

1988

Worthington and Kimball Construction Company,  
a Utah general partnership, Gary Worthington, and  
Edwin N. Kimball, general partners v. C and A  
Development COmpany, an Arizona corporation,  
C and A Enterprises, an Arizona partnership, First  
Interstate Bank of Arizona, N.A., Stewart Title  
Company of Salt Lake City : Brief of Appellant

Utah Supreme Court

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Robert F. Bentley; Bentley and Armstrong; LaVar E. Stark; attorneys for appellees.

Robert F. Babcock; Walstad and Babcock; attorney for appellant.

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Feb 11  
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

20674

WORTHINGTON & KIMBALL CONSTRUCTION  
COMPANY, a Utah general partnership,  
GARY WORTHINGTON and EDWIN N. KIMBALL,  
general partners,

Plaintiffs/Appellants,

vs.

C&A DEVELOPMENT COMPANY, an Arizona  
corporation, C&A ENTERPRISES, an  
Arizona partnership, FIRST INTERSTATE  
BANK OR ARIZONA, N.A., STEWART TITLE  
COMPANY OF SALT LAKE CITY,

Defendants/Respondents.

No. 20674

APPELLANT'S SUPPLEMENTAL ADDENDUM

Appeal from the Judgment of the Second  
District Court for Weber County  
The Honorable Ronald O. Hyde

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C&A Development Company and  
C&A Enterprises

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First Interstate Bank of Arizona and  
Security Title Company

FILED  
FEB 11 1983

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
OF THE STATE OF UTAH

WORTHINGTON & KIMBALL CONSTRUCTION  
COMPANY, a Utah general partnership,  
GARY WORTHINGTON and EDWIN N. KIMBALL,  
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C&A DEVELOPMENT COMPANY, an Arizona  
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First Interstate Bank of Arizona and  
Security Title Company

## BEFORE THE AMERICAN ARBITRATION ASSOCIATION

WORTHINGTON & KIMBALL	)	
CONSTRUCTION COMPANY, a	)	
Utah general partnership,	)	
	)	
Claimant,	)	AWARD
	)	
v.	)	
	)	
C & A DEVELOPMENT COMPANY,	)	No. 77-110-0130-82
an Arizona corporation,	)	
C & A ENTERPRISES, an	)	
Arizona partnership, and	)	
C & A COMPANIES, INC., an	)	
Arizona corporation,	)	
	)	
Respondents.	)	
	)	

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This matter came before Peter W. Billings, George E. Lyman and B. Lue Bettilyon, sitting as a board of arbitrators, to resolve disputes between the parties arising out of the performance and interpretation of a contract originally between C & A Development Company, as owner, and Worthington & Kimball Construction Company, a Utah general partnership and L. M. Hendriksen, dba Western States Construction, a sole proprietorship, as contractor, for the design and construction of a factory building to be occupied by Permaloy Corporation.

Seventeen days of hearings were held on April 25 to 29, May 16 to 20, June 20 to 24 and July 14 and 15, 1983 and the construction site was visited by the panel and representatives of the parties on July 14, 1983. In addition, the arbitrators met on July 5, 1983 to review the evidence and to prepare suggestions to the parties as to the matters they believed should be covered by the post-hearing briefs. During the hearings both parties were

given full opportunity to call all witnesses they desired and 84 exhibits were introduced by Worthington & Kimball and 59 by the respondents. Both parties were given opportunity to file and did file post-hearing and reply briefs.

Under date of August 30, 1983 Worthington & Kimball moved to reopen the hearing to determine the respective rights and liabilities of C & A Development Company, C & A Enterprises and C & A Companies, Inc. under any award made in these proceedings in light of an assignment of the original contract by C & A Development to C & A Enterprises in March, 1981. Under date of September 29, 1983 the American Arbitration Association notified the parties that the arbitrators had agreed to reopen the hearings. Under date of October 18, 1983 the parties were advised the reopened hearing would be held on October 24, 1983, limited to evidence and argument as to whether any award can or should be made for or against any party other than the parties to the original contract, i.e., C & A Development Company as owner and Worthington & Kimball Construction Company as contractor, and as to the allocation of costs and fees.

Because of the inability of counsel for respondents to appear, the hearing scheduled for October 24, 1983 was not held. By means of a conference telephone call, the parties stipulated that in March, 1981 the contract between Worthington & Kimball and C & A Development Company was assigned by C & A Development to C & A Enterprises, an Arizona partnership of which C & A Companies is a general partner. The parties further agreed that respondents should have until and including October 28, 1983 to respond in writing to the merits of the contentions of Worthington & Kimball set forth in their motion to reopen the hearing.

The arbitrators, therefore, vacated the hearing set for October 24, 1983 and granted Worthington & Kimball until November 4, 1983 to respond to any arguments presented by respondents as to the effect of the assignment on the rights and liabilities of C & A Development Company, C & A Enterprises and C & A Companies in the matter before the arbitrators. The arbitrators further directed that the memoranda to be filed by each party should also state the position of such party as to the assessment of costs and fees in this proceeding.

After receipt of said briefs the arbitrators met on November 7, 1983 and, based on the evidence heard, the exhibits introduced, the briefs of counsel and the visit to and inspection of the construction site, make the following Findings:

1. On or about July 2, 1980 Worthington & Kimball and C & A Development Company entered into a contract on AGC Form No. 6a "Design - Build Agreement between Owner and Contractor." The only significant amendment to that form made by the parties was in paragraph 2.5.2, to which was added the following language:

Any and all test borings, soil sampling and pre-determined construction surveys and investigations (other than site survey) shall be done by contractor, if contractor fails or neglects to obtain such borings, testings, etc., contractor shall assume all liability for any failures in the building as a result of any deficiency that may result therefrom.

2. We construe that language to mean that the parties intended that if (a) the contractor employed a competent person to conduct such borings, testings, etc., (b) fully informed that person of the general nature of the planned construction, (c) the borings, testings, etc., were performed and the report thereof was made in accordance with standards of the industry, (d) the

plans and specifications provided by the contractor under paragraph 2.1 complied with the findings and recommendations of the person employed to make such borings, testings, etc., and (e) the contractor followed such plans and specifications in the construction of the building, the contractor is relieved of any liability for any failures or defects in the building resulting from soil conditions, differential settlement and the like.

3. In March, 1981, with the consent of Worthington & Kimball, the original contract between Worthington & Kimball and C & A Development was assigned by C & A Development to C & A Enterprises, an Arizona partnership of which C & A Companies, Inc. is a general partner. In addition, the property on which the building was constructed was deeded by C & A Development to C & A Enterprises. By reason thereof, references in this award to "owner" shall be deemed to include both C & A Enterprises and C & A Development, jointly and severally. We believe any allocation of payment of the award is to be determined by agreement between them, without necessity of any ruling by the arbitrators. The obligation of C & A Companies, Inc. under the award is only as a general partner of C & A Enterprises and is determined by the provisions of Section 48-1-12, Utah Code Annotated.

4. The unpaid balance of the contract price, as adjusted by change orders as provided in Article 9 of the Contract, to which Worthington & Kimball is entitled to be paid as provided in Article 11 of the contract, is \$430,053.00, subject to such deductions therefrom as the arbitrators find to be warranted under the terms of the contract and the evidence received with respect to the claims of the owner.

5. The owner is entitled to a reduction of the said unpaid balance in the sum of \$52,922.00, allocated as follows:

- a. Repairs to asphalt in parking lots and drives, \$25,125.00;
- b. Punch list items - this includes correction of cantilever area of roof over dock, \$10,000.00;
- c. Repair of external walls due to separation and spalling, \$2,500.00; and
- d. Credit for payments by C & A to Worthington & Kimball subcontractors, \$15,297.00.

6. All other claims of the owner have been carefully and fully considered, but are denied on one or more of the following grounds:

- a. Not the responsibility of the contractor;
- b. Not supported by the evidence;
- c. Not authorized by or barred by the terms of the contract between the parties, including the plans and specifications;
- d. Not quantified by reliable evidence;
- e. Not included within the scope of the work to be performed by the contractor;
- f. Barred by acts or failure to act of the owner; and
- g. Abandonment of the claim during hearings or in briefs.

7. The contractor is entitled to interest at the rate of 15% per annum on the sum of \$377,131.00 from December 1, 1981 until paid by owner. We select that rate in part as a measure of damages



to Worthington & Kimball for the unreasonable withholding of the balance of the contract price.

8. All other claims of the contractor have been fully and carefully considered, but are denied on one or more of the following grounds:

- a. Not the responsibility of the owner;
- b. Not supported by the evidence;
- c. Not authorized by the contract or barred by the terms of the contract, including the plans and specifications;
- d. Already covered in change orders executed by owner and contractor;
- e. Not quantified by reliable evidence;
- f. Are otherwise contained in the award herein made;
- g. Barred by acts or failure to act of the contractor; and
- h. Abandonment of claim during hearings or in briefs.

9. Owner shall pay to contractor the sum of \$377,131.00 plus interest as provided in paragraph 7 above upon the contractor filing with the office of the American Arbitration Association in Denver, Colorado lien waivers from the contractor and all its subcontractors. This requirement does not include Robert E. Lee doing business as Ogden Industrial Plastic, who we find is not a subcontractor of Worthington & Kimball.

10. Administrative fees and arbitrators' fees and expenses as determined by the American Arbitration Association office in Denver, Colorado shall be borne 75.0% by owner and 25.0% by

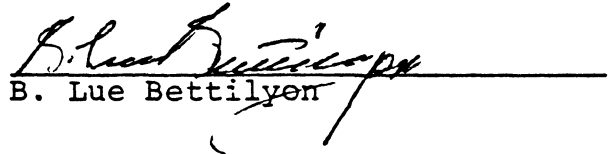
Worthington & Kimball. All other expenses shall be allocated as follows:

- a. The expenses of witnesses for either side shall be paid by the party producing such witness including witnesses produced in response to the arbitrators' letter to counsel dated May 27, 1983;
- b. Cost of the stenographic record, equally between owner and Worthington & Kimball, unless they shall have otherwise agreed prior to the receipt of this award;
- c. All other expenses of the arbitration, as described generally in paragraph 50 of the Construction Industry Arbitration rules, shall be born equally by the parties; and
- d. The nature and amount of such expenses shall be determined by the Denver office of the American Arbitration Association.

DATED this 7<sup>th</sup> day of November, 1983.

  
Peter W. Billings, Chairman

  
George E. Lyman

  
B. Lue Bettilyon

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Attorney for C & A Development Co.  
and C & A Enterprises

FILED  
RICHARD GREEN  
WEBER COUNTY CLERK  
DEC 5 11 24 AM '88

IN THE SECOND JUDICIAL DISTRICT COURT  
OF WEBER COUNTY, STATE OF UTAH

WORTHINGTON & KIMBALL CONSTRUCTION )  
COMPANY, a Utah General Partnership, )  
et al, )  
Plaintiffs, )  
vs. )  
C & A DEVELOPMENT COMPANY, an )  
Arizona corporation, et al, )  
Defendants. )

OPPOSITION TO  
MOTION TO CONFIRM AWARD  
AND MOTION TO VACATE AWARD

Civil No. 83387

Defendants, C & A DEVELOPMENT COMPANY and C & A  
ENTERPRISES, by and through their attorney, ROBERT F. BENTLEY, hereby  
oppose Plaintiff's Motion to Confirm Award and move this Court  
pursuant to Section 78-31-16, Utah Code Annotated, to vacate the  
award of the American Arbitration Association, on the grounds that:

(A) The arbitrators exceeded their powers by making an  
award after the time within which the award was to be made had  
expired, by reopening the hearing at a time which would prevent the  
making of the award within the time agreed upon by the parties  
without agreement of the parties to extension of the time, and by  
making an award upon matters not submitted to them and not within the  
terms of the agreement.

