

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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TRUSTEES OF EMPIRE STATE CARPENTERS  
ANNUITY, APPRENTICESHIP, LABOR-  
MANAGEMENT COOPERATION, PENSION  
and WELFARE FUNDS,

Petitioners,

-against-

**REPORT AND RECOMMENDATION**  
15-CV-6449 (ADS)(AYS)

AKWESASNE CONSTRUCTION, INC.,

Respondent.

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**ANNE Y. SHIELDS, United States Magistrate Judge:**

The Plaintiff-Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor Management Cooperation, Pension and Welfare Funds (collectively, “Petitioners”) commenced this action pursuant to Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1132(a)(3), Section 301 of the Labor Management Relations Act of 1947 (“LMRA”), as amended, 29, U.S.C. § 185, and Section 9 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 9. Petitioners seek confirmation of an arbitration award against Akwesasne Construction, Inc., (“Respondent”), referred to herein as the “Audit Award”.

After Respondent failed to answer or otherwise appear, Petitioners obtained a certificate of default and thereafter moved for entry of judgment and/or to confirm awards of arbitration. Petitioners’ motion was thereafter referred by the Honorable Arthur D. Spatt to this Court for Report and Recommendation. For the reasons set forth below, it is respectfully recommended that the Award be confirmed and that judgment be entered confirming the arbitration award of \$30,191.76, and awarding Petitioners \$1,391.97 in attorneys’ fees and costs arising out of this action.

### Procedural History

Petitioners filed this action on November 11, 2015 by petition. Docket Entry (“DE”) 1. After Respondents failed to appear or answer, Petitioners moved for entry of a certificate of default on January 22, 2016. DE [8]. Petitioners’ request was granted, and the Clerk of the Court noted Respondent’s default. DE [9]. Thereafter, on March 18, 2016, Petitioners filed the instant motion for default judgment and/or to confirm an arbitration award. DE [10-12]. On March 19, 2016, Judge Spatt referred the motion to the undersigned for a report and recommendation as to whether the motion should be granted, and if so, the damages to be awarded. See Referral Order dated March 19, 2016, DE [13].

### Facts

Unless otherwise noted, the following facts are drawn from the petition and are accepted as true for purposes of this motion.

At all relevant times, Respondent was a party to a collective bargaining agreement (“CBA”) that required it to make periodic contributions to Petitioners; pay interest in delinquent contributions at the rate of 0.75% per month; pay liquidated damages of 20% of delinquent contributions; furnish its books and payroll records upon request for an audit; and submit any dispute to final, binding arbitration. Pet. ¶¶7-17. Although the agreement was signed by a representative of Respondent on August 7, 2014, and completed on August 19, 2014, the agreement states that the terms of the CBA are binding on Respondent as of June 1, 2011. See DE [11-1].

A dispute arose when Respondent failed to submit to an audit of its books and records to determine Respondent’s compliance with the CBA. Id. at ¶14. Petitioners determined that Respondent failed to make contributions in the principal amount of \$22,623.48, for the period of

August 1, 2014 through July 31, 2015. Id. at ¶15. A dispute as to this payment arose, and was submitted to arbitration. Id. at ¶18.

An Arbitration was held, upon due notice to the parties, before arbitrator J.J. Pierson. Id. at ¶¶18-20. That hearing resulted in the award of \$30,191.76, dated September 22, 2015 (“Audit Award”). Id. at ¶¶ 18-20. The Audit Award ordered Respondent to pay delinquent contributions in the amount of \$22,623.48 interest in the amount \$1,393.58, liquidated damages in the amount of \$4,524.70, attorneys’ fees of \$900.00, and the arbitrator’s fee of \$750.00. Id. at ¶20. The Audit Award also authorized Petitioners to examine the books and records of Respondent, for the period of August 1, 2014 through July 31, 2015. ¶21.

Respondent’s failure to comply with the terms of the arbitration awards led to the filing of this lawsuit, in which Respondent has defaulted. The Court now turns to determine Plaintiff’s motion for judgment and/or to confirm arbitration.

