IN THE MATTER OF AN ARBITRATION UNDER THE
***LABOUR RELATIONS CODE of BRITISH COLUMBIA*, R.S.B.C. 1996 c.244**

BETWEEN:

STAGE 49 LTD. ("A Million Little Things – Season 1")

(the "Employer")

AND:

BRITISH COLUMBIA & YUKON COUNCIL OF FILM UNIONS

(the "Film Council")

AND:

INTERNATIONAL ALLIANCE STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS ("IATSE"), LOCAL 891

(the "Union")

Re: [redacted] Individual Grievance and Policy Grievance of the BC & Yukon Council of Film Unions

FINAL AWARD

ARBITRATOR:	David C. McPhillips
ON BEHALF OF THE EMPLOYER:	Barry Y. Dong and Kacey Krenn
ON BEHALF OF THE UNION:	Anthony Glavin
DATE OF HEARINGS:	August 10 and 11, 2020
DATES OF WRITTEN SUBMISSIONS:	August 12, 13 and 16, 2020
DATE OF AWARD:	September 28, 2020

The parties are agreed that this Board has the jurisdiction to determine this matter which involves two separate, but related, grievances. The first is an individual grievance filed by IATSE, Local 891 on behalf of [redacted] the "Grievor", who was denied employment on "A Million Little Things - Season 1", a production of Stage 49 Productions, Ltd. ("Stage 49"). Stage 49 is a limited Canadian company owned and controlled by ABC Inc. The BC and Yukon Council of Film Unions (the "Film Council" or "BCCFU") has also filed a Policy Grievance addressing the right of the employers in the industry to place limitations on the work opportunities for individuals who have been "terminated" from a specific production.

There has also been a preliminary objection made by the Employer with respect to a brach of the "time limits" for the filing of these grievances and the parties agreed that this Board would hear the evidence and deal with the timeliness objection in the Final Award.

As well, the Union provided UBCP/ACTRA and DGC-BC (Directors' Guild) with "Hoogendoorn" notice and both unions indicated they did not intend to participate in this hearing.

FACTS:

[redacted], the individual Grievor in this case, is a member of IATSE, Local 891 and has worked in the film industry since 1993 in various capacities and on many different productions within the jurisdiction of the Film Council. In 2011, he worked in the [redacted] Department on the pilot for "Once Upon A Time", a production of Stage 49. Mr. [redacted] then returned to work on that series for Season 5 (2015), Season 6 (2016) and Season 7 (2017). During Season 7 he was dismissed from his employment and the termination letter on Stage 49 letterhead from Stephanie Caprielian, Vice-President Labour Relations for "ABC Inc.", which is part of the Walt Disney ABC Television Group, states:

> Re: Notice of Discharge for Cause ("Once Upon a Time")
>
> Dear Mr. [redacted]
>
> While working on the Stage 49 Productions, Ltd. production "Once Upon A Time" a co-worker reported your inappropriate behavior. During the investigation into that behavior, you admitted to holding up your fingers and saying "next time you masturbate you should use these two fingers. Do you know why? Because they are

> mine." You acknowledged this comment was directed toward a female crew member and made in front of other crew members. Furthermore, you admitted that this was not the first time you made an inappropriate comment to this particular crew member. During this investigation it was revealed that this particular female crew member had been bothered by these comments and in fact, has asked you to stop.
>
> This type of behavior is considered a violation of our Company's Bully, Harassment and Discrimination policy, see enclosed. You received these policies as part of your start packet when engaged on "Once Upon A Time". Violations of company policies cannot be tolerated.
>
> Pursuant to Article 10.06 of the BCCFU Master Agreement and based on your admitted actions you were discharged for cause. Accordingly, you are no longer eligible for employment for Stage 49 Ltd. or any affiliated or related entities.

At the time, IATSE did not grieve Mr. [redacted]s termination from the "Once Upon A Time" production on the basis that Mr. [redacted]s conduct justified his termination. However, it is the final paragraph in that letter which is the source of the present grievances.

In June of 2018, Mr. [redacted] inquired about working on another Stage 49 production, "A Million Little Things – Season 1", and was informed there was a "no hire" edict in place with respect to him.

On September 4, 2018, Kelly Moon, at the time the Senior Steward for IATSE Local 891, filed the following individual grievance on behalf of Mr. [redacted]

> Re: Grievance – "A Million Little Things – Season 1" – [redacted] (Grievor) No Hire
>
> IATSE Local 891 is providing you with notice of grievance pursuant to Article 11.03 of the British Columbia Master Agreement. In accordance with Article 11.01 of the Master Agreement, the BCCFU has approved the advancement of this matter to grievance.
>
> The Union views the ineligibility for employment with regard to [redacted] for Stage 49 Ltd., or any affiliated or related entities, excessive and contrary to Article A1.09(7), 10.06, 10.07 and any other applicable provision of the BCCFU Master Agreement.
>
> With the information stated below, I hope to conclude this matter promptly and without reliance on any further formal action. The Council will participate in this grievance process should it be necessary to advance this grievance to arbitration, and will do so in accordance with its obligations under the BC Labour Relations Code.
>
> The event that first occurred, giving rise to this grievance happened during the period of June 11 through September 4, 2018, when Mr. [redacted] was denied eligibility for employment on "A Million Little Things" produced for ABC as a result of an undisputed termination on "Once Upon a Time – Season 7" on October 16, 2017. The 'Grievor' voluntarily sought training and completed a full day, IATSE Local 891 Anti-Discrimination, Bullying and Harassment. Respectful

> Workplace training December 3, 2017. Mr. [redacted] has been working regularly without further incident.
>
> The remedy sought is to make the Grievor whole, rescind the No Hire edict, and make a declaration that an employee's discipline, up to and including discharge, is only applicable to the production the employee was working on at the time the alleged incident leading to discipline occurred.
>
> Please be aware that it is IATSE Local 891's position that a production may not refuse to employ a person due to discipline imposed on a separate production, until three industry discharges for just and reasonable cause have occurred and have been undisputed or upheld.

As well, on September 14, 2018, Paul Klassen, the Executive Director of the Film Council, filed the following Policy Grievance with respect to a refusal to accept a dispatch of a person who had been discharged from another production:

> The BCCFU is providing you with notice of grievance pursuant to Article 11.03 of the Master Agreement. In accordance with Article 11.02 of the Master Agreement, the BCCFU has approved the advancement of these matters to grievance.
>
> We claim that Stage 49 Ltd. has violated Articles 10.06, 10.07, A1.09(7), and other relevant provisions of the collective agreement by refusing to accept the dispatch of persons who have been discharged from other productions under the Disney/ABC group of companies.
>
> As remedy, the BCCFU seeks a declaration that a person's discipline, up to and including discharge, is only applicable to the production on which the person was working on at the time the alleged incident leading to the discipline occurred.
>
> It is the BCCFU's position that a production may not refuse to employ a person due to discipline imposed on another production, until three industry discharges for just and reasonable cause have occurred, as outlined in Article 10.07.

The grievance procedure provision in the Film Master Agreement, to which Ms. Moon and Mr. Klassen each made reference, states as follows:

> 11.03 Grievance Procedure:
>
> (a) To be valid, grievances must be filed within thirty (30) calendar days of the occurrence of the event(s) upon which the grievance is based, or, within thirty (30) calendar days after the facts underlying the grievance became known or should have reasonably become known by either the Employee, Employer, or the Council — which ever should have first reasonably gained knowledge of the facts underlying the grievance — but in no case more than one hundred eighty (180) days from the event giving rise to the grievance. A grievance is filed by delivering to the other party a written statement of grievance which shall set forth the basis of the dispute, the contractual provisions alleged to be violated, the material facts, the position of the grievant, and the relief sought. If either the Employer or the Council fail to agree to meet within fourteen (14) calendar days after the receipt of the statement of grievance, or they do meet and fail to resolve the grievance, then the Employer, the Council, or a Council Member that has obtained the authorization of a majority of

> the Council Members may proceed to final and binding arbitration pursuant to Article 11.04.

