agreement that was in effect at the time the Minnesota Grievance was initiated.

Third: What work is covered by the Eastern North Dakota Labor Agreement? Nothing in the Eastern North Dakota Labor Agreement distinguishes work on a residential project from work on a commercial project. Accordingly, I rule that the work covered by the Eastern North Dakota Labor Agreement includes work on either residential or commercial projects in the eastern North Dakota territory identified in the agreement -- insofar as such work is within the work done by classifications for which wages and benefits are established.

Fourth: Do provisions of the Eastern North Dakota Labor Agreement require the Employer to pay the wage rates and benefits established by that agreement to those who, during its term, performed work covered by that agreement while in the employ of Mortenson LLC? The Union argues that, even though the Eastern North Dakota Labor Agreement does not include a provision similar to Article 26, Section A, of the Minnesota Labor Agreement, the Employer should, nevertheless, be required to pay the wages and benefits established by the Eastern North Dakota Labor Agreement to those who performed work covered by that agreement while in the employ of Mortenson LLC. The Union urges that Article 3, the Recognition provision of the agreement, which I set out below, imposes that obligation on the

Employer as the de facto employer of those employees through Mortenson LLC, the Employer's alter ego:

Article 3. Recognition. The Employer hereby recognizes the Union as the exclusive collective bargaining representative of the employees of the crafts signatory to this Agreement, in areas including, but not limited to, rates of pay, wages, hours of employment and fringe benefits, and other conditions of employment. The Union represents that it is qualified for such recognition.

The documentary evidence and testimony presented at the arbitration hearing show that Mortenson Inc. and Mortenson LLC operated as a single entity, separate only nominally, but not in reality. As the Union notes 1) Jeff Mortenson is President of Mortenson Inc. 2) he and his brother, David Mortenson, Vice President of Mortenson Inc., own all the stock in Mortenson Inc., 3) Jeff Mortenson is the husband of Connie Mortenson, the sole owner of Mortenson LLC, 4) Connie Mortenson is Secretary-Treasurer of Mortenson Inc., 5) David Mortenson is not only the Vice President and half owner of Mortenson Inc., but is also the primary operator of the projects engaged in by Mortenson LLC. On some of those projects, Jeff Mortenson has directed employees of Mortenson LLC, and Mortenson LLC has used equipment owned by Mortenson Inc. Though witnesses for the Employer testified that such use occurred under a lease agreement, they testified that written leases were not available to show that arrangement. The evidence also shows that Mortenson Inc. and Mortenson LLC have the same operating address in the same building, use the same office staff and the same estimator, have centralized control over labor relations, interchange tools and vehicles, and are operationally interrelated.

Accordingly, I rule that work of the kind covered by the Eastern North Dakota Labor Agreement that was performed by employees of Mortenson LLC should have been compensated according to the terms and conditions established by that agreement and that Mortenson Inc. and its principals did not comply with the exclusivity requirement of Article 3 when they used Mortenson LLC, which Mortenson Inc. controlled, to pay less than the wages and benefits established by the Eastern North Dakota Labor Agreement.

In its post-hearing brief, the Employer argues that Article 26, Section A, of the Minnesota Labor Agreement is unlawful under holdings of the NLRB, including Carpenters Local 745, 312 NLRB 903 (1993), and of the United States Supreme Court in NLRB v. Int'l Longshoremen Ass'n, 447 U.S. 490 (1980). The Employer argues that these cases hold that it is insufficient that such a preservation of work clause use common ownership alone as a criterion to force a signatory employer to extend the benefits of a labor agreement to employees of an affiliated employer -- and that, in addition, it must be shown that the signatory employer has the "right of control" over the operations of the affiliated employer. I rule that the holding for which these cases are cited is not applicable here -- because the evidence shows clearly that Mortenson Inc. exercised actual control over Mortenson LLC. I base this ruling on a determination that the right of control is demonstrated not only by the interrelation of the officers and owners of the two entities, but by the evidence that shows the Employer's

frequent, actual control of the operations of Mortenson LLC, thus implying the right of control.

The parties argue about the meaning of Alessio Const., 310 NLRB 1023 (1993) and Manganaro Corp., 321 NLRB 158 (1996). The Employer argues that these cases hold that a work preservation provision like Article 26, Section A, of the Minnesota Labor Agreement is invalid unless its requirements are applied only to projects where employees of each entity work on the same jobsite at the same time. The Union disagrees with the Employer's interpretation of these cases. It argues that the following passage is controlling, from the Board's discussion in Alessio of Supreme Court precedent, at 310 NLRB 1027:

there is no requirement that the signatory employer also perform work at a common jobsite with the nonsignatory employer in order for the union's contract to apply."