(B) The arbitrators after the close of the hearing received additional evidence in support of Plaintiff's claims but refused to receive additional evidence from Defendants, C & A DEVELOPMENT COMPANY and C & A ENTERPRISES, in support of their claims as Respondents in said arbitration.

(C) There was evident partiality of the arbitrators as evidenced by the irregularities in procedure and the award.

(D) The award was procured by fraud or other undue means.  
This motion is supported by the attached Memorandum.

RESPECTFULLY SUBMITTED this 30th day of November, 1983.



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Robert F. Bentley  
7525 East Camelback Road  
Scottsdale, Arizona 85251  
Attorney for C & A Development  
Co. and C & A Enterprises

MEMORANDUM IN OPPOSITION TO MOTION TO CONFIRM  
AND IN SUPPORT OF MOTION TO VACATE

Defendants, C & A DEVELOPMENT COMPANY and C & A ENTERPRISES, have opposed Plaintiff's Motion to Confirm Award and have moved this Court to vacate the award made by the American Arbitration Association in the matter entitled WORTHINGTON & KIMBALL CONSTRUCTION COMPANY, a Utah General Partnership, Claimant, vs. C & A DEVELOPMENT COMPANY, an Arizona corporation, C & A ENTERPRISES, an Arizona partnership, and C & A COMPANIES, INC., an Arizona corporation, a copy of which Award is attached to Plaintiff's Motion to Confirm Award. The award must be vacated as the arbitrators exceeded their powers, were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy, there was evident partiality in the arbitrators and the award was procured by fraud or other undue means.

I. The arbitrators exceeded their powers by making an award after the time specified had expired. The parties agreed by contract that the rules of the American Arbitration Association would apply. With respect to time for award, the rules provide:

"The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by law, not later than thirty (30) days from the date of closing of the hearings . . . ."

Rule 41, Construction Industry Arbitration Rules, a copy of which is attached hereto as Exhibit "A". As no other time was agreed upon by the parties and the law (U.C.A. §78-31-8) specifies that the award must be made within sixty (60) days from the time of the appointment of the arbitrators, if the time is not fixed in the arbitration agreement, the time within which the award must be made is thirty (30) days from the date of closing the hearings. The hearings were

closed on September 2, 1983. See Exhibit "B" attached hereto. Thus, the award must have been made on or before October 2nd in order to be within the time as specified by the parties.

The arbitration rules specify that if no other specific time is set forth in the contract and the hearings are reopened, the award must be made within thirty (30) days from closing of the reopened hearings. Rule 36, Construction Industry Arbitration Rules. See Exhibit "A". However, the rule also provides that:

"If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit."

Notwithstanding this limitation, the hearing was reopened over the objection of Defendants, C & A DEVELOPMENT COMPANY and C & A ENTERPRISES, and without their consent to extension of the time limit. In fact, they specifically objected to any reopening of the hearing which would permit Plaintiff to submit additional evidence with respect to their claims which should have been but was not submitted in prior hearings without also permitting C & A DEVELOPMENT COMPANY and C & A ENTERPRISES to submit additional evidence with respect to their defenses and claims which they had not presented because the arbitrators directed that the surrebuttal case be limited to two (2) days. See Exhibits "C" (Plaintiffs' Motion for Reopening of Hearing), "D" (the Response thereto), "E" (the American Arbitration Association letter advising that the hearing had been reopened), "F" (the panel's Notice of Hearing) and "G" (letter from

the attorney for C & A DEVELOPMENT COMPANY and C & A ENTERPRISES objecting thereto).

Inasmuch as reopening of the hearing did not extend the time within which the award was to be made, the arbitrators had no power to make an award after October 2, 1983, and the award made must be vacated.

The arbitrators also exceeded their powers by making an award which was not within the contract. The arbitration rules provide that: "the arbitrator may grant any relief or remedy which is just and equitable and within the terms of the agreement of the parties" Rule 43, Construction Industry Arbitration Rules, see Exhibit "A" (emphasis added). The arbitrators fixed interest at fifteen percent (15%) per annum "in part as a measure of damages

for the unreasonable withholding of the balance of the contract price". See Award, pages 5-6. Neither the contract nor any other agreement of the parties provided for damages intended to be punitive in nature such as these. The contract specified the rate of interest which payments due but unpaid should bear. Section 11.1.4, page 8. Both parties submitted evidence as to the appropriate rate (Plaintiff claimed that prime plus two was the appropriate rate while Defendants submitted evidence that after December 1, 1981, the construction loan rate was at seventy-five percent of prime or less than the legal rate of ten percent).

In rejecting the evidence submitted by all parties as to the appropriate interest and arbitrarily choosing a rate of fifteen percent in part to punish C & A DEVELOPMENT COMPANY and C & A ENTERPRISES for being unreasonable, the arbitrators exceeded their powers. (That such interest was intended as a penalty is further evidenced by the panel's letter of July 14, 1983 [prior to the surrebuttal case of C & A DEVELOPMENT COMPANY and C & A ENTERPRISES] which specifically requested argument as to what "penalty" should be assessed against C & A if it withheld an unreasonable amount from the final request for payment. Items 4 (A) and (B), page 2, Exhibit "H".)

Because the arbitrators exceeded their powers by making an award which was not "within the agreement of the parties", the award must be vacated.

In addition, should it be determined that the award is not defective as a result of the failure to make an award within the time agreed by the parties, the panel exceeded their powers by making an award against C & A DEVELOPMENT COMPANY despite the fact that Plaintiff had withdrawn any claim against C & A DEVELOPMENT COMPANY in the Reply of Worthington & Kimball regarding the respective liability of the C & A entities (C & A DEVELOPMENT COMPANY, C & A ENTERPRISES and C & A COMPANIES, INC.). Plaintiff stated, "Because of the individual liability of the general partners of C & A Enterprises, W&K (Worthington & Kimball) will not pursue the



secondary liability of C & A DEVELOPMENT". Exhibit "I", page 2. Thus, Plaintiffs withdrew from the arbitrators' consideration any claim against C & A DEVELOPMENT COMPANY based upon its secondary liability. Despite the withdrawal of this claim, the arbitrators made an award against C & A DEVELOPMENT COMPANY jointly and severally with C & A ENTERPRISES. In so doing, they exceeded their powers by making an award upon a matter not submitted to them. As a result, the award must be vacated.

II. In addition to exceeding their powers, the arbitrators were guilty of misconduct in refusing to permit C & A DEVELOPMENT COMPANY and C & A ENTERPRISES to supplement their surrebuttal case, and the award must be vacated.

As has been discussed above, the surrebuttal case was limited to two days at the arbitrators' direction. In an effort to complete the hearing as directed, C & A DEVELOPMENT COMPANY limited the number of witnesses and the areas of evidence on surrebuttal. When Plaintiff moved to reopen the hearing to submit additional evidence because it had failed to substantiate a claim against any Respondent other than C & A DEVELOPMENT COMPANY, C & A ENTERPRISES and C & A DEVELOPMENT COMPANY requested that if the hearings be reopened, they be permitted to supplement their surrebuttal case.

Plaintiff in its Motion to reopen the hearing argued facts which were not in evidence from the hearings. By so doing, the Plaintiff attempted to ensure that even if the hearings were not

reopened, the evidence which they desired to present would be before the panel. Plaintiff's actions in this respect were clearly improper.

In receiving additional proofs from Plaintiff but refusing to permit C & A DEVELOPMENT COMPANY and C & A ENTERPRISES to supplement their surrebuttal case, the arbitrators were guilty of misconduct and the award must be vacated.

III. The award must be vacated because of evident partiality of the arbitrators. That partiality is evidenced by the penalty interest assessed in the award, by making C & A DEVELOPMENT COMPANY jointly and severally liable with C & A ENTERPRISES in the award despite the withdrawal of claims against C & A DEVELOPMENT COMPANY by Plaintiffs, and by reopening hearings to permit Plaintiff to supplement its case but refusal to permit C & A DEVELOPMENT COMPANY and C & A ENTERPRISES to supplement theirs, all as discussed above.

In addition, partiality is evident from the discussion in the Award regarding the modification to the contract regarding the soil testing. The panel indicates five items which if followed by the contractor, relieved the contractor of liability for failures or defects in the building resulting from soil conditions, differential settlement and the like. Of the five set forth, it was clear from the evidence submitted that at least two were not fulfilled by the contractor. The contractor did not fully inform the person

conducting soil tests of the general nature of the planned construction. Mr. Rollins who performed the soils test, testified that he did not know what type of building was going to be constructed. See Exhibit "J", an excerpt of the testimony of Ralph Rollins, p. 1980, lines 17-20. In addition, the plans and specifications provided by the contractor did not comply with the findings and recommendations of the person employed to make such borings. Plaintiff did not dispute that its architect failed to proportion the footings as recommended by the soils report. In fact, in their brief they stated that an engineering decision was made not to follow that recommendation. Clearly, Plaintiff is not relieved from liability for engineering decisions to deviate from the recommendations of the soils expert. Despite failure to conform to two of the five requirements set forth by the arbitrators, , the arbitrators failed to make any award for damages due to differential settlement despite clear evidence that differential settlement has occurred and caused damage to the building.

Due to the evident partiality of the arbitrators, the award must be vacated.

IV. The award must be vacated as it was procured by fraud or other undue means. C & A DEVELOPMENT COMPANY and C & A ENTERPRISES claimed in the arbitration proceedings that a credit for items which were included in the contract at the time it was signed, were not provided by Plaintiff and yet were included in the contract

price. However, the items were shown on the contract plans which were initialed by the parties. Plaintiff claimed that the deletions occurred prior to execution of the contract and were reflected by a reduction in the price. Despite the clear requirements of the contract plans, Plaintiff claimed that an unsigned set of redlined plans were the contract drawings though none of the personnel of C & A DEVELOPMENT COMPANY who testified had ever seen them prior to the arbitration hearing. C & A DEVELOPMENT COMPANY and C & A ENTERPRISES are preparing a discovery request which will include documents in the hands of Plaintiff which they believe will demonstrate that the initialed plans were in fact those which defined the contract and that the contract price includes those items which Plaintiff claims were deleted from the contract and price prior to execution. C & A DEVELOPMENT COMPANY and C & A ENTERPRISES believe that with those documents, they can demonstrate that the award was procured through fraud or other undue means and that the award must be vacated. At such time as the documents have been provided to C & A DEVELOPMENT COMPANY and C & A ENTERPRISES, they will supplement their memorandum with respect to this issue.

Because of defects in the award and procedure of the arbitration, adequate grounds exist for vacation of the award by this Court. Despite the interests of the Court in resolution of disputes, the Legislature has specified that arbitration proceedings which do

not meet certain criteria may not be confirmed. That is the case in this matter.

RESPECTFULLY SUBMITTED this 30th day of November, 1983.

  
\_\_\_\_\_  
Robert F. Bentley

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Opposition to Motion to Confirm Award and Motion to Vacate Award, postage thereon fully prepaid, this 30th day of November, 1983, to the following:

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Michael Glassman  
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Robert F. Bentley

shall submit to questions or other examination. The arbitrator may vary this procedure but shall afford full and equal opportunity to the parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

### **30. Arbitration in the Absence of a Party**

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as deemed necessary for the making of an award.

### **31. Evidence**

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator authorized by law to subpoena witnesses or documents may do so upon the request of any party, or independently. The arbitrator shall be the judge of the admissibility of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived his or her right to be present.

### **32. Evidence by Affidavit and Filing of Documents**

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it such weight as seems appropriate after consideration of any objections made to its admission.