Both those grievances were referred to arbitration on January 19, 2019 and the matter was set down for hearing on October 7, 8 and 9, 2019. In the grievances themselves and at the arbitration hearing, the parties made reference to the following substantive terms of the Film Master Agreement which covers IATSE, 891 (8000 full members), Teamsters Local 155 (1600 full members) and the ICG, Local 669 (the Cinematographers, with 900 members):

> THIS AGREEMENT is created in the City of Vancouver in the Province of British Columbia as of the 1st day of April 2018 effective as such date by and between the negotiating producer entities all of whom are parties of the first part, hereinafter referred to collectively as the "Producers" and individually as a "Producer," and the British Columbia and Yukon Council of Film Unions, party of the second part comprised of three separate and distinct local trade Unions, hereinafter referred to as the "Council".
>
> ...
>
> 1.02 Adherence to Master Agreement: Any person or corporation now or hereafter engaged in the business of producing motion pictures in British Columbia shall be afforded the opportunity of becoming a party to this Master Agreement. This Master Agreement does not bind the Producers; a Producer is not an "Employer." However, any person or corporation that desires to become a party to this Agreement will provide the Council with an executed Letter of Adherence, which is a statement of agreement to be bound to the terms and conditions of this Master Agreement for a specific production or for a definite period of time within the Term of this Master Agreement along with an acknowledgement of the Council's Prior Obligations set forth in the written notice described in Article 1.03 below. Any person or corporation that provides the Council with an executed Letter of Adherence is hereinafter referred to as the "Employer" for the specific production or period of time covered thereby. When reasonable grounds exist to believe that a prospective Employer will be unable to meet its financial obligations under the Master Agreement the Council may refuse to permit that prospective Employer to adhere to the Master Agreement.
>
> ...
>
> 10.06 Discharge: No Employee shall be discharged (as distinguished from replacements or layoffs) by an Employer without just and reasonable cause. If the Council-member Union believes the action to be unjustified, the Council may file a grievance which shall be handled in accordance with Article Eleven. Any party to the grievance under this Article may make a written demand for an expedited arbitration pursuant to Article 11.05. The Arbitrator shall have the power to reinstate the Employee with or without full compensation, to award damages in lieu of reinstatement, or to sustain the discharge. Refusal to comply with an order, directive, or assignment that is unlawful, unsafe, or which is known by the Employee to be in violation of a location permit shall not result in discipline or discharge. An Employer will not be required to re-employ an Employee previously discharged by such Employer under this Article.

10.07 Industry Termination: An Employer is not required to employ, and the Union will not dispatch a person previously discharged for any reason by the film and television industry Employers three (3) times provided that no Employee shall be discharged (as distinguished from replacements or layoffs) by an Employer without just and reasonable cause. An agreed list of Industry Terminations will be maintained by the Council, the AMPTP and CMPA-BC offices and updated on a regular basis.

...

SIDELETTER NO. 1
As of April l, 2018

Mitch Davies, President
IATSE Local 891
1640 Boundary Road
Burnaby, BC V5K 4V4
Canada

Brian Whittred, President
ICG Local 669
3823 Henning Dr., Unit 217
Burnaby, BC V5C 6P3
Canada

Lorrie Ward, Secretary-Treasurer
Teamsters Local Union No. 155
490 East Broadway
Vancouver, BC V5T 1X3
Canada

This is to confirm our agreement that in lieu of providing a Performance Bond, pursuant to Article 14 of the 2018 Master Agreement, the following Companies, when "Employers" as that term is defined in the Master Agreement, hereby individually and severally guarantee payment of wages and other moneys that may become due to their respective Employees covered by the Master Agreement. Each of the following Companies may also designate other Employers for which such guarantee will apply. Any such designation shall be in writing to the British Columbia and Yukon Council of Film Unions:

Alameda Entertainment B.C., Inc.
Cartoon Network Studios Inc.
CBS Canadian Films and Television Inc.
CBS Films Inc.
CBS Productions
CBS Studios Inc.
Gabriel Simon Production Services Limited
GEP Productions Inc.
Home Box Office
Legendary Pictures Productions LLC
MGM Production Services (B.C.) Ltd.
Paramount Pictures Corporation (Canada) Inc.
Riverside Television B.C.
Screen Gems (Canada) Ltd.
SKG Studios Canada Inc.
Showtime Networks Inc.
Stage 49 Ltd.
Turner Films, Inc.
Twentieth Century Fox Canada Limited
Universal Studios Canada Inc.
Warner Bros. Pictures (B.C.) Inc.
Warner Bros. Television (B.C.) Inc

The Union has also referred to Article A1.09 contained in Section A of the Film Master Agreement which has specific application to IATSE, Local 891. That lengthy provision deals with the various dispatch and bumping rules and includes a statement that states "the Employer shall not unreasonably refuse to accept persons dispatched by Local 891".

At the hearing the parties provided testimony and documentation to place this dispute in context. In 1996, the British Columbia and Yukon Council of Film Unions was created by the British Columbia Labour Relations Board to bring an orderly structure to what, at the time, was a quite chaotic and "ad hoc" situation in the burgeoning film and television industry in British Columbia. At that time, Article 10:06 (as Article 10:05) was included in the first Film Master Agreement and the evidence is it has not been changed through subsequent rounds of bargaining.

Then, in 2003, Mr. Justice Tysoe was appointed as an Industrial Inquiry Commissioner to make recommendations concerning certain issues with respect to the "competencies" in the film and television industry. In his Final Report he made five recommendations, the third of which is of relevance here. That point addressed the issue of employees who were terminated from one film or television production being able to be dispatched by the Unions to other productions with the result they would be able to serially offend without any long term consequences. To address that problem, the concept of a "Three Strike" Rule was recommended by Mr. Justice Tysoe. In that respect, his Report stated the following:

> (iii) "Three Strike" Rule
>
> Section 10.06 of the Council's master agreement does provide that an employer is not required to re-employ an employee who was previously discharged by the employer. The problem is that it is the usual practice in the film industry for a production company to be incorporated for each production. The employer is the production company, not the producer. This means that a producer who has discharged an employee for cause on one production cannot refuse to employ the employee on his or her next production because the employer will be different. Appendix "B" to the master agreement, which applies to Teamsters 155, contains a somewhat broader right for an employer to refuse to accept an employee (e.g., if the employee was discharged by another movie industry employer within the previous four months).
>
> Most producers/production managers do not bother to discharge troublesome employees because there is minimal consequence to the employees. The production of a feature film or television show requires enormous amounts of effort and is usually subject to time constraints. The producer/production manager has better things to do with their time, especially in view of the fact that they will not be entitled to refuse to employ the worker on the next production.
>
> There is a difference of opinion within the industry as to whether management or the union bears the responsibility to discipline employees/union members. Management thinks that the unions should discipline union members, while the unions believe that it is the responsibility of the employer to discipline employees. On the one hand, there is an inherent conflict of interest in unions disciplining members who they are designed to represent. On the other hand, it is difficult for employers in the industry to effectively discipline employees because the workers frequently move around from employer to employer.

> This matter will become less important if my recommendation regarding a name request dispatch system is implemented. The troublesome workers will presumably not be requested unless they improve their work habits. They may be sent on day dispatches but that may not provide a sufficient amount of work and they may have to move to other industries if they do not improve their work habits. Nevertheless, it is my recommendation that a "three strike" rule be implemented in the industry. If nothing else, such a rule should assist in discouraging dishonest behavior. Each of the three discharges would have to comply with the requirement that there must be just and reasonable cause for the discharge. CFTPA could be the repository of discharge information so that there would be a central source of such information.

The evidence indicates that because the existing Film Master Agreement (2002 – 2005) was not set to expire for another year, the parties agreed to a process about how the Three Strike Rule (which is also known as an "Industry Termination") would work up until the next set of negotiations and they then formalized that process in the 2005 – 2008 Master Agreement by creating Article 10.07.

There is also documentary evidence that in January 2005, Bruce Laughton, at the time was Counsel for the Council of Film Unions, wrote to the Ministry of Competition, Science and Enterprise as follows:

> The following is our understanding of the current status of the recommendations made by Mr. Justice Tysoe:
>
> Recommendation No. 1- To replace the seniority dispatch system applicable to the dispatch members of Teamsters Local 155 and IATSE Local 891.
>
> With assistance of the Assistant deputy Minster of Skills, Development and Labour the parties are discussing a process to mediate this issue.
>
> Recommendation No. 2 – Require the BC Council of Film Unions to act as a single Union for the purposes of screening grievances and resolving jurisdictional disputes.
>
> The parties have agreed to specific language amending the Master Collective Agreement to give effect to this recommendation. The Council has provided additional wording to further enhance this agreement.
>
> Recommendation No. 3 – Introduce a "three strike rule" into the industry so that workers who are discharged for cause from three productions are no longer permitted to work within the industry.
>
> The parties have finalized a Collective Agreement provision dealing with this issue.