#### Discussion

In accordance with the prevailing opinion in this District, this Court limits its inquiry to the determination of damages<sup>1</sup>.

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<sup>1</sup> The Second Circuit has advised district courts that they should treat an unanswered petition to confirm an arbitration proceeding “as an unopposed motion for summary judgment,” since a petition to confirm an arbitration award is typically accompanied by a record. See D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 109–10 (2d Cir.2006) (“We conclude that default judgments in confirmation/vacatur proceedings are generally inappropriate.”). Recently, courts in this District have criticized Petitioners and their counsel for filing complaints (rather than petitions for confirmation of arbitration proceedings) and moving for default judgment under Fed. R. Civ. P. 55. In re Certain–Default–Motions Brought o/b/o Trs. of Empire State Carpenters Annuity, Apprenticeship, Labor–Mgmt. Coop., Pension & Welfare Funds (“In re Certain Default–Motions”), 2015 WL 968125, at \*4–7 (E.D.N.Y. Feb. 27, 2015), report and recommendation adopted, 2015 WL 1247085 (E.D.N.Y. Mar. 18, 2015) and 2015 WL 1396475 (E.D.N.Y. Mar. 25, 2015).

Nevertheless, the Court recognizes a line of cases that finds default judgments appropriate where, as here, the defendant has failed to appear at both the arbitration hearing and the federal action, as “the distinction between moving for default judgment and moving for

A. Confirmation of the Awards

“Judicial review of a labor-arbitration decision pursuant to [a collective bargaining agreement] is very limited.” Major League Baseball Ass'n v. Garvey, 532 U.S. 504, 509 (2001).

Accord Local 339 United Serv. Workers Union v. Advanced Ready Mix Corp., No. 12–CV–4811 (RRM)(VMS), 2013 WL 685447, at \*2 (E.D.N.Y. Feb. 24, 2013) (“court's review of an arbitration award is 'severely limited' so as not to frustrate the goals of arbitration—namely to settle disputes efficiently and avoid long and expensive litigation.” (citing Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir.1997))).

“The arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case....

Only a “barely colorable justification for the outcome reached by the arbitrators is necessary to confirm the award.” D.H. Blair & Co. v. Gottdiener, 462 F.3d at 110 (citations and quotation marks omitted). A court must confirm the arbitration award where “there is no indication that the arbitration decision was made arbitrarily, exceeded the arbitrator's jurisdiction, or otherwise was

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summary judgment is somewhat academic.” Trs. of Empire State Carpenters Annuity, Apprenticeship, Labor–Management Cooperation, Pension and Welfare Funds v. Manhattan Concrete Structures, Inc., 2014 WL 4810262, at \*2 (E.D.N.Y. Sept. 23, 2014) (citation and quotation marks omitted); Trs. of the Local 807 Labor Mgmt. Health Fund v. Express Haulage Co., 2008 WL 4693533 (E.D.N.Y. Oct. 23, 2008) (“[A] more stringent review of Petitioners' case under the summary judgment standard does not improve defendant's position; Petitioners' claims, from the beginning, have gone uncontested.”). Accordingly, the Court may properly assess damages on default judgment in this instance, but joins other courts in warning Petitioners and their counsel to adhere in the future to the proper procedure for confirmation of arbitral awards. In re Certain-“Default “-Motions, 2015 WL 968125, at \*7 (cautioning the same Petitioners and counsel that their persistence in filing default judgments in such matters “may result in recommendations that such motions be denied or that some or all of the attorneys' fees and costs not be awarded”); Trs. of the New York City Dist. Council of Carpenters Pension Fund v. Harbor Island Contracting Inc., 2015 WL 5146093 (S.D.N.Y. Aug. 31, 2015) (same warning). See Trustees of Empire State Carpenters Annuity v. J. Careri Constr. Co., LLC, 2016 WL 492145, at \*1 (E.D.N.Y. Jan. 5, 2016), report and recommendation adopted (E.D.N.Y. January 30, 2016).

contrary to law.” Local 339 United Serv. Workers Union v. Advanced Ready Mix Corp., 2013 WL 685447, at \*3; Trustees of Empire State Carpenters Annuity v. J. Careri Constr. Co., LLC, 2016 WL 492145, at \*2 (E.D.N.Y. Jan. 5, 2016), report and recommendation adopted (E.D.N.Y. January 30, 2016).