All documents not filed with the arbitrator at the hearing, but arranged for at the hearing or subsequently by agreement of the parties, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded opportunity to examine such documents.

### **33. Inspection or Investigation**

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the time and the AAA shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that one or both parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

### **34. Conservation of Property**

The arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

### **35. Closing of Hearings**

The arbitrator shall specifically inquire of the parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make an award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

### **36. Reopening of Hearings**

The hearings may be reopened by the arbitrator at will, or upon application of a party at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

### **37. Waiver of Oral Hearings**

The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

### **38. Waiver of Rules**

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.

### **39. Extensions of Time**

The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

### **40. Communication with Arbitrator and Serving of Notices**

There shall be no communication between the parties and an arbitrator other than at oral hearings. Any other oral or written communications from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or its attorney at the last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted such party.

### **41. Time of Award**

The award shall be made promptly by the arbitra-

tor and, unless otherwise agreed by the parties, or specified by law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

### **42. Form of Award**

The award shall be in writing and shall be signed either by the sole arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law.

### **43. Scope of Award**

The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties. The arbitrator, in the award, shall assess arbitration fees and expenses as provided in Sections 48 and 50 equally or in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

### **44. Award upon Settlement**

If the parties settle their dispute during the course of the arbitration, the arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

### **45. Delivery of Award to Parties**

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

### **46. Release of Documents for Judicial Proceedings**

The AAA shall, upon the written request of a party, furnish to such party, at its expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

### **47. Applications to Court**

No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.



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AMERICAN ARBITRATION ASSOCIATION

789 SHERMAN STREET, DENVER, COLORADO 80203  
SUITE 430

(303) 831-0222

0823

MARK E APPEL

President

September 12, 1983

Robert F. Babcock, Esq.  
Walstad, Kasimer, Tansey  
& Ittig  
185 S. State Street, Ste 1000  
Salt Lake City, UT 84111

Robert F. Bentley  
General Counsel  
C & A Companies, Inc.  
P.O. Box 1549  
Scottsdale, AZ 84252

L.M. Henriksen dba  
Western States Construction  
790 East 400 North  
Linden, UT 84062

Steven M. Ashby, Controller  
Holbrook Company, Inc.  
151 North 600 West  
P.O. Box 226  
Kaysville, UT 84037

Joseph C. Rust, Esq.  
Kesler & Rust  
2000 Beneficial Bldg.  
36 S. State Street  
Salt Lake City, UT 84111

RE: 77 110 0130 82  
Worthington & Kimball  
Construction Company  
-and-  
C & A Enterprises;  
C & A Development;  
C & A Companies;  
L.M. Henriksen dba  
Western States Const.;  
Holbrook Company, Inc.  
Staker Paving and  
Construction Company  
Salt Lake City or Ogden,  
UT

Gentlemen:

This will confirm that the hearings in the above-captioned arbitration were held on July 14 and 15, 1983.

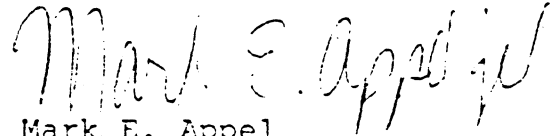
This will advise that the Arbitrators declared the hearings closed on September 2, 1983.

"EXHIBIT B"

September 12, 1983  
Page 2

Therefore, the Award will be due thirty (30) days  
thereafter or by, on or before October 2, 1983.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Mark E. Appel". The signature is fluid and cursive, with a large initial "M" and a stylized "A".

Mark E. Appel  
Regional Director

MEA:km

xc: Peter W. Billings  
George E. Lyman  
B. Lue Bettilyon

Robert F. Babcock and  
James J. Tansey of  
WALSTAD, KASIMER, TANSEY & ITTIG  
Attorneys for Claimant  
185 South State, Suite 1000  
Salt Lake City, Utah 84111  
Telephone: (801) 531-7000

---

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

---

WORTHINGTON & KIMBALL CONSTRUCTION	:	
COMPANY, a Utah general partnership,	:	MOTION FOR REOPENING
	:	OF HEARING
Claimant,	:	
	:	
vs.	:	
	:	
C & A DEVELOPMENT COMPANY,	:	
an Arizona corporation, C & A ENTERPRISES,	:	
an Arizona partnership, C & A COMPANIES,	:	No. 77-110-0130-82
INC., an Arizona corporation,	:	
	:	
Respondents.	:	

---

Pursuant to Rule 36 of the Construction Industry Arbitration Rules of the American Arbitration Association Claimant W & K hereby moves the panel to reopen the hearing to clarify an issue raised for the first time in Respondents' Reply Brief as to the status of C & A Enterprises and C & A Companies, Inc. It is and has been the understanding of W & K that there is and has been no dispute that all three C & A parties are jointly liable for the claims of W & K.

The facts summarized hereinafter, evidences that all three C & A entities are jointly and severally liable.

1. The contract was initially entered into between W & K and C & A Development Company. Article 14 of said contract requires written consent to assign the contract.

2. C & A Development obtained the written consent of W & K to assign its contract to C & A Enterprises.

3. The Certificate of Substantial Completion was directed to C & A Enterprises. (See Exh. 23B behind Tab 8)

4. The property was deeded by C & A Development to C & A Enterprises of which C & A Companies is a general partner. (See the Deed of Trust and Security<sup>th</sup> Agreement, the last document behind Tab 28)

5. Both of the letters written by Robert F. Bentley to W & K and Robert E. Lee were signed by Robert F. Bentley, General Counsel for Permaloy Corporation and C & A Enterprises. (See Exhs. 67, D)

6. All of the pay requests were submitted to C & A Companies, the partner responsible for handling payments. (See Exh. 23A)

7. As further involvement of C & A Companies see the letter of Richard Campbell on C & A Companies' stationery in response to the final pay application of W & K (Exh. 24) and letter of Gary Worthington to C & A Companies (Exh. E).

8. The original arbitration was filed solely against C & A Enterprises.

9. The amended claim for arbitration brought in C & A Development and C & A Companies.

10. The answer filed by C & A Enterprises and the Counterclaim of C & A Enterprises states on page one in the first paragraph "named Respondent and Counterclaimant, a party to an arbitration agreement contained in a written contract. . .". Further, paragraph two of C & A Enterprise's response states "Respondent also demands arbitration pursuant to the contract. . .".

11. The letter from Holbrook to the American Arbitration Association dated July 15, 1982 refers to the contract between C & A Enterprises and Holbrook. (See also said contract behind Tab 19)

12. The letter of counsel for Respondent (C & A Enterprises) dated August 12, 1982, refers to the contract between W & K and Respondent (C & A Enterprises).

13. The letter of October 12, 1982 to American Arbitration Association from counsel for C & A refers to the claims of C & A Enterprises against W & K and the subcontractors for failure to provide for arbitration in their subcontracts as required by the "agreement with C & A Enterprises".

14. The letter of April 14, 1983 from counsel for Respondents refers both to "Respondent C & A's counterclaims" and "pursuant to the contract between Worthington & Kimball Construction Company and C & A. . . .".

15. The correspondence from Respondents to the AAA was typically on the letterhead of C & A Companies, Inc.

16. From the beginning of the hearing, including the opening statement, all parties, including counsel for Respondents, referred to the three C & A Entities as simply C & A.

17. The 58 page Respondents' Brief simply refers to "C & A". The only reference in the text of the Brief to a specific entity is found on pages 35-36 which states C & A Enterprises should be awarded a sum for business interruption damages in an amount of between \$480,000 and \$522,000. Further, under Section 9 entitled "Award" the amounts requested to be awarded to "C & A" refer to all amounts alleged at the hearing. Lastly, on page 57 of Respondents' Brief it states "Respondents respectfully request the panel to enter an award in their favor and to hold that Petitioners are no (sic) entitled to an award".

It is the position of W & K that the "pleadings" and correspondence with the American Arbitration Association, the evidence presented at the hearing, the posture of "C & A" at the hearing and in its brief in consistently referring to all three C & A entities as "C & A" even to the requesting of relief for C & A Enterprises clarifies this issue.

Nonetheless, if the panel feels it would be helpful to clarify once and for all the relationship between the C & A entities W & K would request a short reopening

of the hearing for this sole purpose. The rehearing would not take more than a couple of hours and could easily be held within the time needed for the panel to make the award. Further, it should not delay the panel in making the award.

Respectfully submitted this 30<sup>th</sup> day of August, 1983.

WALSTAD, KASIMER, TANSEY & ITTIG

By: Robert F. Babcock

Robert F. Babcock

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Motion for Reopening of Hearing, postage thereon fully prepaid, this 30<sup>th</sup> day of August, 1983 to the following:

Robert F. Bentley and  
Vaughn Armstrong  
C & A Development Co.  
P. O. Box 1549  
Scottsdale, Arizona 85252

Kasimer H. Pedersen

IN THE ARBITRATION TRIBUNALS OF THE  
AMERICAN ARBITRATION ASSOCIATION

Worthington & Kimball Construction Company

-and-

C & A Development Company, C & A Enterprises  
and C & A Companies, Inc.

No. 77-110-013-82

-and-

L.M. Henriksen d/b/a Western States Construction,  
Holbrook Company, Inc. and Staker Paving and  
Construction Co.

RESPONSE TO MOTION FOR REOPENING OF HEARING

Respondents, C & A Development Co., C & A Enterprises, and  
C & A Companies, Inc., hereby respond to Claimant's Motion for  
Reopening of Hearing. The Motion must be denied as there is no basis  
for reopening the hearing.

Claimant contends that the issue was first raised in  
Respondent's Reply Brief and that Claimant presumed that there had  
been no dispute that all three parties are jointly liable. This is  
not the case. The issue was raised at the time Claimant amended their  
Demand for Arbitration. In response to the Amended Demand,  
Respondents stated that "not all of the parties named as Respondents  
in such Amended Demand are proper parties". (This was contained in a  
letter to the American Arbitration Association, December 10th, 1982,  
which was forwarded to counsel for Claimant by the American  
Arbitration Association on December 15, 1982. See Exhibits A & B  
attached hereto.) Clearly, Claimant was aware that there was a dispute  
as to which if any, of Respondents was liable.

Even in the absence of a specific statement questioning whether one or more Respondents is a proper party, basic legal principles require Claimant to prove a case with respect to any party from which it wishes to claim an award. Merely naming a party is not sufficient to make it jointly liable with another party.

Claimants failed to address the issue at any time during the protracted hearings held in connection with this matter. In its briefs, Claimant did not identify any legal theory upon which joint liability could be based. Claimant failed to meet its burden to prove liability of C & A Enterprises of C & A Companies, Inc. Respondents had no obligation to address the issue inasmuch as it had not been addressed by Claimants nor did they have an obligation to remind Claimant of issues which Claimant had raised but overlooked in presentation of its case. Granting Claimants Motion to Reopen the Hearing would be inappropriate as Claimant had notice of the dispute as to proper parties and adequate time to prepare for and to address the question in the course of the hearing. Claimant's Motion must be denied.

In addition, Claimant's Motion must be stricken and the allegation and argument set forth must not be considered by the panel. Claimant, by way of the Motion, improperly attempts to supplement both the record and its briefs. The allegations of fact with respect to which no evidence appears in the record and the legal arguments to justify an award against C & A Enterprises or C & A Companies are not related to the question of whether the hearing should be reopened.