There was also placed into evidence an affidavit sworn on November 2, 2006 by Don Cott which was submitted to Vince Ready who had been appointed as an Industrial Inquiry Commission to deal with dispatch and seniority issues in the industry. Mr. Cott, at the time the

Vice-President for the Canadian Affiliates of the Alliance of Motion Picture and Television Producers ("AMPTP"), affirmed the following, at p. 21:

> 21. Two of the five recommendations in the Tysoe Report was the abolishment of the seniority dispatch systems found in the Council's Master Collective Agreement (the "Master Agreement") with the Negotiating Producers and the requirement that the Master Agreement take priority over unilateral and internally-made rules. Specifically, the summary of the recommendations included the following:
>
> 1. Replace the seniority dispatch systems applicable to the dispatch of members of Teamsters 155 and IATSE 891 with a name request system, which would allow for the production company to choose the members hired by it from a list of available workers. Seniority dispatch could be made applicable to daily workers if requested an d in cases where the production company does not know all the names of workers it wishes to hire.
>
> ...
>
> 3. Introduce a "three strike" rule into the industry. Workers who are discharged for cause from three productions are no longer permitted to work in the industry.
>
> ...
>
> 5. Require parties to collective agreements to acknowledge that the provisions of the agreements are paramount and take priority over internally-made rules and require disclosure in writing prior to the commencement of the production of internally-made rules which are not inconsistent with the applicable collective agreement.

As referenced in the Tysoe Report, and confirmed by the witnesses at this hearing, the historical practice in the film and television industry in British Columbia has been for the producers to establish a separate corporate entity to produce a particular show or series. When such an entity or company is created, signs a Letter of Adherence ("LOA") with the Film Council for each specific production.

As one example, for the production of the pilot for "Once Upon A Time", the following document, under the letterhead of "Stage 49 Ltd.", was sent to the Film Council:

> Re: Once Upon a Time – Letter of Adherence
>
> Dear Tom and Members of the Council:
>
> On behalf of Stage 49 Ltd., this is to inform you that pursuant to Section 1.02 of the British Columbia Council of Film Unions Master Agreement hereinafter "Master Agreement"), Stage 49 Ltd. agrees to be bound to the terms and conditions of the Master Agreement for the one-hour pilot *Once Upon A Time* being produced for ABC Television Network.

Stage 49 Ltd. acknowledges that it is aware of the Council Member Unions' prior obligations set forth in the written notice of prior obligations described in Section 1.03 of the Master Agreement.

Stage 49 Ltd. is affiliated with the AMPTP.

In the case of ABC Disney, a practice has recently developed in which it uses Stage 49 as the vehicle to engage all its local Canadian employees and is used for producing all the ABC Disney television shows. It is estimated there have been roughly 37 productions to this point. As well, ABC Disney uses other entities such as Black Angels and Free Form to produce other types of material for its Cable station and Disney channel programming.

It is agreed by the parties that the historical practice in the industry has been for separate LOAs to be sent by any company for a pilot and for each successive season of a particular show. Moreover, it is agreed various obligations, such as staffing arrangements, do not carry over from one season to the next. More recently, however, in an effort to reduce paperwork the parties have adopted the practice of one LOA being used for all the seasons of a particular show, with the LOA simply being rolled over as long as, according to Mr. Klassen, there are no significant changes to material facts such as the name of the company or for whom the show is being produced.

The undisputed evidence is that the tax credits available to the industry relate to individual seasons of a specific show. Start Packets are given out to each employee for each production (pilot or season) and the evidence indicates the Packets given to employees of any Disney related company contain the identical "Bullying Harassment and Discrimination Policy". As well, Call Sheets, which set out scheduling of the crews, show the series title and the specific season. Finally, employees negotiate separate Deal Memos for each season of a television production.

Returning now to the situation giving rise to the present grievances with respect to "A Million Little Things – Season 1", the following Letter of Adherence was sent, on June 7, 2018, to Mr. Klassen at the Film Council under the Stage 49 Ltd. letterhead and signed by Ms. Caprielian:

Re: "A Million Little Things" – Letter of Adherence

Dear Paul:

On behalf of Stage 49, Ltd., this is to inform you that pursuant to Section 1.02 of the British Columbia Council of Film Unions Master Agreement (hereinafter "Master

> Agreement"), Stage 49, Ltd. agrees to be bound to the terms and conditions of the Master Agreement for the series "A Million Little Things" being produced for ABC.
>
> Stage 49, Ltd. acknowledges that it is aware of the Council Member Unions' prior obligations set forth in the written notice of prior obligations described in Section 1.03 of the Master Agreement.
>
> Stage 49, Ltd. is affiliated with the AMPTP.

Mr. [redacted], who has worked in the [redacted] Departments for many years and has most recently worked primarily as a "[redacted]" which is the senior position in that Department, became aware of this new production and made employment inquiries of the Production Manager for the show, Dennis Swartman. Mr. Swartman, in turn contacted Ms. Caprielian at ABC Disney, who instructed him that Mr. [redacted] was not to be employed on any Stage 49 or any affiliated productions. That message was then communicated to Mr. [redacted] who contacted Ms. Moon at IATSE, Local 891.

On July 12, Ms. Moon made contact by email with Ms. Caprielian in Los Angeles and asked her to reconsider her position with respect to Mr. [redacted]s "no hire" edict. Ms. Moon confirmed to Ms. Caprielian that Mr. [redacted] had completed an Anti-Discrimination, Bullying and Harassment Course which had been put on by the Union on December 7, 2017. Ms. Moon testified she had originally thought Ms. Caprielian had been informed at the time of that course completion but there is no evidence that actually did occur.

Ms. Moon testified her hope in these types of situations is "rehabilitation" will result in a relaxation of the employment limitations which had previously been imposed. Ms. Caprielian responded to Ms. Moon's email inquiring whether Ms. Moon was asking for [redacted]'s "no-hire" letter to be rescinded. Later that day, Ms. Moon emailed back, stating in part:

> When we had originally received [redacted]'s termination, you and I had a conversation where I would be sending you his course completion. I also at that time, maintained the Council position, that we are not in agreement with Studio no hires and that we consider terminations to be tied to the Production that employed them. I know you and I have agreed to disagree about this issue. Having said that, since the incident on Once Upon A Time, there have been no further incidents on productions he has worked on, and I would very much appreciate if you would reconsider the 'no hire' edict.
>
> A production called 'A Million Little Things' apparently would have hired him if not for the No Hire at ABC. They have since sent in a permit request for a non-member and quite frankly even if [redacted] is not an option in your view, there are available [redacted] who have expressed interest, therefore, I am about to respectfully deny the permit request and notify production.

That evening Ms. Caprielian replied to Ms. Moon that "you have to do what you have to do. I am not ready to rescind Mr. [redacted]'s no-hire at this time. I will evaluate your request and discuss internally."

Ms. Moon and Ms. Caprielian agree they had a brief follow-up telephone conversation, although neither can recall precisely when that occurred. Their best recollection was that it was sometime between two and four weeks later and, in that telephone conversation, Ms. Caprielian confirmed to Ms. Moon that the "no hire" edict with respect to Mr. [redacted] would remain in effect.

Subsequently, the individual grievance on behalf of the Grievor was filed by IATSE on September 4 and the Policy Grievance by the Film Council on September 14.

As indicated above, the hearing filed into this dispute was initially scheduled for dates commencing on October 7, 2019 and, at that time, there was an attempt to resolve the dispute as it has potential implications for the industry beyond the narrow scope of a discipline dispute. The matter was then adjourned until August 10, 11 and 12, 2020 in order that the parties would have an opportunity to further discuss a resolution of the matter. However, due to heavy workloads and the arrival of COVID-19, those discussions could not take place.

On July 23, 2020, three weeks before the rescheduled hearing was to commence, Ms. Caprielian sent two letters to Mr. [redacted] The first reads as follows:

> Re: Notice of Discharge for Cause ("Once Upon A Time")
>
> Dear Mr. [redacted]
>
> This letter will confirm that we are withdrawing that portion of the original discharge letter that prohibited you from working for affiliated or related entities to Stage 49 Productions, Ltd. We have revised the no-hire letter, which is attached, to reflect that the Discharge for Cause is limited to Stage 49 Productions, Ltd.
>
> You were never denied any employment with any of the affiliated or related entities and you are free to seek employment with any related or affiliated entity.
>
> Please be advised that the events that lead to your no-hire letter, originally dated 10/16/17, will not be considered and will have no bearing on your eligibility for employment on a related or affiliated entity to Stage 49 Productions, Ltd.

The second letter was the "revised" termination letter and it now stated:

> While working on the Stage 49 Productions, Ltd. production "Once Upon A Time," a co-worker reported your inappropriate behavior. During the investigation into that behavior, you admitted to holding up your fingers and saying "next time you

> masturbate you should use these two fingers. Do you know why? Because they are mine." You acknowledged this comment was directed toward a female crew member and made in front of other crew members. Furthermore, you admitted that this was not the first time you made an inappropriate comment to this particular crew member. During this investigation it was revealed that this particular female crew member has been bothered by these comments and in fact, has asked you to stop.
>
> This type of behavior is considered a violation of our Company's Bully, Harassment and Discrimination policy, see enclosed. You received these policies as part of your start packet when engaged on "Once Upon A Time". Violations of company policies cannot be tolerated.
>
> Pursuant to Article 10.06 of the BCCFU Master Agreement and based on your admitted actions you were discharged for cause, effective 10/16/17. Accordingly, you were no longer eligible for employment with Stage 49 Productions, Ltd.