As I interpret Alessio, Manganaro and other related cases cited by counsel, there is no requirement that a work preservation clause such as Article 26, Section A, be applied only to projects where employees of each entity work on the same jobsite at the same time.

The Employer also argues 1) that the Union has had knowledge for many years that Mortenson LLC, an entity related to the Employer, was doing masonry work on residential projects, 2) that, despite such knowledge, the Union did not object that Mortenson LLC was doing such work -- either by grievance or in bargaining -- until the Union brought the present grievances on August 13, 2013, and 3) that, by its inaction, the Union has acquiesced in work by Mortenson LLC on residential projects

and has waived any right it might have to object in this proceeding.

Below, I summarize the evidence presented at the arbitration hearing concerning this issue. Jeff Mortenson testified as follows:

1. When Mortenson Inc. first contracted with the Union in 2001, he told a Union representative, Roger Wilby, that Mortenson Inc. did masonry work on commercial projects only.
2. Mortenson Inc. itself has never worked on residential projects.
3. He has been aware since Mortenson LLC was formed in 2005 that Mortenson LLC works only on residential projects, except for the three commercial projects that were the subject of the Settlement Agreement with the NLRB -- Concordia College, the Skaff Apartments and Sam's Club.
4. The first time he ever heard that the Union alleged that the labor contracts between the Employer and the Union applied to residential projects was a week before the arbitration hearing in the present case.
5. When he has signed the current and past Independent Minnesota Agreements, he did not know that he was agreeing to the terms of the multi-employer Minnesota Labor Agreement.
6. The Settlement Agreement is an agreement with the NLRB and not an agreement with the Union. An email from a Field Agent for the NLRB, sent on November 25, 2013, to Richard Ross, the Employer's attorney, informed him that "The Union is not claiming the residential housing work."

I summarize below, the testimony of Ganz and Carlson, who testified for the Union about the Employer's argument that the Union had knowledge of the residential work done by Mortenson LLC and had waived any claim based on doing such work.

Carlson testified as follows. He has been a Field Representative for the Union since 2006. As such, he visits

construction job sites in North Dakota and in ten western counties of Minnesota, attempting to organize any non-Union workers who may be working, and to make sure that employers who have a labor contract with the Union are paying contract wages and benefits to all workers, whether members of the Union or not. In June of 2013, he first learned of the existence of Mortenson LLC, after having heard rumors of the existence of such a non-Union entity. He then talked to Jeff Mortenson, who told him about the existence of Mortenson LLC and said that it was "Connie's Company," that it did only residential work and that he had nothing to do with it.

Subsequently, in July of 2013, after Carlson found out that Mortenson Inc. and Mortenson LLC were working on the Concordia College project, Jeff Mortenson asked him and Ganz to ignore the work that Mortenson LLC was doing there at non-Union wages and benefits and that, if the Union did so, he, Jeff Mortenson, would send the non-Union Mortenson LLC employees to western North Dakota, outside the territory covered by the labor agreements between the Union and Mortenson Inc.

Ganz testified as follows. He has been a Field Representative and a Vice President of the Union for thirteen years. In July of 2013, he heard that Mortenson Inc. had obtained the Concordia College contract with a very low bid, so low that he suspected it planned to to pay non-Union wages and benefits. He talked to the Foreman of the non-union employees and found that they were employed by Mortenson LLC. He had no previous knowledge of the existence of that entity. He checked

other job sites and found that Mortenson LLC was also working at the Skaff's Apartments and Sam's Club projects -- projects that Mortenson Inc. was working on. Jeff Mortenson telephoned him and told him that the non-union employees were not his, but that if the Union would overlook their work on the three projects, he, Jeff Mortenson, would see that they were sent to western North Dakota, out of the Union's territory. Thereafter, on August 13, 2013, the Union brought the present grievances.

The Employer also argues that the ULP Consolidated Complaint alleged that Mortenson LLC was doing both commercial and residential work and that the Settlement Agreement applies only to commercial work, thus indicating that no evidence was presented in the ULP proceeding relevant to such residential work and confirming that the Union has waived the claim made here based on residential work done by Mortenson LLC. The Employer also points out that, even though the Union was not a party to the Settlement Agreement, it did have the right to appeal and thus to have it reviewed, a right it did not exercise.