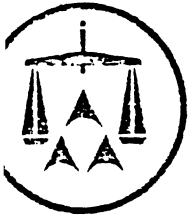
Even if those arguments were to be considered, they do not establish a basis for relief against C & A Enterprises or C & A Companies, Inc. Worthington & Kimball's submission of the Certificate of Substantial Completion or the pay applications to someone other than C & A Development Co. does not make that other person liable under the contract. The fact that the property was transferred to C & A Enterprises or that letterhead of C & A Companies, Inc. (or Permaloy Corporation) was used in correspondence does not make either liable on the contract. The fact that a owner of a property may be entitled to a claim for loss of use against the party responsible for such loss does not imply that the owner has any liability to such other party.

In the event that Claimant's motion is granted and the hearing is reopened, Respondents request that sufficient time be set aside that Respondents may supplement their surrebuttal case which was shortened by Respondents in an effort to complete the hearing in a timely matter.

Respectfully submitted this 13th day of September, 1983

C & A DEVELOPMENT CO.

EY: /s/Vaughn S. Armstrong  
Vaughn S. Armstrong  
Assistant General Counsel



4 /  
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AMERICAN ARBITRATION ASSOCIATION

789 SHERMAN STREET, DENVER, COLORADO 80203  
SUITE 430  
(303) 831-0532  
0823

September 29, 1983

MARK E APPEL  
Regional Director  
Denver, Colorado

Robert F. Babcock, Esq.  
Walstad, Kasimer, Tansey  
& Ittig  
185 S. State Street, Ste 1000  
Salt Lake City, UT 84111

Robert F. Bentley  
General Counsel  
C & A Companies, Inc.  
P.O. Box 1549  
Scottsdale, AZ 84252

L.M. Henriksen dba  
Western States Construction  
790 East 400 North  
Linden, UT 84062

Steven M. Ashby, Controller  
Holbrook Company, Inc.  
151 North 600 West  
P.O. Box 226  
Kaysville, UT 84037

Joseph C. Rust, Esq.  
Kesler & Rust  
2000 Beneficial Bldg.  
36 S. State Street  
Salt Lake City, UT 84111

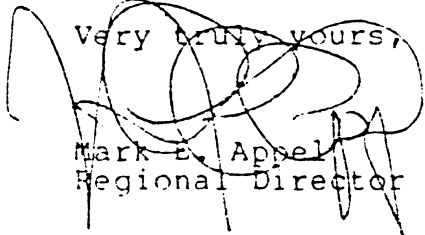
Re: 77 110 0130 82  
Worthington & Kimball  
Construction Company  
-and-  
C & A Enterprises;  
C & A Development;  
C & A Companies;  
L.M. Henriksen dba  
Western States Const.;  
Holbrook Company, Inc.  
Staker Paving and  
Construction Company  
Salt Lake City or Ogden,  
UT

Gentlemen:

This will advise the Parties that after careful consideration of the Parties' contentions, the Arbitrators, per Section 36 of the Rules, have determined to re-open hearings for the above-captioned arbitration.

Further, this will advise the Parties that the Arbitrators will direct the Parties as to the necessity of additional hearings or briefs in the future.

Very truly yours,

  
Mark E. Appel  
Regional Director

MEA:jel

xc: Messrs: Bettilyon, Billings, and Lyman

"EXHIBIT E"

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

WORTHINGTON & KIMBALL CONSTRUCTION )  
COMPANY, a Utah general )  
partnership, )

Claimant, )

v. )

C & A DEVELOPMENT COMPANY, an )  
Arizona corporation, C & A )  
ENTERPRISES, an Arizona )  
partnership, and C & A COMPANIES, )  
INC., an Arizona corporation, )

Respondents. )

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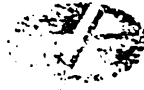
NOTICE OF HEARING

No. 77-110-0130-82

Pursuant to the notice sent to you under date of September 29, 1983 by the Denver office of the American Arbitration Association, the reopened hearing will be held at the 7th floor conference room of Fabian & Clendenin in the Continental Bank Building, Salt Lake City, Utah beginning at 9:00 a.m. on October 24, 1983. The arbitrators have determined that the scope of the hearing shall be limited to evidence and argument as to whether any award can or should be made for or against any party other than the parties to the contract, i.e., C & A Development Company, as owner, and Worthington & Kimball Construction Company, a Utah general partnership and L. M. Henriksen, dba Western States Construction, a sole proprietorship, as contractor, and as to the allocation of costs and fees.

DATED this 18th day of October, 1983.

  
Peter W. Billings, Chairman



C & A COMPANIES, INC.

P.O. BOX 1549 • SCOTTSDALE, ARIZONA 85252

(602) 947-7775

ROBERT F. BENTLEY  
*Senior Vice President and General Counsel*

VAUGHN S. ARMSTRONG  
*Assistant General Counsel*

October 21, 1983

Mr. Mark E. Appel  
Regional Director  
AMERICAN ARBITRATION ASSOCIATION  
789 Sherman Street  
Suite 430  
Denver, Colorado 80203

Re: 77 110 0130 82  
Worthington & Kimball  
Construction Company  
-and-  
C & A Enterprises  
Salt Lake City or Ogden, Utah

Dear Mr. Appel:

By telephone yesterday, we advised you that on October 20th we received notice from Mr. Billings that a hearing in the above-referenced matter had been set for 9:00 o'clock a.m. October 24th. We advised you in that conversation and by this letter confirm that neither Mr. Bentley nor myself will be available on that date for the hearing due to prior commitments and insufficient notice. You indicated that you would attempt to reschedule the hearing for November 3rd or 4th but that Mr. Babcock had not returned your call as of this afternoon.

We object to the hearing being held upon inadequate notice and without consultation with Respondents prior to scheduling.

In addition, we object to any hearing being held to determine "whether any award can or should be made for or against any party other than the parties to the contract", unless Respondents are permitted in connection with such hearing to present additional surrebuttal evidence which was not presented due to the panel's direction that the hearing was to be completed on July 15th, 1983.

Very truly yours,

Vaughn S. Armstrong

cc: Robert Babcock, Esq.

Robert F. Babcock, Esq.  
Robert F. Bentley, Esq.  
July 14, 1983  
Page Two

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2. Condition of Tanks.

- a. Who is responsible for work of Ogden Industrial Plastics?
  - b. Was work done to the date Ogden Industrial Plastics was discharged in compliance with specifications agreed to by owner and Ogden?
  - c. How handle award, if any, for Ogden's unpaid portion -- need for lien release?
  - d. Is Worthington & Kimball entitled to 5% on any award made for work by Ogden Industrial Plastics?
  - e. What is the effect, if any, on the issues of disclaimer in change orders nos. 17 and 18?
  - f. If C & A is entitled to any award on this item, is it to be made against Worthington & Kimball or Ogden Industrial Plastics?
3. What is effect on responsibility of Worthington & Kimball for condition of interior walls in light of inadequate system installed by owner to eliminate moisture and toxic fumes?
4. When did "substantial completion" occur?
- a. Did C & A withhold an unreasonable amount on contractor's request for final payment?
  - b. If so, what penalty, if any, should be assessed against C & A?
  - c. What is the effect on any claims by C & A based on deficient construction in view of the one year warranty contained in provision 2.4.1 of the design-build agreement?
  - d. A substantial portion of the punch list items appear to be nit-picking. What amount, if any, should be awarded on punch list items?

LAW OFFICES OF  
ABIAN & CLENDENIN  
A PROFESSIONAL CORPORATION

Robert F. Babcock, Esq.  
Robert F. Bentley, Esq.  
July 14, 1983  
Page Three

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5. What is effect, if any, of the Permaloy - C & A relationship on the respective responsibilities of owner and contractor?
6. Rollins, Brown and Gunnell Soil Report (Exhibit K).
  - a. What is the effect of the contract provision (12.5.2 as amended) with respect to such report?
  - b. Did contractor deviate from any recommendations of the Rollins, Brown and Gunnell report?
  - c. If not, does reliance on that report relieve contractor from any liability for cracks due to settling or expansion?
  - d. Is the perimeter crack the responsibility of the owner, Buehner or Worthington & Kimball?
  - e. Has settlement been excessive under the plans and specifications accepted by the owner?
  - f. What dollar damages, if any, for (1) wall panels and (2) floor cracks?
7. Roof Condition.
  - a. Who is responsible for deflection of roof area over dock?
  - b. What is effect of elimination of gravel on roof condition -- who is responsible?
  - c. What defects, if any, exist?
  - d. Are they the responsibility of the contractor?
  - e. What amount, if any, be awarded C & A for any defects?
8. We believe any award to Worthington & Kimball should be conditioned on delivery of lien waivers or release of lien by all subcontractors.
  - a. How handle Ogden Industrial Plastics' claim?

LAW OFFICES OF  
ABIAN & CLENDENIN  
A PROFESSIONAL CORPORATION

Robert F. Babcock, Esq.  
Robert F. Bentley, Esq.  
July 14, 1983  
Page Four

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The foregoing is not intended to preclude either party from addressing any other issue which it believes to be important, but to suggest the issues as to which the panel needs full exposition of the position of each party.

Very truly yours,



Peter W. Billings

PWB:bw

cc: George E. Lyman, Esq.  
B. Lue Bettilyon

Robert F. Babcock and  
James J. Tansey of  
WALSTAD, KASIMER, TANSEY & ITTIG  
185 South State, Suite 1000  
Salt Lake City, Utah 84111  
Telephone: (801) 531-7000

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BEFORE THE AMERICAN ARBITRATION ASSOCIATION

---

WORTHINGTON & KIMBALL CONSTRUCTION	:	
COMPANY, a Utah general partnership,	:	
	:	REPLY OF
Claimant,	:	WORTHINGTON & KIMBALL
	:	
vs.	:	
	:	
C & A DEVELOPMENT COMPANY,	:	
an Arizona corporation, C & A ENTERPRISES,	:	
an Arizona partnership, C & A COMPANIES,	:	No. 77-110-0130-82
INC., an Arizona corporation,	:	
	:	
Respondents.	:	

---

Claimant hereby replies to the Response of Respondents as to the liability of the respective C & A entities in the subject arbitration proceeding as well as to the apportionment of costs and fees.

I. PROPER PARTY

Since C & A stipulated that the subject contract between W & K and C & A Development Company was assigned by C & A Development Company to C & A Enterprises, an Arizona general partnership, in March of 1981 it was agreed that no further evidence would be submitted by either party. Other than the foregoing fact which was stipulated to by the parties as referred to in the Notice and Order from the panel of arbitrators dated October 24, 1983 no other evidence, subsequent to the hearing, was submitted by Claimant to the panel.

Based upon the foregoing stipulation and for the sake of simplification W & K requests that the award be entered against C & A Enterprises. The C & A entities



acknowledge in their Response that C & A Enterprises is the appropriate party to the arbitration proceeding. Because of the individual liability of the general partners of C & A Enterprises W & K will not pursue the secondary liability of C & A Development. During the enforcement proceedings, if needed, W & K will pursue the joint and several liability of all of the partners of C & A Enterprises including C & A Companies, Inc.

## II. COSTS AND FEES

Rule 43 of the Construction Industry Arbitration Rules provides:

The arbitrator(s) may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties. The arbitrator(s), in the award, shall assess arbitration fees and expenses as provided in Sections 48 and 50 equally or in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

In addition to the administrative fees and expenses the arbitrators' fees are to be allocated in accordance with the agreement of the parties to this proceeding.

Claimant and Respondent agree that the panel may apportion the administrative fees paid to the AAA, the fees paid to the respective arbitrators, and the miscellaneous expenses of the arbitration. The parties also agree that the cost of witnesses is to be born by the respective parties. The only area of dispute is that of the cost of the stenographic record.

In the same sense that the parties advanced the administrative fees and arbitrators' fees which were to be subsequently apportioned by the panel both Claimant and Respondent agreed to advance one half each of the cost of the stenographic record which cost was to be apportioned in a similar fashion to the administrative and arbitrator fees.