As a result of these amendments, the "no hire" ban in respect to Mr. [redacted] is now limited to Stage 49 productions and he is no longer prevented from working for other ABC Disney affiliates, for example, Dark Angels, Free Form or 20th Century Fox.

Mr. Klassen, who prior to going to the Film Council was with IATSE Local 891, testified he has been involved in collective bargaining for the 2009, 2012, 2015 and 2018 Film Master Agreements. He indicated that it is his understanding that the Producers are not the employers for the purposes of the Film Master Agreement. Further, he asserted that individuals are employed for a specific production and the practice has generally been for Producers to incorporate a specific company or entity for each television series or film. He acknowledged that, although ABC Disney (Stage 49), or NBC Universal (GEP) have utilized the same corporate vehicle for multiple productions, in his view, Stage 49, for example, is the separate employer for each season of each series which it produces and each of these distinctive productions comprise separate entities. Mr. Klassen stated that the "Employer" is the person or company that adheres, through the Letter of Adherence, for the specific production. Under cross-examination, Mr. Klassen agreed there is no restriction in the Film Master Agreement on Stage 49 being a company and being able to produce multiple shows but he stated it is not an "ongoing Employer" for those various productions. In his view, the "Employer" is the entity which signs the LOA and it does so for each specific production.

Ms. Moon, who has worked in the film and television industry since 1985, became a full time Assistant Steward with IATSE 891 in 2005 and the Senior Steward in 2008. She testified that the unions have always operated on the assumption the Three Strike Rule applied to

individual productions and not to the Studios. She stated that has never been raised as an issue in collective bargaining. At one point, the Unions did attempt to bargain a "sunset provision" with respect to the "terminations" but that was rejected by the Negotiating Producers. She also agrees that Article 10.06 has not been changed since it was first introduced in 1996.

She also confirmed in cross-examination that, although the practice of setting up a separate company for each production is the "usual practice", it is "not the exclusive practice". She also agreed that the practice in the United States is the one argued here by Stage 49.

Ms. Moon also testified that "no-hire" edicts have come up for discussion between the parties in the past and they have simply "agreed to disagree". As well, she acknowledged Stage 49 has issued similar letters to the one it provided Mr. [redacted] but the "no hire" issue has not had to be addressed. Ms. Moon stated that individuals are often "rehabilitated" and their discipline letters were subsequently amended.

Ms. Caprielian testified she has worked for ABC Disney for five (5) years and reports to Mark Sandman, the Senior Vice President of Labour Relations. She is located in Burbank, California and has worked in the motion picture industry in the labour relations field since 1976, primarily with Universal Pictures.

She testified the Vice Presidents at ABC-Disney are assigned to various productions and they work with the Line Producers, Production Managers, Accounting Staffs and Department Heads for that particular production. Her own assignments have been in the United States and in Vancouver and she has been responsible for a number of the Stage 49 productions in this province.

Ms. Caprielian testified that the Employer's position is that the Producer is not the Employer and it is Stage 49 which engages the individuals and its specific productions are simply the titles for the projects. She also stated that this approach is not unique to Canada, although she did confirm in her cross-examination that the United States collective agreements do not contain a provision similar to Article 1.02 of the Film Master Agreement here. Ms. Caprielian also testified it is the Employer's view that there is nothing in the Film Master Agreement which prevents a studio from using the same employer for a variety of productions. She also testified that Sideletter No. 1 of the Film Master Agreement clearly indicates Stage 49 is a company.

Ms. Caprielian indicated it is the position of ABC Disney that Articles 10.06 and 10.07 of the Film Master Agreement would refer to Stage 49 as "the capital E" Employer for the purposes of discipline and those provisions have never been changed during collective bargaining. She stated that is the position the Industry took before Mr. Justice Tysoe in 2003 in an attempt to get a process similar to "what happens in Los Angeles" and ensure the industry was able to get rid of "dead weight" employees.

Moreover, Ms. Caprielian testified that in the United States she had, over the years at both Universal and ABC Disney, sent out hundreds of letters identical to the one given to Mr. [redacted] and that is the approach she has always taken. As well, she also stated she has issued similar letters in British Columbia with respect to ABC Disney. Ms. Caprielian agrees with Ms. Moon's evidence that not all those letters were grieved and that the "no hire" issue has never had to be formally addressed by the parties. With respect to the specific situation involving Mr. [redacted], she testified that he was discharged from "Once Upon a Time" for egregious behavior and that because Stage 49 now has knowledge of that situation, it would have potential liability if he were to reoffend on another Stage 49 production.

The parties take views consistent with their positions here with respect to other matters, for example, overtime (6 and 7 day), the duty to accommodate employees and their WorkSafeBC obligations. The Union assert that, if an employee has worked on one Stage 49 production for five days and then was employed on a different Stage 49 production on days 6 and 7, the premium overtime (for 6th and 7th days) would not be required as the two productions constitute separate entities. On that issue, Ms. Caprielian testified that she has advised her production managers that such overtime would be owing in those circumstances. However, there were no actual examples provided to show any practice by Stage 49 in that regard.

Similarly, with respect to the duty to accommodate individual employees, the Unions see no carry-over of any duty to accommodate between the different productions of Stage 49 and assert that that has never occurred. Ms. Caprielian is of the opinion that such an obligation to accommodate individuals would exist, if the appropriate circumstance arose. Once again, there is no evidence of that issue has ever arisen.

Finally, with respect to the WorkSafeBC situation, Ms. Caprielian testified that Stage 49 has only one WorkSafeBC account for all its productions in British Columbia and is, therefore, considered as the Employer for that purpose. The evidence does indicate Stage 49 is considered

by WorkSafeBC to be one "Employer" but it is acknowledged that decision has been made at the discretion of WorkSafeBC.

Turning now to the timeliness with respect to the filing of the present grievances, Mr. Klassen testified that he was aware in June and July of 2018 of the ongoing discussions between Ms. Moon and Ms. Caprielian and, in his view, this was an important issue for the industry and these were "good faith negotiations". He testified it was only when it finally became clear that Ms. Moon and Ms. Caprielian could not resolve the dispute with respect to Mr. [redacted] that the time limits for the filing of these grievances began to run.

Ms. Moon testified that although these parties have generally tried to adhere to the time limits in the Film Master Agreement, both sides have often missed them because "they try to work it out until there is no hope". Ms. Moon asserted that, in this case, the Union was not grieving the actual termination of Mr. [redacted] from Once Upon a Time" but rather the failure of Stage 49 to rehire him and that issue did not arise until June 2018. Under cross-examination, Ms. Moon agreed that IATSE, Local 891 had not sought an extension of the time limits from the Employer during this period of time. As well, she agreed that Ms. Caprielian never changed her position with respect to Mr. [redacted] s situation throughout their discussions in June and July, 2018.

Ms. Caprielian testified that she was never of the view that her discussions with Ms. Moon served to extend the time limits for these grievances being filed. Ms. Caprielian also stated in her evidence that the Union never asked her for an extension of the time limits, which it has often done in the past, but if one had been requested, it would have been granted.

DECISION:

The first matter to be addressed is the Employer's objection with respect to the timeliness of both of the grievances. The Employer first provided the Union notice of its timelines argument on October 1, 2019, a week before the beginning of the hearing on October 7, 2019 and asserted that both the individual grievance of IATSE, Local 891 and the Policy Grievance from the Film Council were filed beyond the time limits set out in the Film Master Agreement.

Once again, Article 11.03 states:

11.03 Grievance Procedure:

(a) To be valid, grievances must be filed within thirty (30) calendar days of the occurrence of the event(s) upon which the grievance is based, or, within thirty (30) calendar days after the facts underlying the grievance became known or should have reasonably become known by either the Employee, Employer, or the Council — which ever should have first reasonably gained knowledge of the facts underlying the grievance — but in no case more than one hundred eighty (180) days from the event giving rise to the grievance. A grievance is filed by delivering to the other party a written statement of grievance which shall set forth the basis of the dispute, the contractual provisions alleged to be violated, the material facts, the position of the grievant, and the relief sought. If either the Employer or the Council fail to agree to meet within fourteen (14) calendar days after the receipt of the statement of grievance, or they do meet and fail to resolve the grievance, then the Employer, the Council, or a Council Member that has obtained the authorization of a majority of the Council Members may proceed to final and binding arbitration pursuant to Article 11.04.