I find from the evidence summarized above that the Union, through its officers and agents, did not have knowledge about the existence of Mortenson LLC and its use of employees to do masonry work until the summer of 2013 and that, accordingly, the Union did not have information upon which to base a waiver of or acquiescence in the use by Mortenson Inc. of its inter-related and controlled entity, Mortenson LLC, to do residential masonry work.

I reach the following conclusions. The evidence shows that Mortenson Inc. has performed work covered by the Minnesota Labor Agreement and by the Eastern North Dakota Labor Agreement through Mortenson LLC, an entity over which Mortenson Inc. exercised a significant degree of ownership, management and control and that, by doing so Mortenson Inc. avoided payment of wages and benefits required to be paid for such work under Article 26, Section A, of the Minnesota Labor Agreement and under Article 3 and other provisions of the Eastern North Dakota Labor Agreement. Accordingly, I make the following award.

AWARD

The Minnesota Grievance.

Paragraph 1. This grievance is sustained. The Employer and the individuals who executed the Independent Minnesota Agreement in effect on August 13, 2013 (the date the Minnesota Grievance was initiated), shall pay the amounts described in Paragraph 2, below, to and in behalf of employees who performed work covered by the work jurisdiction provisions of the Minnesota Labor Agreement in the geographic areas where Article 26, Section A, applies, whether those employees were employed by Mortenson Inc. or by Mortenson LLC. I intend this paragraph of the award to apply to the Union's request for the full make-whole recovery attributable to the work of Mortenson LLC on the three commercial projects -- Concordia College, Skaff Apartments and Sam's Club -- that were the subject of the ULP Settlement Agreement.

Paragraph 2. The amounts to be paid to and in behalf of the employees described in Paragraph 1 of this award shall be the difference between what they actually received in wages and benefits for such work and the wages and benefits established by the Minnesota Labor Agreement.

Paragraph 3. The Minnesota Grievance award shall cover work done during the duration of the Individual Minnesota Agreement that was in effect at the time the grievance was initiated, nominally, from May 1, 2013, through April 30, 2014. I note that the parties did not execute a new Independent Minnesota Agreement that expressly extended the Employer's obligation to abide by the Minnesota Labor Agreement beyond April 30, 2014, nor did they present evidence and argument whether, by that adoption of the Minnesota Labor Agreement, the term of which, by its provisions, extends till April 30, 2016, they also adopted its duration provision, notwithstanding the express ending of the term of the Independent Minnesota Agreement on April 30, 2014.

The North Dakota Grievance.

Paragraph 4. This grievance is sustained. The Employer and the individuals who executed the Eastern North Dakota Labor Agreement in effect on August 13, 2013 (the date the North Dakota Grievance was initiated), shall pay the amounts described in Paragraph 5, below, to and in behalf of employees who performed work covered by the work jurisdiction provisions of the Eastern North Dakota Labor Agreement whether those employees were employed by Mortenson Inc. or by Mortenson LLC.

Paragraph 5. The amounts to be paid to and in behalf of the employees described in Paragraph 4 of this award shall be the difference between what they actually received in wages and benefits for such work and the wages and benefits established by the Eastern North Dakota Labor Agreement.

Paragraph 6. The North Dakota Grievance award shall cover work done during the duration of the Eastern North Dakota Labor Agreement that was in effect at the time the grievance was initiated, from May 1, 2011, through April 30, 2014. The parties did not execute a new labor agreement at the end of its term. The parties did not present evidence whether negotiations for a new agreement were "formally broken off" in a manner that would discontinue contract obligations after expiration of the nominal duration of the old agreement, under Article 26, Section D, of the Eastern North Dakota Labor Agreement.

Retention of Jurisdiction.

Paragraph 7. The Union presented general evidence identifying construction projects for which the Union claims a make-whole remedy, information obtained from records of Mortenson Inc. and Mortenson LLC. Because that evidence does not provide sufficient detail to determine exact amounts of wages and benefits payable, the Union asks that I retain jurisdiction to specify those amounts in an amended award after such information is provided. Accordingly, I retain jurisdiction to make such an amended award, and I direct that the Employer provide that information to the Union. I

recognize, however, that the task of recovering that information is substantial, and I encourage the parties to make a strong effort to reach agreement about the amounts to be paid.

January 30, 2015



Thomas P. Gallagher, Arbitrator