W & K submits that in considering how to apportion the foregoing fees the panel should consider the nature of the claims of the respective parties, how the claims affected the length and therefore the cost of the hearing and the meritoriousness of the respective claims of the parties. In considering the foregoing W & K respectfully

Respectfully submitted this 4th day of November, 1983.

WALSTAD, KASIMER, TANSEY & ITTIG

By: Robert F. Babcock

Robert F. Babcock

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AMERICAN ARBITRATION ASSOCIATION

\* \* \*

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In the Matter of the  
Arbitration between

:

:

Case No. 77 110 0130 82

:

Testimony of:

:

RALPH ROLLINS

:

WORTHINGTON & KIMBALL  
CONSTRUCTION CO., and  
C & A COMPANIES: L. M.  
HENRIKSEN dba WESTERN STATES  
CONSTRUCTION; HOLBROOK  
COMPANY, INC.; STAKER PAVING  
AND CONSTRUCTION COMPANY.

:

\* \* \*

BE IT REMEMBERED that on the 22nd day of June  
1983, the testimony of RALPH ROLLINS, produced as a witness  
herein at the instance of the claimant herein, in the  
above-entitled matter, was taken before Linda Van Tassell,  
Certified Shorthand Reporter, Registered Professional Reporter  
and Notary public in and for the State of Utah, commencing at  
the hour of 3:45 p.m. of said day at 700 Continental Bank  
Building, Salt Lake City, Salt Lake County, State of Utah.

\* \* \*

1 floor slab to the wall?

2 A Yes.

3 Q Is it also common that because of expected  
4 settlement, there occurs a perimeter crack?

5 A Yes, that's true.

6 Q Is it also common occurrence to have some spalling  
7 in some of the joints in a double tee building?

8 A I think that quite often occurs.

9 MR. BILLINGS: You say in here on page 4, "It is  
10 our opinion if the foundations for proposed facility are  
11 proportioned using an allowable soil bearing pressure of 2,500  
12 pounds per square foot, no serious problems will occur due to  
13 swelling of the subsurface soils."

14 THE WITNESS: Provided -- that's provided the  
15 recommendation is complied with. I've said in there you take  
16 the necessary precautions to keep it from becoming wet.

17 MR. BILLINGS: Now if a building with this  
18 double tee-type construction --

19 THE WITNESS: I didn't really know at that time  
20 it was going to be a double tee-type construction.

21 MR. BILLINGS: If they followed your  
22 recommendations in your soil report with that type of building  
23 and tied the floor to the walls, would you still have expected  
24 a perimeter cracking?

25 THE WITNESS: It could have occurred. One has

0 4 3 2 2 5

Robert F. Bentley  
7425 East Camelback Road  
Scottsdale, Arizona 85251  
(602) 947-7775


RICHARD  
WEBER  
FILED  
DEC 5 11 23 AM '88  
CLERK

IN THE SECOND JUDICIAL DISTRICT COURT  
OF WEBER COUNTY, STATE OF UTAH

WORTHINGTON & KIMBALL CONSTRUCTION	)	
COMPANY, a Utah General Partnership,	)	NO. 83387
et al,	)	
	)	NOTICE OF APPEARANCE
Plaintiffs,	)	
	)	
vs.	)	
	)	
C & A DEVELOPMENT COMPANY, et al,	)	
	)	
Defendants)	)	

The undersigned, Robert F. Bentley, hereby gives notice of his appearance of counsel for C & A Enterprises and C & A Development Co. in the above-referenced cause of action.

RESPECTFULLY SUBMITTED this 30th day of November, 1983.

  
Robert F. Bentley  
Attorney for Defendants  
C & A Development Company,  
C & A Enterprises, and  
Permaloy Corporation

I hereby certify that I mailed a true and correct copy of the foregoing Notice of Hearing, postage thereon fully prepaid, this 30th day of November, 1983, to the following:

Robert Babcock  
WALSTAD, KASIMER, TANSEY & ITTIG  
Attorneys for Plaintiff  
185 South State, Suite 1000  
Salt Lake City, Utah 84111

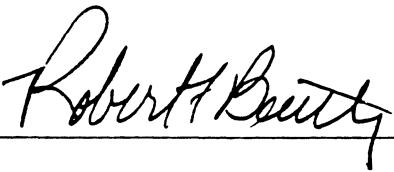
LaVar E. Stark  
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2651 Washington Blvd. #10  
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Steven M. Ashby  
Holbrook Company, Inc.  
151 North 600 West  
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Thomas A. Duffin  
Attorney for Otto Buehner  
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Michael Glassman  
Attorney for Redd Roofing  
First Security Bank Bldg. #1000  
Ogden, Utah 84401

David B. Smith  
First Interstate Bank of Arizona  
P.O. Box 20551  
Phoenix, Arizona 85036

  
\_\_\_\_\_

0 4 3 2 2 6

Robert F. Bentley  
7525 East Camelback Road  
Scottsdale, Arizona 85251  
(602)-947-7775

RICHARD GREEN  
WEBER COUNTY CLERK  
FILED  
DEC 5 11 24 AM '83

IN THE SECOND JUDICIAL DISTRICT COURT  
OF WEBER COUNTY, STATE OF UTAH

WORTHINGTON & KIMBALL CONSTRUCTION )  
COMPANY, a Utah General Partnership, ) NO. 83387  
et al, )  
Plaintiffs, ) MOTION TO CONTINUE  
vs. )  
C & A DEVELOPMENT COMPANY, et al, )  
Defendants) BAC

Comes now, Defendants C & A Development Co. and C & A Enterprises, by and through their attorney undersigned and hereby request that this Court continue the hearing set for December 2nd, 1983, in the above captioned cause to a time mutually convenient to this Court and the parties thereto as and for the reason that Defendant's attorney will be in Mexico City on previously scheduled business and further Defendant's attorney will be in Chicago the week of December 5th on corporate business. Attorney for Defendant would be able to attend a hearing on Friday, December 9th, 1983, if said date would be acceptable to this Court.

Further, moving Defendants have made a Motion to Vacate the Award. In order to permit Plaintiff adequate time to respond, both

Plaintiff's Motion to Confirm and Defendants' Motion to Vacate should be heard together at a later hearing.

RESPECTFULLY SUBMITTED this 30th day of November, 1983.



Robert F. Bentley  
7525 East Camelback Road  
Scottsdale, Arizona 85251  
Attorney for C & A Companies, Inc.  
and C & A Enterprises

I hereby certify that I mailed a true and correct copy of the foregoing Notice of Hearing, postage thereon fully prepaid, this 30th day of November, 1983, to the following:

Robert Babcock  
WALSTAD, KASIMER, TANSEY & ITTIG  
Attorneys for Plaintiff  
185 South State, Suite 1000  
Salt Lake City, Utah 84111

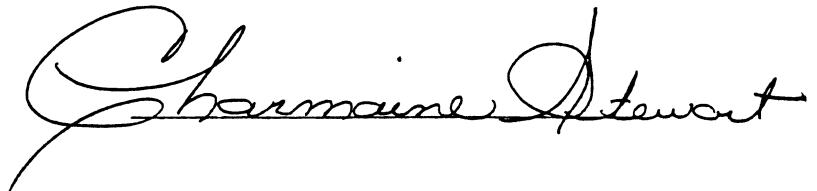
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Robert F. Babcock of  
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Attorneys for Plaintiff  
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Salt Lake City, Utah 84111  
Telephone: (801) 531-7000

REC  
WEED  
FILED  
JAN 5 1 50 PM '8

---

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF WEBER, STATE OF UTAH

---

WORTHINGTON & KIMBALL CONSTRUCTION	:	
COMPANY, a Utah General Partnership, et al,	:	MEMORANDUM IN OPPOSITION
	:	TO MOTION TO VACATE
Plaintiffs,	:	
	:	
vs.	:	
	:	
C & A DEVELOPMENT COMPANY, et al,	:	Civil No. 83387
	:	
Defendants.	:	

---

Plaintiff, by and through its attorney, Robert F. Babcock of and for Walstad Kasimer Tansey & Ittig, hereby submit this Memorandum in Opposition to Defendants' Motion to Vacate Award.

FACTS

The claims of the parties to this proceeding arise out of the construction of the project known as the Permaloy Building in the Weber Industrial Park near Ogden, Utah. Plaintiff, the general contractor, claimed the unpaid contract balance together with interest thereon plus other consequential damages. Defendants C & A Development Company, C & A Enterprises, and C & A Companies, the owner-developer, alleged that the cost to complete and repair the subject building exceeded the contract balance due Plaintiff by approximately \$1,000,000.00.

The contract between the parties, attached as Exhibit "B" to the Motion to Confirm Award, provides in Article 16 that all disputes concerning the contract be submitted to the American Arbitration Association for final and binding arbitration.

Pursuant to said contractual provision, the parties submitted to said American Arbitration Association the subject claims.

The panel of arbitrators consisted of Peter W. Billings, Esq., the senior partner of Fabian & Clendenin, George E. Lyman, Esq. and B. Lue Bettilyon, owner of Bettilyon Construction Company. Seventeen days of hearings were held on April 25 to 29, May 16 to 20, June 20 to 24 and July 14 and 15, 1983. During said hearings a total of 23 witnesses were called by the respective parties. The transcript of the hearings, including the depositions, exceeded 3,000 pages in length. Plaintiffs introduced 84 exhibits (many were multi-page exhibits) and Defendants introduced 59 exhibits (again many were multi-page exhibits). During the hearings, the parties were given full opportunity to call all witnesses they desired. Both parties were given the opportunity to file and did in fact file both post-hearing and reply briefs exceeding 180 pages in length. The hearings covered nearly 100 disputed issues.

The panel of arbitrators rendered an award on November 7, 1983, a copy of which is attached as Exhibit "A" to the Motion to Confirm Award. Plaintiffs brought their Motion to Confirm Award on November 18, 1983. Defendants responded by filing their Motion to Vacate Award. Both motions are before the court for disposition.

#### ARGUMENT

The parties to this dispute agreed by contract to resolve their disputes by arbitration. In recent years arbitration has become more and more the accepted mode of settling disputes in the construction industry. All major segments of the building community provide for arbitration in their standard form contracts. The chief justice of the United States Supreme Court is a staunch advocate of the use of alternate dispute resolution procedures and arbitration in particular. The Utah Supreme Court recently stated in a case upholding the constitutionality of arbitration that "the trend toward such inter se agreements without resort to litigation reflects a good, practical

way to resolve disputes." Lindon City vs. Engineers Construction Company, 636 P.2d 1070, 1073 (Utah 1981).

An earlier Utah court indicated that arbitration is favored in the law as a speedy and inexpensive method of adjudicating differences by a tribunal whose award is final and persons are being encouraged to resort to such procedures. Giannopoulos vs. Pappas, 15 P.2d 335 (Utah 1932).

Defendants C & A Development Company and C & A Enterprises challenge the award on four grounds. Each of the grounds will be discussed in the order argued by said Defendants.

Before discussing the merits of said Defendants' arguments it is important to reaffirm the standard of review to be given by this Court to the subject arbitration award. The discussion in the case of Park Imperial, Inc. vs. E. L. Farmer Construction Co., 454 P.2d 181 (Ariz. 1969) properly sets forth the standard of review.

Were the trial court required to try each case de novo the reason for arbitration agreements would be frustrated.  
(Citation omitted)

In the instant case the person objecting to the award had the burden of making an "adequate showing" to the trial court wherein the award should be set aside. This Court on appeal is bound to view the action of the trial court in a light most favorable to upholding the trial court's determination, (citations omitted) just as the trial court was required to view the arbitration award in a light most favorable to upholding the said award.