On this issue, the parties have referred this Board to the following authorities: *Bilfinger Berger (Canada) Inc.,* [2006] B.C.C.A.A.A. No. 125 (Kinzie); *Kitchener-Waterloo Hospital,* [1994] O.L.A.A. 125 (Brown); *British Columbia (Evans Grievance),* [1992] B.C.C.A.A.A. No. 35 (Bird); *Public Service Employee Relations Commission,* [1996] B.C.C.A.A.A. No. 418 (McDonald); Brown & Beatty, *Canadian Labour Arbitration,* 5th Edition, Canada Law Book, para. 2:3128; *Vancouver School District,* [1995] B.C.C.A.A.A. No. 132 (Hope); *Pacific Forest Products Ltd.,* [1984] B.C.C.A.A.A. No. 235 (Munroe); *Malaspina University College,* [2003] B.C.C.A.A.A. No. 375 (Jackson).

There are two matters to be determined with respect to the timeliness issue in this case. The first requires deciding when the events crystalized such that the time limits started to run; the second is whether any discretion to extend them should be exercised by this Board.

With respect to when the time limits began to run, the Employer submits that the relevant date is October 16, 2017, the date on which Mr. [redacted] was provided with his termination letter. It asserts it is from that date that the 30 day limit would run and, therefore, the grievances were out of time as of November 16, 2017. Moreover, the Employer argues that even if one takes the most permissive approach under Article 11.03(a) and uses the 180 day time limit, the right to file these grievances would have expired on April 14, 2018, which is still five months before the individual grievance on behalf of Mr. [redacted] and the Policy Grievance were filed respectively by IATSE on September 4, 2018 and the Film Council on September 14, 2018.

For its part, the Union submits that this dispute did not crystalize until Mr. [redacted] was denied employment in "A Million Little Things – Season 1" in June, 2018 and he contacted IATSE, Local 891. As a result, it asserts there was a delay of no more than two months beyond the 30 day time limit and, in any event, both the individual and Policy grievances were filed within the absolute 180 day time limit set out in Article 11.03. Further, discussions between the parties continued until near the end of July in an effort to resolve the matter.

In my view, the issue in the present dispute did not arise until June 2018: *Malaspina University College, supra*. It is clear that the Individual Unions, the Film Council and ABC Disney have openly held differing views with respect to the scope of these "no hire" edicts. The evidence is that this issue of employment limitations extending to other productions of the same Employer or to affiliated entities has been simmering, at least for the five years Ms. Caprielian has been at ABC Disney. During that period, it is clear the parties have "agreed to disagree" and have been able to avoid having the matter determined by, for example, removing the limitation after an employee has been "rehabilitated". The parties appear to have generally been able to resolve individual cases such that the more contentious issue of the scope of the hiring limitation has been avoided.

Moreover, after Mr. [redacted] was refused employment on "A Million Little Things – Season 1" in June, 2018, there were then ongoing discussions between Ms. Caprilian and Ms. Moon until the end of July when it became clear that ABC Disney had finally determined it was not prepared to amend its imposed hiring limitation. On the evidence presented, these types of discussions were a common practice within the highly professional relationships that exist in this Industry.

Therefore, although a precise date was not established, it appears that it was not until sometime around the end of July or early August that the parties were finally clear that they were at an impasse and that no resolution of the [redacted] situation would be forthcoming. As a result, it is concluded the time limits began to run sometime around the end of July, 2018.

We turn now to whether the time limits were violated and should be enforced in the present circumstances. The *Labour Relations Code,* RSBC 1996, c.244, in Section 89(e), grants an arbitrator the authority to "relieve, on just and reasonable terms, against breaches of time limits or other procedural requirements set out in the collective agreement".

In *Pacific Forest Products Ltd., supra,* Arbitrator Munroe set out the appropriate matters to consider in relieving against time limits, under what was then Article 98(e), at para. 13:

> 13 In my view, a determination of whether the burden under s. 98(e) has been satisfied should proceed on the following considerations: (a) the degree of force with which the parties have given contractual expression to the time-limits; (b) whether the breach of the time-limits was in the early or later stages of the grievance procedure; (c) the length of the delay; (d) whether the applicant for relief has a reasonable explanation for the delay; € the nature of the grievance – i.e., the impact on the grievor of a refusal to grant relief against the time-limits; (f) whether the employer would suffer prejudice by the granting of such relief, and (g) any other factors peculiar to the circumstances at hand.

Therefore, it must first be determined what "the force of the language" is in this case and whether the wording in Article 11.03 is "mandatory" or "directive": *Bilfinger Berger (Canada) Inc., supra; Vancouver School District No. 39, supra.* Generally speaking, the authorities indicate if the language is mandatory, arbitration boards will only relieve against the expressed time limits in serious or extraordinary circumstances.

Arbitrator Kinzie addressed that distinction between mandatory and directive language in *Bilfinger Berger (Canada) Inc.,* and stated, at para. 55:

> 55 In my view, the question in each case is what the parties intended by their inclusion of time limits in their grievance procedure provisions. Did they intend them as expressions of desirable conduct and best efforts or did they intend them to be mandatory in the sense that a failure to comply with them would result in the grievances being rendered inarbitrable? In the absence of express language in the collective agreement as to whether the time limit was directory or mandatory or bargaining history evidence on the point, arbitrators have inferred an intention from the use of the words like "shall" in the agreement in the context of the time limit and from whether or not the agreement has specified any penalty or consequence for failing to follow it.

For its part, the Union asserts that the language in Article 11.03(a) is "directory" in that there is no consequence expressed in that provision. Thus, the principal question is whether the delay was unreasonable in the sense of compromising a fair hearing. In the alternative, even if the language is considered to be mandatory, the Union notes there still remains a statutory jurisdiction to relieve against the time limits.

The Union submits the following factors should be considered by this Board:

- The length of the delay beyond 30 days is not extensive;
- The consequences for Mr. [redacted] for the rest of his career in the film industry are significant. The grievances will determine whether Stage 49, Ltd. (or similarly

operating corporate entities) can indeed refuse to hire him on the basis of his discharge from Once Upon a Time – Season 7.

- If the individual grievance is denied on the basis of the timeliness running from the June 11, 2018, the Union will simply file a grievance over a further refusal to hire Mr. [redacted]
- There has been absolutely no evidence of prejudice raised by Stage 49 Ltd.

The Employer takes the position that the time limits established in Article 11.03(a) of the Film Master Agreement are mandatory. It asserts that the term "to be valid, grievances must …" indicates that no other options are possible. In other words, it submits the use of the term "must" should be considered as a "mandatory" word as a consequence has been established in that a grievance would no longer "be valid".

In my opinion, although Article 11.03(a) of the Film Master Agreement contains a statement that a grievance would no longer be "valid", there is not stronger language contained in the provision. For example, there is no statement such as "it will be deemed the grievance is abandoned" or that "the matter will be inarbitrable". As well, there is also no language in Article 11.03(a) indicating that the time limits may only be extended by mutual consent as was the case in *Kitchener-Waterloo Hospital, supra.* Statements such as those are generally considered in the jurisprudence to be a major requirement for a successful claim that the language should be considered mandatory: *Brown & Beatty, supra; British Columbia (Evans Grievance), supra.*

The next observation is that Article 11.03(a) contains two separate time limits which creates an inherent contradiction. At one point, the Article states there is a 30 day time limit but then indicates "but in no case more that one hundred eighty (180) days". On its most simple reading, it is difficult to have two different mandatory time limits. In other words, it is impossible to conclude that the 30 day time limit in Article 11.03 is intended to be mandatory when the provision also contains a one hundred eighty (180) day limitation. Accordingly, it is my conclusion that the time limits set out in Article 11.03(a) with respect to the 30 day limit are certainly directory, but arguably the 180 day time limit could be found to be mandatory. In the event, these grievances were filed slightly beyond the 30 day time limit but were filed well within the 180 day period.

We next turn to the other factors set out in the authorities concerning whether relief against the directory 30 day time limit should be granted in these circumstances. The evidence of Ms. Moon, which was not contested in any way, is that these parties often seek to resolve matters prior to the filing of a grievance and there has never been a practice of these parties requiring strict compliance. As a result, some latitude has existed and that is an important factor to be considered: *Vancouver School District No. 39, supra; Board of School Trustees, School District No. 24 (Kamloops)*, August 28, 1991.

Moreover, this was certainly not a situation where either IATSE 891 or the Film Council was negligent or mislead the Employer in any way into thinking they had abandoned their intention to dispute the imposed employment limitations and that must also be taken into account. As well, it must be noted that the Employer never even raised the issue of time limits with the Union until a few days before the hearing was initially scheduled to begin on October 7, 2019.

Moreover, this is an important issue for the parties generally and Mr. [redacted] specifically. Arbitration boards must be careful not to prevent an inquiry into the merits of a case on purely technical grounds. Further, as the Union correctly points out, if these grievances were found to be "out of time", IATSE will simply dispatch Mr. [redacted] to the next Stage 49 production and the issue will be joined once again.

Finally, there has been no evidence presented of any, let alone a substantial, prejudice to the Employer: *Malaspina University College, supra; Kitchener-Waterloo Hospital, supra.* Indeed, Ms. Caprielian testified that if an extension of the time limits had been requested by the Union in the summer of 2018, it would have been granted.

Therefore, it is concluded that the 30 day time limit for the filing of the grievances was exceeded only by a couple of weeks at most and they were filed well within the 180 day time limit also contained in Article 11.03(a). As a result, the Employer's objection with respect to timeliness is dismissed and the merits of the dispute will now be addressed.

This matter requires an interpretation of certain Articles of the Film Master Agreement and, in respect to what is required in that task, the parties have referred to the following authorities: *Labour Relations Code,* RSBC 1996 c.244; *Re James Shavick Enterprises Ltd.,* [1995] B.C.L.R.B.D. No. 431 (Longpre, et al); *Warner Bros. Television (B.C.) Inc., National City Films Inc. – "Supergirl",* [2017] B.C.C.A.A.A. No. 45 (Blasina); *Catalyst Paper Corp.*

(Port Alberni Division), [2010] B.C.C.A.A.A. No. 49 (Germaine); *Re Nanaimo Times Ltd.,* [1996] B.C.L.R.B.D. No. 40 (BCLRB); *Stage 49 Ltd. v. British Council of Film Unions (Staffing Arrangements Grievance),* [2014] B.C.C.A.A.A. No. 109 (Lanyon); *Re Santa Buddies Productions Inc.,* [2009] B.C.L.R.B.D. No. 215 (Fleming); *Warner Bros. Television (B.C.) Inc. (Supernatural 5 Films Inc.),* [2012] B.C.C.A.A.A. No. 145 (Fleming); *Re Fraser Burrard Hospital Society and H.S.A.,* [1988] B.C.C.A.A.A. No. 25 (Munroe); *Halifax (Regional Municipality) (Boudreau Grievance),* [2012] N.S.L.A.A. No. 2 (Richardson); *Cariboo-Chilcotin School District No. 27,* [2004] B.C.C.A.A.A. No. 317 (Hope); *Catalyst Paper Corp.,*[2010] B.C.C.A.A.A. No. 49 (Germaine); *C.H. Cates and Sons Ltd.,* {1994] B.C.C.A.A.A. No. 157 (Germaine); *Health Employers Assn. of British Columbia,* [2011] B.C.C.A.A.A. No. 124 (Brown); *Health Employers Association of BC (Beacon Hill Lodge,*[1998] B.C.C.A.A.A. No. 15 (Gordon); *Lakes District Maintenance Ltd. (LDM),* [2012] B.C.C.A.A.A. No. 91 (Keras); *New Westminster School District No. 40,* [1999] B.C.C.A.A.A. No. 221 (Gordon); *Northwest Waste System Inc.,* [2007] B.C.C.A.A.A. No. 158 (Blasina); *Prince Rupert School District No. 52,* [2003] B.C.C.A.A.A. No. 148 (Blasina); *Cranbrook (City)(Re),* [2001] B.C.L.R.B.D. No. 294; *Public Service Employee Relations Commission (Cleghorn Grievance),* [1996] B.C.C.A.A.A. No. 418 (McDonald); *Stage 49 Ltd.,* [2014] B.C.C.A.A.A. No. 109 (Lanyon); *TBC Teletheatre British Columbia,* [2002] B.C.C.A.A.A. No. 68 (Foley); *Columbia Hydro Constructors (Re),*[1994] B.C.L.R.B.D. No. 35; *Greater Vancouver Transit Authority (Re),* [2002] B.C.L.R.B.D. No. 52; *Steel Equipment Co* (1964), 14 L.A.C. 356 (Reville); *Wm Scott & Co Ltd.,* [1976] B.C.L.R.B.D. No. 98 (BCLRB); *Alliance of Motion Picture & Television Producers v. British Columbia & Yukon Council of Film Unions,* [1995] B.C.L.R.B.D. No. 431.:

To begin, the basic rules of interpretation were enumerated by Arbitrator Bird in 1995 in *Pacific Press,* [1995] B.C.C.A.A.A. No. 637:

1. The object of interpretation is to discover the mutual intention of the parties,.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.

8. Where an agreement uses different words, one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

Other interpretive principles have also been recognized in the jurisprudence. For example, a union bears the onus of proving that the employer has contravened the provisions of the collective agreement although there is no onus on either party with respect to having to prove a particular meaning of any term: *New Westminster School District No. 40, supra.* As well, when faced with a choice between two linguistically permissible interpretations, arbitrator boards should be guided by the reasonableness and/or practical labour relations implications of each possible interpretation: *Health Employers Association of BC (Beacon Hill Lodge), supra; TBC Teletheatre British Columbia, supra.* Next, parties to a collective agreement are presumed not to provide for significant obligations or benefits by implication, unless by clear language: *C.H. Cates and Sons Ltd., supra; Lakes District Maintenance Ltd. (LDM), supra.* Finally, the interpretation of any specific provisions or words in a contract must be viewed in the context within which they are used in that collective agreement: *Catalyst Paper Corp., supra.*

It has been widely acknowledged that the principal obligation of an arbitration board is to determine what the mutual intention of the parties was when the disputed provisions were inserted into the collective agreement. It is also not the role of an arbitration board to impose its own sense of fairness or equity or to alter the intended meaning of the parties because circumstances or conditions have changed: *Pacific Press, supra; Catalyst Paper Corp., supra; Surrey School District No.; 36,* [2009] B.C.C.A.A.A. No. 27 (Korbin).

Next, the primary resource with respect to determining that mutual intention is the actual language which the parties included in their collective agreement and the words that were adopted by the parties should be given their plain and ordinary meaning: *Cranbrook (City),* [2001] B.C.L.R.B.D. No. 294; *Surrey School District No. 36, supra*; *Health Employers Association,* [2002] B.C.C.A.A.A. No. 1340 (Gordon); *Prince Rupert School District No. 52, supra.*

There was a great deal of evidence presented at this hearing about how each of the parties interprets the provisions in question but it must be observed much of that testimony merely reflects the unilateral intentions of ABC-Disney, IATSE or the Film Council. However, this inquiry must focus on discovering the <u>mutual</u> intention of the parties.

Once again, the key provisions of the Film Master Agreement are the following:

> 1.02 Adherence to Master Agreement: Any person or corporation now or hereafter engaged in the business of producing motion pictures in British Columbia shall be afforded the opportunity of becoming a party to this Master Agreement. This Master Agreement does not bind the Producers; a Producer is not an "Employer." However, any person or corporation that desires to become a party to this Agreement will provide the Council with an executed Letter of Adherence, which is a statement of agreement to be bound to the terms and conditions of this Master Agreement for a specific production or for a definite period of time within the Term of this Master Agreement along with an acknowledgement of the Council's Prior Obligations set forth in the written notice described in Article 1.03 below. Any person or corporation that provides the Council with an executed Letter of Adherence is hereinafter referred to as the "Employer" for the specific production or period of time covered thereby. When reasonable grounds exist to believe that a prospective Employer will be unable to meet its financial obligations under the Master Agreement the Council may refuse to permit that prospective Employer to adhere to the Master Agreement.
>
> ...
>
> 10.06 Discharge: No Employee shall be discharged (as distinguished from replacements or layoffs) by an Employer without just and reasonable cause. If the Council-member Union believes the action to be unjustified, the Council may file a grievance which shall be handled in accordance with Article Eleven. Any party to the grievance under this Article may make a written demand for an expedited arbitration pursuant to Article 11.05. The Arbitrator shall have the power to reinstate the Employee with or without full compensation, to award damages in lieu of reinstatement, or to sustain the discharge. Refusal to comply with an order, directive, or assignment that is unlawful, unsafe, or which is known by the Employee to be in violation of a location permit shall not result in discipline or discharge. An Employer will not be required to re-employ an Employee previously discharged by such Employer under this Article.
>
> 10.07 Industry Termination: An Employer is not required to employ, and the Union will not dispatch a person previously discharged for any reason by the film and television industry Employers three (3) times provided that no Employee shall be discharged (as distinguished from replacements or layoffs) by an Employer without just and reasonable cause. An agreed list of Industry Terminations will be maintained by the Council, the AMPTP and CMPA-BC offices and updated on a regular basis.