A party seeking to set aside an arbitration award on account of error has the burden to affirmatively establish the existence of such error and the fact that it was prejudicial. (Citation omitted)

Further, the case of Mars Constructors, Inc. vs. Tropical Enterprises, Ltd., 460 P.2d 317 (Hawaii 1969) sheds further light on the standard of review. The Hawaii Supreme Court, in discussing a motion to vacate an arbitration award, based on a statute having the same four grounds for vacating an arbitration award as the Utah statute, stated:

This Court has decided to confine judicial review to the strictest possible limits. (Citations omitted) We reaffirm this holding because we believe an extensive judicial review of arbitration awards would frustrate the intent of the parties to avoid litigation and would also nullify the legislative objective in the enactment of the Arbitration and Awards statute.

The parties have voluntarily agreed to arbitrate, and they thereby assumed all the hazards of the arbitration process, including the risk that the arbitrators may make mistakes in the application of law and in their findings of fact. In (earlier cases) this Court held that such mistakes of arbitrators did not vitiate awards and that the review of awards by the courts were limited to the provisions of the arbitration statute.

I. THE PANEL OF ARBITRATORS DID NOT EXCEED THEIR POWERS IN RENDERING THE AWARD.

A. THE AWARD WAS RENDERED TIMELY

The parties agreed in the subject contract to abide by the rules of the American Arbitration Association. A copy of the pertinent rules are attached as Exhibit "A" to Defendants' Motion. Rule 41 provides:

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, not later than thirty days from the date of closing of the hearings. . . .

Rule 36 provides as follows:

The hearing may be reopened by the arbitrator at will, or upon application of a party at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

The hearings were initially closed on September 2, 1983 but were reopened on September 29, 1983. The reopened hearing was held on October 24, 1983 by means of a telephone conference in which the parties simply stipulated that in March, 1981, the contract between Plaintiff and C & A Development Company was assigned by C & A Development Company to C & A Enterprises. There was no evidence or other argument presented. The parties, however, further stipulated that said Defendants would have until and including October 28, 1983 to brief the effects of said assignment and that

Plaintiffs would have until November 4, 1983 to respond to the brief of said Defendants. Upon receipt of said briefs the arbitrators were to close the hearing. Rule 35 states, in part, as follows:

If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. . . . The time limit within which the arbitrator is required to make an award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

Therefore, pursuant to Rule 41, the award was to be made by December 4, 1983. The award was in fact made well before that time in that the award was rendered November 7, 1983 and transmitted by letter dated November 11, 1983 from the American Arbitration Association to the respective parties.

Defendants argue that the award must have been made on or before October 2 which is within thirty days of the closing of the initial hearings. It should be emphasized that there is no specific time fixed in the contract within which an award must be made. The contract simply provides for adhering to the rules of the American Arbitration Association.

Defendants either overlook or ignore the affect of Rule 36, quoted in its entirety above, which states in pertinent part:

When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

Assuming, for the sake of argument, that there was a problem with the timeliness of award, said Defendants clearly waived any right to object to the timeliness of award. A case which is dispositive of this issue is Ash Apartments vs. Martinez, 656 P.2d 708 (Colo. 1982). The parties in that case, like the parties in the instant case, agreed to arbitrate their disputes pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association. There was a disputed issue as to

whether the parties had consented to an extension of the thirty day period in which the arbitrators had to enter an award. The court stated:

The question of whether Plaintiffs consented to an extension is irrelevant to the disposition of this issue because it is uncontroverted that Plaintiffs chose not to object to the timeliness of the award until after it was announced with a result which was unfavorable to them. . . Since Plaintiffs here also chose to wait until it saw the results of the award, it waived its right to assert the untimeliness of the award as a defect. Consequently, the arbitrators' award will not be vacated on this basis.

Such are the facts in the incident case. Said Defendants in their Response to Motion for Reopening of Hearing dated September 13, 1983 made no mention of the timeliness of the award. Neither did said Defendants object in their Response of Respondents dated October 28, 1983 nor in their Respondent's Memorandum Regarding Award of Costs and Fees dated November 3, 1983. If said Defendants truly believed that the time to render an award lapsed on October 2, 1983 then said Defendants clearly waived any objection by failing to raise the objection during the telephone conference of October 24, 1983 and the briefs of October 28 and November 3 of 1983. Said Defendants chose not to object to the timeliness of the arbitration award until after the unfavorable result was announced.

Again, the rules clearly provide that the arbitrator may reopen the hearing and that the time for rendering an award runs thirty days from the closing of the reopened hearings. Therefore, the award was rendered well within the time requirements set forth in the rules.

B. THE PANEL OF ARBITRATORS DID NOT LIMIT THE EVIDENCE

Said Defendants assert in their Motion to Vacate that the arbitrators directed that the rebuttal case be limited to two days. Such is not the case. The true facts are that the parties, during the week of June 20 to 24 agreed that the next hearing dates would be July 14 and 15 and that it was assumed that the parties would complete

the presentation of evidence during those two days. Attached hereto as Exhibit "A" is page 1982 of the transcript in which the chairman of the panel, Mr. Billings, states:

We've agreed that assuming we finish with all the testimony at the end of the day on the 15th of July, the counsel will file their briefs simultaneously. . . is that agreeable for each side?

Counsel for said Defendants agreed to such statement.

More importantly, said Defendants did not use the full two days to present its surrebuttal case but terminated its surrebuttal case at approximately twelve noon on July 15th. Again, Mr. Billings, the chairman of the panel asked counsel for said Defendants if they had any further witnesses to which counsel for said Defendants indicated that they had no more witnesses. See copies of pages 2694-96 of the transcript attached hereto as Exhibit "B". Said exhibit shows no objection to concluding the evidence portion taking of the hearing. Further, no objection was ever made on or off the record.

C. THE PANEL OF ARBITRATORS DID NOT EXCEED ITS AUTHORITY IN AWARDING INTEREST AT 15 PERCENT PER ANNUM.

The contract between the parties in Article 11.1.4 provides that payments due but unpaid shall bear interest at the rate the owner is paying on the construction loan or at the legal rate, whichever is higher. In support of its position, Plaintiff submitted Exhibit 28, one page of which is attached hereto as Exhibit "C". Said exhibit reflects the interest rate requested by Plaintiff which was the rate of the construction loan (a floating rate of prime plus two percent). The arbitrators did not start the running of interest in August 1981 as Plaintiff requested but delayed it until December, 1981. Rather than awarding interest at the floating rate the arbitrators awarded interest at the average of the various interest rates from December 1981 to the present which averages 15.05 percent (rounded it off to fifteen percent).

Plaintiffs submit that it is clearly within the prerogative and power of the arbitrators to use an average interest rate rather than using the floating interest rate.

An early Utah case contains language which sheds light on this issue. The court in Bivans vs. Utah Lake Land, Water & Power Company, 174 P. 1126 (Utah 1918) states:

Speaking generally, it may be said that (arbitration) awards will not be disturbed on account of irregularities or informalities, or because the court does not agree with the award, so long as the proceeding has been fair and honest and the substantial rights of the parties have been respected.

The case of Giannopoulos vs. Pappas, supra, also states that "ordinarily a court has no authority to review the action of arbitrators to correct errors or to substitute its conclusions for that of the arbitrators acting honestly and within the scope of their authority".

D. THE PANEL OF ARBITRATORS PROPERLY ENTERED THE AWARD AGAINST BOTH C & A ENTERPRISES AND C & A DEVELOPMENT COMPANY.

The construction contract was initially entered into between Plaintiff and Defendant C & A Development Company. It was stipulated between the parties that said contract was subsequently assigned by Defendant C & A Development Company to Defendant C & A Enterprises. Said assignment makes both parties liable. Plaintiff never specifically withdrew their claim against Defendant C & A Development but acknowledges that its statement in the reply of Plaintiff of November 4, 1983 is ambiguous in terms of Plaintiff's not arguing further what had already been argued to the panel.

Further, and more importantly, the principle heretofore cited that ordinarily a court has no authority to review the action of arbitrators to correct errors or to substitute its conclusion for that of the arbitrators acting honestly and within the scope of their authority is applicable here as well.

II. THE PANEL OF ARBITRATORS WAS NOT GUILTY OF MISCONDUCT IN REFUSING TO PERMIT SAID DEFENDANTS TO SUPPLEMENT THEIR SURREBUTTAL CASE.

As has been outlined heretofore, the purpose of the reopened hearing was to clarify the assignment of the construction contract between Defendant C & A



Development and Defendant C & A Enterprises to clarify the proper parties to the action. Initially, said Defendants objected to the reopening unless said Defendants could present further evidence on all issues of the case. The panel of arbitrators decided to reopen the hearing to clarify the proper parties. The necessity of the clarification arose out of the fact that throughout the seventeen day hearing the witnesses, the arbitrators, counsel for Plaintiff, and even counsel for Defendants simply referred to the three C & A entities as "C & A" without effort to differentiate or distinguish among the different entities.

More importantly, said Defendants never made any proffer of evidence as to what evidence said Defendants wanted to present but simply stated that they wanted to present additional surrebuttal evidence. Section 78-31-16(3) provides that arbitrators may be guilty of misconduct only in refusing "to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced." There is absolutely no showing or even an inkling of what it was that said Defendants wanted to present that they had not presented or had an opportunity to present during the 17 days of hearing extending over a four month period. Neither is there the slightest evidence that the excluded evidence was "pertinent and material to the controversy".

### III. THERE WAS NOT EVIDENT PARTIALITY ON THE PART OF THE PANEL OF ARBITRATORS.

Said Defendants are clearly grasping at straws to argue that this panel was guilty of "evident partiality". To support its argument said Defendants simply point out issues in which the panel ruled against said Defendants. If there had been evident partiality why didn't the panel of arbitrators award Plaintiff a sum in excess of \$750,000.00 as was requested. See the summary of damages entered at the hearing attached hereto as Exhibit "D".

Said Defendants dispute the panel's interpretation of some contract language. Said Defendants cite one page of testimony from one witness where in reality ten witnesses testified regarding that issue and the testimony consisted of hundreds of pages. Further, said Defendants assert that there was clear evidence that differential settlement had occurred and caused damage to the building. There was also clear evidence presented that what had occurred was not damage to the building but was nothing out of the ordinary.

Let it simply be said that the arbitrators heard the evidence which was voluminous and either found that there was no damage or found that Plaintiff was not liable for the damage. In either event, the arbitrators are not guilty of "evident partiality" simply because they found against said Defendants.

#### IV. THE AWARD WAS NOT PROCURED BY FRAUD OR OTHER UNDUE MEANS.

Said Defendants have gone from grasping at straws to trying to catch the wind in arguing that the award was procured by fraud or other undue means. There was a dispute throughout the hearing concerning the scope of work for the subject construction contract. Several sets of contract drawings were introduced into evidence and testimony presented regarding variations between the different sets of contract drawings and the importance of said variations. Nine witnesses testified regarding this issue. The issue was briefed by both parties. The arbitrators apparently found that the scope of work was as asserted by Plaintiff which included approximately 80 signed change orders to the contract. Said Defendants argued during the course of the hearing, in their briefs, and now in their Motion to Vacate Award that Plaintiff committed fraud upon said Defendants in somehow duping said Defendants in what work was actually to be performed. The scope of work issue has been fully litigated. The ruling must stand.

CONCLUSION

Based upon the foregoing, Plaintiff submits that the award of the panel of arbitrators be confirmed. The dispute is over two years old, has been through protracted evidentiary hearings where all parties were provided the opportunity to present all evidence desired, and a decision has been rendered by an impartial qualified panel of arbitrators. The parties should be required to abide by the decision of the panel of arbitrators.