Article 10.06 simply addresses the need for the Employer to have just cause to terminate an employee. Article 10.07 deals with "Industry Termination" and incorporates the Three Strike Rule proposed by Mr. Justice Tysoe in 2003. That provision states that "an Employer is not required to employ, and the Union will not dispatch a person previously discharged for any reason by the film and television Employers three (3) times ..."

Where the dispute between these parties actually arises is in the meaning to be given to the term "Employer" in these two provisions. That leads to a consideration of Article 1.02 in

which it is clearly indicated that a "Producer is not an Employer". The provision then goes on to state:

> However, any person or corporation that desires to become a party to this Agreement will provide the Council with an executed Letter of Adherence, which is a statement of agreement to be bound to the terms and conditions of this Master Agreement for a specific production or for a definite period of time within the Term of this Master Agreement along with an acknowledgement of the Council's Prior Obligations set forth in the written notice described in in Article 1.03 below. Any person or corporation that provides the Council with an executed Letter of Adherence is hereinafter referred to as the "Employer" for the specific production or period of time covered thereby ...

In my view, that language adopted by these parties clearly connects the concept of a person or corporation to a specific production. The evidence that there is a new and separate Letter of Adherence filed for each production; in other words, an entity becomes an "Employer" once it executes a Letter of Adherence and that must be done for each separate production. It is the person or corporation which signs the LOA for the specific production "covered thereby" which is the Employer, certainly at least for the purposes of Article 10.06 and 10.07. It is acknowledged by the parties that Letters of Adherence are submitted for each separate season and create distinct legal obligations, as for one example, the salaries paid under the Deal Memos for key personnel. Indeed, Stage 49 itself has signed separate LOA's for different productions over the years; in doing so, Stage 49, or any other such entity, acquires rights and obligations for a production only when it submitted a new Letter of Adherence.

Moreover, when an employee is employed on Season 1 of a series a new employment relationship is created incorporating the terms of the Film Master Agreement. If and when Season 2 of that show goes into production, there is a new employment relationship created with new deal memo, salary packets, etc. for each employee and there is also no guarantee of ongoing employment of any employee for subsequent seasons. In other words, the Film Master Agreement is adopted separately for each production by an entity or corporation.

The evidence is the usual practice in the industry is for Producers to have created separate corporate entities with different names to operate each production. I do agree there is certainly nothing in the Film Master Agreement to prevent ABC-Disney or any other Producer from creating an entity, such as Stage 49 Productions Ltd., for tax or accounting purposes, organizational efficacy, WorkSafeBC reasons or any of a number of legitimate purposes: *Columbia Hydro Constructors, supra; Greater Vancouver Transit Authority, supra.* Such an

entity can also be used repeatedly as a serial employer for a number of various productions but that is distinct from concluding that it is the same entity for all productions for the purpose of Article 10.07.

The Employer has raised two other matters that need to be addressed. First, there is reference in Article 1.02 to an Employer issuing a Letter of Adherence for a "definite period of time" but there was no evidence submitted at the hearing indicating how, if ever, that concept has been employed in the industry nor was that matter addressed in any depth in the written submissions of the parties. Second, the Employer submits that the Union's interpretation effectively elevates unincorporated, non-entity productions to the status of employers. In my view, the Union is correct in its response on this point when it asserts that Stage 49 is a Corporation but it is only when it submits a Letter of Adherence that it becomes the "Employer for the specific production".

Finally, although the practice in the United States in the one asserted here by Stage 49, it has been acknowledged that there is no provision similar to Article 1.02 to be found in the American agreements.

As a result, it is concluded that based on the language of the Film Master Agreement, it is not Stage 49 which was the Employer but rather it is Stage 49 for "A Million Little Things – Season 1".

Further, as noted above by Arbitrator Bird in *Pacific Press Ltd., supra*, often one of the useful sources for discerning the mutual intention of the parties is extrinsic evidence, either with respect to the bargaining history related to a particular provision or the actual past practice of the parties.

The leading case in this jurisdiction with respect to the admissibility of such evidence is *Nanaimo Times Ltd.,* [1996] B.C.L.R.B.D. No. 40. In that decision, the Labour Relations Board stated, at paras. 27 – 32:

> 27 We begin by quoting a key passage in U.B.C.:
>
> > ...in any case in which there is a bona fide doubt about the proper meaning of the language of the agreement... arbitrators must have available to them a broad range of evidence about the meaning which was mutually intended by the negotiators.... [T]he party [seeking to adduce the extrinsic evidence] does not have to clear a preliminary barrier before that evidence can be utilized, of securing an initial ruling from the arbitrator that the agreement is legally ambiguous on its face. Instead the arbitrator, when he begins the task of interpretation, will be able to do so with a full appreciation of the relevant exchanges which eventually culminated in the formal document.

> With that material before him, the arbitrator can decide whether he entertains any doubt about the meaning for the provision in question and, if so, whether the negotiation history is helpful in resolving that doubt.... We have been articulating the principles upon which arbitrators may properly use evidence of negotiation history. That should not be taken to imply that arbitrators are bound to base their decisions on such evidence simply whenever the wording of the agreement is somewhat equivocal. The arbitrator is trying to decipher the proper meaning which the parties may reasonably be said to have intended for their contract language. (p. 18)

28 It follows that there is no requirement or pre-condition that a party seeking to adduce extrinsic evidence must first establish a bona fide doubt or an ambiguity on the face of the collective agreement prior to the arbitrator admitting the evidence. An arbitrator will accept the evidence when it is proffered (subject, of course, to the usual rules about relevancy and so on). The arbitrator is then able to consider both the language of the disputed provision and the extrinsic evidence when determining whether there is any bona fide doubt or ambiguity about the language of the agreement.

29 If the arbitrator decides, after considering both the collective agreement language and the extrinsic evidence, that there is no doubt about the proper meaning of the clause in question, the arbitrator then reaches an interpretive judgment without regard to the extrinsic evidence. See Pacific Press Ltd., BCLRB No. B97/94 (upheld on BCLRB No. B40/96 reconsideration BCLRB No. B427/94) where the Board concluded that after considering the extrinsic evidence and finding the language of the collective agreement to be clear, the arbitrator did not need to (and would not be entitled to) resort to extrinsic evidence as an aid to interpretation. This amounts to the arbitrator effectively concluding: "I have considered all of the evidence, both the collective agreement and that which is extrinsic to the agreement, and conclude that what the language means is what it appears to mean to me on first reading."

30 On the other hand, if an arbitrator concludes that when the language of the collective agreement is considered with the extrinsic evidence, there is some doubt about the meaning of the provision in dispute, the arbitrator is entitled to use extrinsic evidence to resolve the ambiguity or doubt, even in the face of collective agreement language that appeared clear when read in isolation: Finlay Forest Industries Ltd., BCLRB No. B137/94. However, even in these circumstances, an arbitrator is not bound to base his or her decision on the extrinsic evidence simply because the language is somewhat equivocal. The arbitrator is trying to decipher the meaning which the parties mutually intended for the disputed contract language, and should not forget the actual language in concentrating on a mass of extrinsic material: U.B.C. Subject to the considerations in Board of School Trustees, School District No. 57 (Prince George), BCLRB No. 41/76, with respect to the relative value of various types of extrinsic evidence as disclosing mutuality, an arbitrator's assessment of the weight attached to extrinsic evidence is not properly the subject of review under Section 99: Board of School Trustees of School District No. 39 (Vancouver), BCLRB No. B386/95.

31 In our view, the use of "bona fide doubt" as opposed to "ambiguity" in U.B.C. is of no consequence; one term is not a more stringent standard than the other. Neither are required prior to admitting extrinsic evidence, and both express the notion that an arbitrator must find some doubt arising from the language of the collective agreement in the context of any extrinsic evidence.

32 The fundamental point, as we have emphasized, is that arbitrators approach their interpretive task with a full appreciation of the circumstances relevant to the

> disputed contract language. The arbitrator may then determine how, if at all, the extrinsic evidence is of assistance. For example, the collective agreement language may not admit of ambiguity, such that the extrinsic evidence is properly disregarded; alternatively, where ambiguity is found, the evidence may be used as an aid to interpretation. These aspects of an arbitrator's reasoning should be evident on the face of the award (although there is no need for a rote analysis of the U. B. C. concepts). Beyond this, it is not the Board's role to second guess the arbitrator's assessment of ambiguity, the weight attached to the extrinsic evidence, or the interpretation of the collective agreement in light of the extrinsic evidence.

In 2001, the Labour Relations Board again addressed the use of extrinsic evidence in *Cranbrook (City), supra,* stating at paras. 64 and 68:

> [64] The starting point in the mutual intent is the language of the agreement itself. A collective agreement is a bargain that is required to be in writing, and as Arbitrator Munroe stated in *Government Air Services, supra,* at p. 19, the general principle is the intention of the parties is "to be derived as far as possible from the plain meaning of the words used by them in their written instrument". Likewise, Arbitrator Hope in *Vancouver Police Board, supra,* at p. 226:
>
> > ... The primary resource in a disputed interpretation is ... the language itself. An arbitrator has no jurisdiction to alter, amend, subtract from or add to the collective agreement: id. at p. 225.
>
> ...
>
> [68] ... If an arbitration board concludes, after receiving and considering the extrinsic evidence, that the language is clear and unambiguous, the extrinsic evidence may not be used to alter its meaning. The purpose of admitting extrinsic evidence is to assist in determining what meaning the parties mutually intended for the disputed language. Objective evidence such as negotiating minutes signed by both parties or past practice of one party acquiesced in by the other, may point unambiguously to one interpretation rather than the other. However, subjective evidence of a party's interpretation or impressions of what was in fact achieved at a bargaining session, may be of no value unless supported by evidence validating those impressions: see *Board of School Trustees of School District No. 57 (Prince George), supra,* at p. 6.

Turning first to the evidence related to the past practice of these parties, there is no evidence that either of these parties has ever explicitly conceded that it was incorrect in its views about the scope of the "no-hire" edicts. Rather, the evidence clearly demonstrates that they have repeatedly "agreed to disagree" and simply maintained their positions, both in actions and in words.

The parties also referred this Arbitration Board to a Labour Relations Board decision as well as to prior arbitral awards in this industry. First, in 2009, in *Santa Buddies Production Inc., supra*, the Labour Relations Board was dealing with the "usual" situation where a specific

corporate vehicle had been created for each of the film productions at issue. That Decision states, at paras. 25 – 29:

> 25 It is evident from the submissions that all parties, including the Film Council, accept that in the B.C. film industry, the employer for the purposes of the Code is the specific corporate entity created to produce a given film or television production and not the corporate parent of that entity. Accordingly, in this case, the Film Council seeks a successorship declaration in which Space Buddies is said to be the predecessor employer and Santa Buddies the successor. The Film Council does not seek any declaration as against the parent company of both, Keystone.
>
> 26 The question arising is whether it can be reasonably concluded there is a discernible continuity of business as between Space Buddies and Santa Buddies.
>
> 27 In seeking to establish that continuity, the Film Council relies on what it says is the transfer of certain key elements from one company to the other, including key personnel, the "Buddy" trademark and the customer, Disney. However, I find that, in the context of the B.C. film industry, this is insufficient to establish a discernible continuity of business from one production to the other for the purposes of Section 35 of the Code.
>
> 28 The business of making a particular movie or television show or series has not been transferred between Space Buddies and Santa Buddies. Rather, Space Buddies was in the business of making one movie, "Space Buddies". Santa Buddies is in the business of making another movie, " Santa Buddies". The fact the two films have much in common, or are part of a series of genre films produced by the same writer/director/producer, is not in my view, sufficient to constitute a transfer of a business within the meaning of Section 35 of the Code.
>
> 29 This is not a situation where, in the midst of a making of a movie or television series, one corporate vehicle took over production of the movie or series from another. Without deciding the issue, it may be that in those circumstances, a successorship as between the two corporate vehicles could occur. However, here, it is clear that, in the context of the B.C. industry, Space Buddies and Santa Buddies are each a separate employer of a separate and distinct movie production.

For our purposes, that Decision of the Labour Relations Board simply indicates that there has been a general practice in the film and television industry of creating separate entities for each production and in that particular situation there was not a "discernible continuity" of businesses between productions.

In 2012 in *Warner Bros. Television (BC) Inc., (Supernatural 5 Films Inc.), supra,* Arbitrator Fleming was addressing the termination of an employee from Supernatural 5 Films Inc. as well as the Employer's decision "to issue a 'no-hire' direction in its termination letter to the effect that the Grievor was not eligible for employment on any other production of Warner Bros. Television (BC) Inc. ("WBTV")". On the facts of that case, he concluded that, based on a *Wm Scott* analysis, the Grievor being dismissed from all WBTV productions now and in the

future was an excessive response. Arbitrator Fleming then went on to observe that he did not need to address the Union's challenge to the "no-hire" direction or the Employer's assertion that the true employer issue should properly be decided by the Labour Relations Board. As a result, for our purposes, this Decision only confirms that the "no hire" issue has been lurking just off screen for a number of years.

Finally, in *Stage 49 Ltd., supra,* Arbitrator Lanyon dealt with a dispute involving the sharing of Department Heads between two different productions. In that 2014 decision he concluded there was nothing in the Film Master Agreement preventing individuals working in such dual capacities. In the course of his Award, he noted, at para. 33 that "Although Stage 49 Ltd. is signatory to both Letters of Adherence in respect of each of the productions, the parties agreed that for the purpose of this grievance each production represented a different employer". Therefore, that admission was only for the specific circumstances of that dispute and cannot be held to apply to other situations, including the present dispute.

Therefore, none of these Industry decisions actually aids this Arbitration Board in determining the mutual intention of the parties with respect to the issue in dispute here.

In my view, of far greater value with respect to the intention of the parties is the Tysoe Report which is where the concept of the Three Strike Rule originated. In 2017, in *Warner Bros. Television (B.C.) Inc., supra,* Arbitrator Blasina observed that the Tysoe Report was a "cogent aid to interpretation".

Once again, the Tysoe Report states, in part:

> (iii) "Three Strike" Rule
>
> Section 10.06 of the Council's master agreement does provide that an employer is not required to re-employ an employee who was previously discharged by the employer. The problem is that it is the usual practice in the film industry for a production company to be incorporated for each production. The employer is the production company, not the producer. This means that a producer who has discharged an employee for cause on one production cannot refuse to employ the employee on his or her next production because the employer will be different.
>
> ...
>
> Nevertheless, it is my recommendation that a "three strike" rule be implemented in the industry. If nothing else, such a rule should assist in discouraging dishonest behavior. Each of the three discharges would have to comply with the requirement that there must be just and reasonable cause for the discharge. CFTPA could be the repository of discharge information so that there would be a central source of such information.
>
> (emphasis mine)

It is clear the prevailing model at the time was to create separate companies for each production. In other words, when the Three Strike Rule was adopted by these parties, the common practice was separate entities being created for each production and it was within that particular framework that the Three Strike Rule was recommended by Mr. Justice Tysoe and implemented by the parties in the 2005 Film Master Agreement

In my view, that appears to have been the core principle of the Tysoe Report and that is corroborated by the subsequent letter from Mr. Laughton, then Counsel to the Film Council, and the affidavit filed by Mr. Cott at the AMPTP which both indicate that the intention of the Three Strike Rule was focused on terminations from specific "productions".

As a result, in my view, this extrinsic evidence supports the conclusion set out above that the language in Article 1.02, 10.06 and 10.07 should be interpreted in the manner suggested by IATSE and the Film Council. It is that intention, one of there being a disciplinary ban from a single production, which should be given effect here.

As noted above, it is not the role of an arbitration board to alter the intended meaning of a provision simply because circumstances or conditions have changed. Arbitrator Germaine observed in *Catalyst Paper Corp., supra,* at para. 32, that "it is the parties' mutual intention which is sought and which is determinative, even if conditions may have changed since the applicable terms were negotiated and even if another meaning might seem more suitable in the new conditions".

In that respect, it is clear that this issue of who is an Employer, not just with respect to discipline but also potentially for other purposes under the Film Master Agreement, has been an ongoing issue for the Negotiating Producers as well as the Film Council and the individual Unions. That appears to have become of even greater concern now as the structure of some of the corporate entities have evolved in the Industry. Fortunately, the parties themselves will be able to directly address this matter in the near future as there will be bargaining for the renewed Film Master Agreement in 2021.

AWARD:

For all of the above reasons, both the individual grievance filed by IATSE, Local 891 and the Policy Grievance filed by the British Columbia and Yukon Council of Film Unions are upheld.

As a result, the following remedies are in order:

(i) It is hereby declared that Articles 10.06, 10.07 and A1.09 were violated when Mr. [redacted] was refused employment on "A Million Little Things – Season 1".

(ii) It is also declared that Stage 49 Ltd. cannot refuse to employ a person on one of its productions due to discipline imposed on a separate Stage 49 production, unless the person has been previously discharged by Employers three times in accordance with Article 10.07;

(iii) Mr. [redacted] should also be made whole for the violation of the Film Master Agreement in his case. That issue is referred back to the parties for resolution but I will retain jurisdiction to determine the issue of damages should the parties be unable to agree.

It is so Ordered. I will retain jurisdiction to deal with any matters arising from the interpretation or implementation of the terms of this Award.

Dated this 28th day of September, 2020.

"David McPhillips"

David C. McPhillips
Arbitrator