Respectfully submitted this 30<sup>th</sup> day of December, 1983.

WALSTAD KASIMER TANSEY & ITTIG

By: Robert F. Babcock

Robert F. Babcock

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum in Opposition to Motion to Vacate, postage thereon fully prepaid, this 3<sup>rd</sup> day of January, 1984, to the following:

Robert F. Bentley  
Vaughn Armstrong  
C & A Companies, Inc.  
P. O. Box 1549  
Scottsdale, AZ 84252

Thomas A. Duffin  
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Jeff Willis  
Streich, Lang, Weeks & Cardon  
P. O. Box 471  
Phoenix, AZ 85001

Joseph Smith Plumbing  
483 E. Maryrose Drive  
Salt Lake City, Utah 84107

Kimley M. Pedersen

1 Worthington & Kimball.

2 (Hearing adjourned.)

3 \* \* \*

4 (24 <sup>June</sup>~~July~~ 1983 - 2:00 p.m.)

5 MR. BILLINGS: We've agreed that assuming we  
6 finish with all the testimony at the end of the day on the 15th  
7 of July, that counsel will file their briefs simultaneously on  
8 the 15th of August, and they'll serve each other by express  
9 mail. And at the same time, they'll send copies to each of the  
10 Panel, and that reply briefs will be due on the 25th of August  
11 to be served in the same fashion. Is that agreeable for each  
12 side?

13 MR. ARMSTRONG: Yes.

14 MR. TANSEY: On the 15th and on the 25th. We  
15 will also provide a copy to the AAA.

16 MR. BILLINGS: If they want, but we want ours  
17 direct.

18 MR. TANSEY: Yes.

19 MR. ARMSTRONG: Shall we send them all to you?

20 MR. LYMAN: You have the addresses.

21 MR. BILLINGS: You have our addresses. Why  
22 don't you send them separately?

23 MR. BILLINGS: Mr. Rollins, you're still under  
24 oath.

25 DIRECT EXAMINATION

1 THE WITNESS: That's right.

2 MR. BETTILYON: Okay.

3 MR. BABCOCK: But for further clarification, the  
4 sample was taken off the east wall which would have the 900  
5 loading, not the 2,500.

6 THE WITNESS: No, no. The sample was taken on  
7 the south wall.

8 MR. BILLINGS: Let's not all talk at once.  
9 Either have counsel or the --

10 THE WITNESS: The test pits were taken,  
11 according to the testimony, on the east side. The boring, the  
12 last boring made was taken on the south side or the heavy  
13 loaded one.

14 MR. BABCOCK: I'll clarify that. There were two  
15 test pits on the east wall. Rollins' boring was on the east  
16 wall. Rollins took another sample for Chen's third test, which  
17 was taken on the south wall.

18 MR. BILLINGS: Anything further with this  
19 witness?

20 MR. BABCOCK: No.

21 MR. ARMSTRONG: No.

22 MR. BILLINGS: Thank you, Mr. Anderson.

23 MR. BILLINGS: Do you have any further  
24 witnesses?

25 MR. ARMSTRONG: No.

1 MR. BILLINGS: Do you have anything further  
2 witnesses, Mr. Babcock?

3 MR. BABCOCK: No.

4 MR. BILLINGS: Then the evidence portion taking  
5 of this hearing will be concluded. It's my understanding that  
6 counsel agreed they will exchange briefs and furnish them to  
7 the arbitrators on the 15th of August and reply briefs ten days  
8 thereafter, which would be the 25th.

9 MR. TANSEY: I think we agreed we would send  
10 each one individually and also send a copy to AAA.

11 MR. BILLINGS: If both side agree to do that --

12 MR. TANSEY: We agreed on the 15th, Federal  
13 Express or whatever, same day.

14 MR. LYMAN: The hearing doesn't technically  
15 close until the last brief is received.

16 MR. TANSEY: Yes. Until the close it.

17 MR. BILLINGS: We close it. And I was just  
18 going to suggest that we would close it by -- we will have a  
19 session, the three of us, after we've had a chance to review  
20 the briefs, both the open and responsive briefs.

21 (Off-the-record.)

22 MR. BILLINGS: For the record, the Board of  
23 Arbitrators will meet on August 30, 9:30 a.m. here, and  
24 officially close the hearing at that time, unless after  
25 discussion of the briefs, we feel we need some more help from

1 counsel, if that's agreeable.

2 MR. BABCOCK: That's fine.

3 MR. ARMSTRONG: That's fine.

4 (Hearing concluded.)

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LAST DRAW INCLUDING RETAINAGE	445,883.00
INTEREST ON EXCESSIVE RETAINAGE WITHHELD	15,373.00
INTEREST ON LATE PAYMENTS	<u>9,734.00</u>
TOTAL	470,990.00

ACCRUING INTEREST

<u>DATE</u>	<u>INTEREST RATE</u>		<u>INTEREST DUE</u>		<u>BALANCE DUE</u>
8-30-81	(22.50)	+	17 41.98	=	472,731.93
9-30-81	(22.08)	+	8698.26	=	431,430.24
10-30-81	(20.45)	+	8204.37	=	489,634.61
11-30-81	(18.84)	+	7687.26	=	497,321.87
12-30-81	(17.75)	+	7356.21	=	504,678.08
1-30-82	(17.75)	+	7465.02	=	512,143.10
2-29-82	(18.56)	+	7921.14	=	520,064.24
3-30-82	(18.50)	+	8017.65	=	528,081.89
4-30-82	(18.50)	+	8141.26	=	536,223.15
5-30-82	(18.50)	+	8266.77	=	544,439.92
6-30-82	(18.50)	+	8394.21	=	552,834.13
7-30-82	(18.26)	+	8413.05	=	561,297.13
8-30-82	(16.39)	+	7666.38	=	538,963.56
9-30-82	(15.50)	+	7349.11	=	576,312.67
10-30-82	(14.52)	+	6973.38	=	583,286.05
11-30-82	(13.85)	+	6732.09	=	590,018.14
12-30-82	(13.50)	+	6637.70	=	596,655.84
1-30-83	(13.16)	+	6543.32	=	603,199.16
2-30-83	(12.98)	+	6524.60	=	609,723.76
3-30-83	(12.98)	+	6595.18	=	616,318.93
4-30-83	(12.98)	+	6666.52	=	622,935.44
5-30-83	(12.98)	+	6738.62	=	629,724.06

SUMMARY OF DAMAGES

Balance of Contract and Retainage	445,833.00
Interest on Excessive Retainage Withheld By C & A	15,373.00
Interest On Late Progress Payments	9,734.00
Interest On Contract Payments To Date	153,734.00
Delay Damages -- Extended Overhead	130,055.00
Interference -- Disruption Damages	50,000.00
Additional Tank Line Wall	2,500.00
Credit Due C & A	<u>(26,247.00)</u>
TOTAL DUE	<u><u>735,982.00</u></u>

## IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

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WORTHINGTON & KIMBALL CONSTRUCTION  
COMPANY, a Utah General Partnership,  
GARY WORTHINGTON and EDWIN N.  
KIMBALL, General Partners,

Plaintiffs,

vs.

C & A DEVELOPMENT COMPANY, an  
Arizona corporation, C & A  
ENTERPRISES, an Arizona partnership,  
FIRST INTERSTATE BANK OF ARIZONA,  
STEWART TITLE COMPANY, et al.,

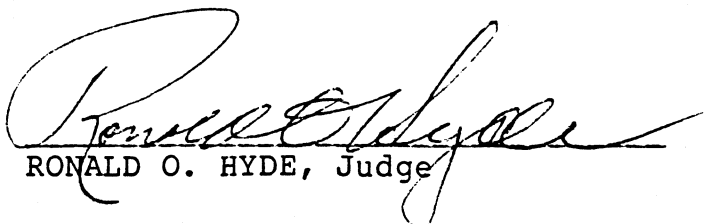
Defendants.

MEMORANDUM DECISION

Civil No. 83387

Having studied the parties' memoranda and heard oral argument thereon, I find that the arbitrators did not exceed their powers, no evidence of misconduct or partiality, no evidence that award was procured by fraud or other means. Plaintiff's motion to confirm award is granted. Defendants C & A Development Company and C & A Enterprises motion to vacate the award is denied.

DATED this 2 day of January, 1984.

  
RONALD O. HYDE, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of January, 1984,  
a true and correct copy of the foregoing Memorandum Decision was  
served upon the following:

Robert F. Babcock  
Attorneys for Plaintiff  
185 South State, Suite 1000  
Salt Lake City, Utah 84111

Robert F. Bentley  
Attorney for Defendant  
C & A Companies, Inc.  
P. O. Box 1549  
Scottsdale, Arizona 84252

LaVar E. Stark  
Attorney for Stewart Title  
2651 Washington Blvd. #10  
Ogden, Utah 84401

Joseph Smith Plumbing  
483 E. Maryrose Drive  
Salt Lake City, Utah 84037

Thomas A. Duffin  
Attorney for Buehner  
311 South State #380  
Salt Lake City, UT 84111

Michael J. Glasmann  
Attorney for Redd Roffing  
1000 First Security Bank  
Ogden, Utah 84401

David B. Smith  
First Interstate Bank of  
Arizona  
P. O. Box 20551  
Phoenix, Arizona 85036

Steven M. Ashby  
Holbrook Company, Inc.  
151 North 600 West  
Kaysville, Utah 84037



PAULA CARR, Secretary

~~MAILED~~ *NR*

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RICHARD WEBER  
FILED *NR* ERK

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THOMAS A. DUFFIN of  
SPAFFORD, DIBB, DUFFIN & JENSEN  
Attorneys for Defendant,  
Otto Buehner & Company  
311 South State, Suite 380  
Salt Lake City, Utah 84111  
Telephone: 531-8020

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, IN AND FOR  
WEBER COUNTY, STATE OF UTAH

---

WORTHINGTON & KIMBALL )  
CONSTRUCTION COMPANY, a )  
Utah general partnership )  
GARY WORTHINGTON and )  
EDWIN N. KIMBALL, general )  
partners, )

Plaintiff, )

vs. )

C & A DEVELOPMENT COMPANY, )  
an Arizona corporation, )  
C & A ENTERPRISES, an Arizona )  
partnership, FIRST INTERSTATE )  
BANK OF ARIZONA, N.A., )  
STEWART TITLE COMPANY OF )  
SALT LAKE CITY, C & A )  
DEVELOPMENT COMPANY, INC., an )  
Arizona corporation, )  
PERMALOY CORPORATION, a Utah )  
corporation, OTTO BUEHNER & )  
COMPANY, HOLBROOK COMPANY, )  
INC., DONALD K. LYBBERT, dba )  
LYBBERT MASONRY COMPANY, )  
JOSEPH SMITH PLUMBING, )  
REDD ROOFING COMPANY and )  
JOHN DOES 1 through 24, )

Defendants. )

S U M M O N S

*DP*

Civil No. 83387

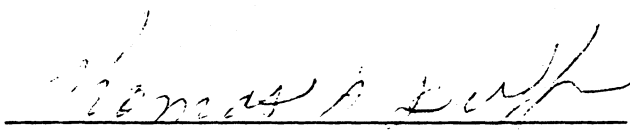
THE STATE OF UTAH TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned and required to file an answer in writing to the attached Crossclaim with the clerk of the above entitled court, and to serve upon, or mail to THOMAS A. DUFFIN, Cross-Claim Defendant, Otto Buehner & Company's attorney, 311 South State, Suite 380, Salt Lake City, Utah 84111, a copy of said answer within 20 days after service of this Summons upon you.

If you fail so to do, judgment by default will be taken against you for the relief demanded in said Crossclaim which has been filed with the clerk of said court and a copy of which is hereto annexed and herewith served upon you.

Dated this 30 day of Dec, 1983.

SPAFFORD, DIBB, DUFFIN & JENSEN

  
Thomas A. Duffin  
Attorney for Otto Buehner & Co.

Serve:

Redd Roofing Company  
513 West Lake Street  
Ogden, Utah

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Robert F. Babcock of  
WALSTAD KASIMER TANSEY & ITTIG  
Attorneys for Plaintiff  
185 South State, Suite 1000  
Salt Lake City, Utah 84111  
Telephone: (801) 531-7000

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF WEBER, STATE OF UTAH

---

WORTHINGTON & KIMBALL CONSTRUCTION  
COMPANY, a Utah General Partnership,  
et al,

Plaintiffs,

vs.

C & A DEVELOPMENT COMPANY, et al,

Defendants.

ORDER AND JUDGMENT

Civil No. 83387

Plaintiff's Motion to Confirm Award and Defendant's Motion to Vacate Award came on regularly for hearing on January 6, 1984 at 11:00 a.m. before the Honorable Ronald O. Hyde. Robert F. Babcock was present and representing Plaintiffs. Robert F. Bentley and Vaughn Armstrong were present and representing Defendants C & A Development Company and C & A Enterprises. LaVar E. Stark was present and representing Defendant Stewart Title. Thomas A. Duffin was present and representing Buehner Concrete. Michael J. Glassman was present and representing Redd Roofing.

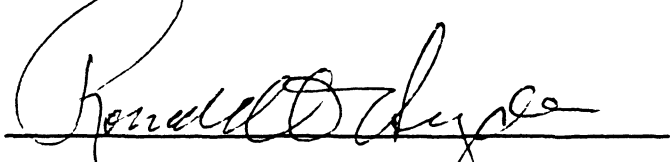
The Court having considered the respective motions and having been fully advised as to the Pleadings, the parties' memoranda and having heard oral argument thereon,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion to Confirm Award is granted and Defendants C & A Development Company and C & A Enterprises' Motion to Vacate Award is denied.

IT IS FURTHER ORDERED that Plaintiff recover judgment against C & A Development Company, an Arizona Corporation, and C & A Enterprises, an Arizona general partnership, with C & A Companies, Inc., an Arizona Corporation, Frank S. Campbell, Robert A. Campbell, F. Richard Campbell, Gary Dee Jones, and Robert F. Bentley, as general partners, the sum of \$377,131.00 plus interest at the rate of fifteen percent (15%) per annum from December 1, 1981 until paid together with costs as awarded.

DATED this 23 day of January, 1984.

BY THE COURT:

  
Ronald O. Hyde, District Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Order and Judgment, postage thereon fully prepaid, this 17<sup>th</sup> day of January, 1984, to the following:

Robert F. Bentley  
Vaughn Armstrong  
C & A Companies, Inc.  
P. O. Box 1549  
Scottsdale, AZ 84252

Thomas A. Duffin  
Attorney for Otto Buehner  
311 South State  
Suite 380  
Salt Lake City, Utah 84111

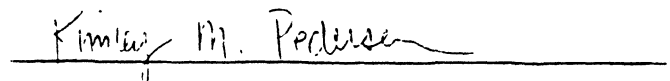
LaVar E. Stark  
Attorney for Stewart Title  
2651 Washington Blvd. #10  
Ogden, Utah 84401

Michael Glassman  
Attorney for Redd Roofing  
First Security Bank Bldg. #1000  
Ogden, Utah 84401

Steven M. Ashby  
Holbrook Company, Inc.  
151 North 600 West  
P. O. Box 226  
Kaysville, Utah 84037

Jeff Willis  
Streich, Lang, Weeks & Cardon  
P. O. Box 471  
Phoenix, AZ 85001

Joseph Smith Plumbing  
483 E. Maryrose Drive  
Salt Lake City, Utah 84107





Dec 6 3 02 PM '84

WEBER COUNTY CLERK  
RICHARD S. RICHARDS

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

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WORTHINGTON & KIMBALL, et al., )

Plaintiffs, )

vs. )

C & A DEVELOPMENT  
COMPANY, et al., )

Defendants. )

MEMORANDUM DECISION

Case No. 83387

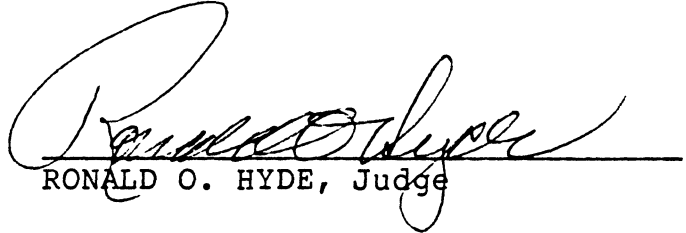
I hold that while Otto Buehner & Company were not personally part of and involved in the arbitration dispute between Kimball Construction and C & A Enterprises, their claim was. That the arbitration decision is dispositive of the claims between Kimball and C & A. That the doctrine of collateral estoppel is applicable to the claim of Otto Beuhner and is binding upon C & A Companies as to the amount due and owing.

The arbitration dispute also settled the responsibility for any failures or defects in the building resulting from soil conditions, defferential settlement and the like. The sufficiency of the footings was determined by the arbitration board not to be the responsibility of the contractor; therefore, through the application of collateral estoppel also found not to be the responsibility of Otto Beuhner.

In other words, the counterclaim of C & A Enterprises against Otto Beuhner is barred on the basis of the collateral estoppel doctrine.

As to whether or not Otto Buehner substantially complied with the notice provisions of mechanic's liens, the decision thereon is reserved for trial with the other questions of the validity of liens.

DATED this \_\_\_\_ day of November, 1984.



RONALD O. HYDE, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_ day of November, 1984, a true and correct copy of the foregoing Memorandum Decision was served upon the following:

Robert F. Bentley  
Attorney for C & A Enterprises, Inc.  
7525 East Camelback Road  
Scottsdale, Arizona 85251

LaVar E. Stark  
Attorney for Security Title and  
First Interstate Bank  
2485 Grant Avenue  
Ogden, Utah 84401

JAN 11 11 35 AM '85  
WEBER COUNTY CLERK  
RICH

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

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WORTHINGTON & KIMBALL, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
C & A DEVELOPMENT )  
COMPANY, et al., )  
 )  
Defendants. )

MEMORANDUM DECISION

*fb*  
Case No. 83387

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As to the question of the date of final completion of the prime contract. I find that the date of the delivery of the certificate of substantial completion is not the key date. I find that the evidence shows that the plaintiffs were doing continual work in the nature of punch list corrections up to the date they were requested to leave. I find that the date of November 12, when they went in and dug the final trench, was the date of final completion. I further find that this work was done in good faith and not for the purpose of extending the lien date. The application of final payment was not made until after this date which is further evidence of good faith in trying to complete the punch list work. I further find that the continual work on the punch list was not trivial or minor, but was a good faith attempt to remedy defects as requested by the owner.

As to the Otto Beuhner lien. This lien was filed within 64 days following the suspension of the work on the project, and, therefore, timely filed. A copy of the lien was mailed to the owner on January 18. It was not mailed by certified mail; however, it is agreed that the owners received a copy of the mechanic's lien a few days following January 18. Section 38-1-7 requires that the lien claimant shall deliver or mail by certified mail a copy of the lien. I hold that the purpose of this phrasing is to assure notice, and that where notice was admittedly received, that the failing to mail by certified mail is of no legal significance. Regular mail would satisfy the deliver requirement.

The question of proper verification is not raised on the Beuhner lien. In regard to the Beuhner lien, I hold that it is valid and enforceable. If my figures are correct, the amount owed is \$41,466 with interest since December 1, 1981. In this regard, I hold the interest to be the legal rate and not the 15% awarded by the arbitration board. The 15% figure was apparently used as a form of penalty. In regard to attorney's fees for the enforcement of this lien, I find the amount of \$12,000 to be reasonable.

As to Smith Plumbing, they filed a counterclaim against Worthington & Kimball, but did not bring an action for the foreclosure of its lien. I find that the amount owed Smith Plumbing is \$6,172.50 with interest at 10% from December 1, 1981.

I find the amount owed Worthington & Kimball is \$377,131 less \$2,355 that goes to personal property and not under the lien.

As to the first and second mechanic's liens of Worthington & Kimball, it appears to me that the second mechanic's lien is nothing more than a correction of the description set forth in the first, and was probably superfluous in that the first mechanic's lien description, though flawed, was sufficient to give notice. The problem with the plaintiffs' lien or liens is that they are not verified. Each is an acknowledgment that the signer executed the notice, and that the contents thereof is true of his own knowledge. This is not a verification. A verbal affirmation that the statements are true is not the same as or a substitute for a verification. Verification requires both the swearing to the truth of the statements by the subscriber and certification thereto by the officer authorized by law to administer oaths. Section 38-1-7 states "the claim must be verified". It appears that the case of First Security Mortgage v. Hansen forecloses a substitution for actual verification. That case states "verification is not a hypertechnicality that we can discount. Without verification, no lien is created. Our statute leaves no room for doubt as to the requirement of a verified notice of claim, and this court, in Eccles Lumber Company v. Martin stated that since a mechanic's

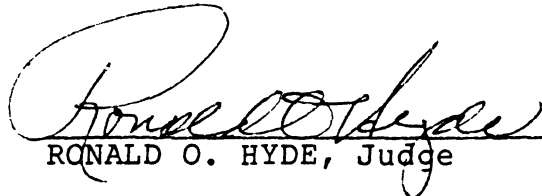
lien is statutory and not contractual, a lien cannot be acquired unless the claimant complies with the statutory provision." The Court further stated that "where the statute fails, courts cannot create rights, and should not do so by unnatural and forced construction."

Plaintiffs' notice of lien, lacking verification, fails to create a valid mechanic's lien.

Otto Beuhner is entitled to judgment against Worthington & Kimball for the figure set out above, as is Smith Plumbing. Otto Beuhner is entitled to a decree of foreclosure in the amount as set out above plus attorney's fees. In regard to attorney's fees to the prevailing party, in regard to the failure to Worthington & Kimball's lien, I find C & A's attorney's fees to be reasonably worth \$6,000, and the Defendants First Interstate Bank of Arizona and Stewart Title together to be worth \$6,000. The reason these fees are less than Beuhner's attorney's fees is because they prevail in part and do not prevail in part.

Counsel for Otto Beuhner and Company is to prepare findings, conclusion and judgment in accordance herewith.

DATED this 10 day of January, 1985.

  
RONALD O. HYDE, Judge

CERTIFICATE OF SERVICE

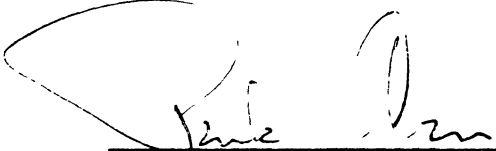
I hereby certify that on this 11 day of January, 1985,  
a true and correct copy of the foregoing Memorandum Decision was  
served upon the following:

Robert F. Bentley  
Attorney for C & A Enterprises, Inc.  
7525 East Camelback Road  
Scottsdale, Arizona 85251

LaVar E. Stark  
Attorney for Security Title and  
First Interstate Bank  
2485 Grant Avenue  
Ogden, Utah 84401

Robert F. Babcock  
Attorney for Plaintiffs  
185 South State, Suite 1000  
Salt Lake City, Utah 84111

Thomas A. Duffin  
Attorney for Defendant Otto Beuhner  
311 South State, Suite 380  
Salt Lake City, Utah 84111

  
\_\_\_\_\_  
PAULA CARR, Secretary