In this case, the Arbitrator issued an award that “drew [its] essence from the CBA.” Trustees of Empire State Carpenters Annuity v. J. Careri Constr. Co., LLC, 2016 WL 492145, at \*2 (E.D.N.Y. Jan. 5, 2016), report and recommendation adopted (E.D.N.Y. January 30, 2016)(citing E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000) (citation and quotation marks omitted). Based upon the record before him, the Arbitrator directed Respondent to pay Petitioners \$30,191.76 in the Audit Award. The Arbitrator further awarded the opening of Respondent’s books and records as necessary under the terms of the CBA and Collection Policy. There is no indication that these awards were made arbitrarily, exceeded the Arbitrator’s authority, or were otherwise contrary to law. Accordingly, it is respectfully recommended that the Court confirm the award of \$30,191.76.

#### B. Attorneys’ Fees and Costs

In addition, Petitioners seek attorneys’ fees and costs for this action in the amount of \$1640.47, reflecting a total of 7.3 hours of work for a total of \$1,147.50, and \$492.97 in court fees and expenses. See Burke Aff. ¶¶31-34. The record reflects that two attorneys worked on this matter. See Burke Aff. ¶¶27-29. A recent case in this District recently deemed attorney Burke as a junior associate and recommended setting her hourly rate at \$200.00. See Trustees of Empire State Carpenters Annuity v. J. Careri Constr. Co., LLC, 2016 WL 492145, at \*3 (E.D.N.Y. Jan. 5, 2016), report and recommendation adopted (E.D.N.Y. January 30, 2016). That court also recommended a \$90.00 hourly fee for legal assistants. See id. (citing Bd. of Trs. of the

United Union of Roofers, Waterproofers & Allied Workers v. N.Y. Roofing Co., 2015 WL 1535373, at \*6 (E.D.N.Y. Mar. 5, 2015) (recognizing hourly rate of \$100 as “slightly higher than is generally awarded in this district”), report and recommendation adopted, 2015 WL 1546447 (E.D.N.Y. Apr. 6, 2015). This Court concurs with those recent recommendations and recommends that Mr. Roffe’s hourly rate be set at \$200.00, as he is also a junior associate having graduated after Ms. Burke. As discussed below, the fees are adjusted accordingly.

The contemporaneous time records show that counsel and support staff together billed 7.3 hours in this action. The Court finds that this amount of time is reasonable under the circumstances. See e.g., Trustees of Empire State Carpenters Annuity v. J. Careri Constr. Co., LLC, 2016 WL 492145, at \*3 (E.D.N.Y. Jan. 5, 2016) report and recommendation adopted (E.D.N.Y. January 30, 2016); Trs. of Empire State Carpenters Annuity, Apprenticeship, LaborMgmt. Cooperation, Pension & Welfare Funds v. Infinity Glass & Restoration LLC, 2013 WL 5278200, at \*9 (E.D.N.Y. Sept. 17, 2013). Applying the reduced hourly rates set forth above, the Court recommends reasonable attorneys’ fees in the amount of \$899.00, plus an additional \$492.97 for court fees and expenses.

#### Conclusion

For the reasons set forth above, it is respectfully recommended that judgment be entered against Respondent as follows: (1) confirming the arbitration award and awarding Petitioners \$30,131.76; and (2) awarding Petitioners \$ 1,391.97 in attorneys’ fees and costs arising out of this action.

#### **OBJECTIONS**

A copy of this Report and Recommendation is being provided to counsel via ECF. Furthermore, the Court directs Plaintiff's counsel to (1) to serve a copy of this Report and Recommendation by first class mail to Respondents and counsel at their last known addresses, and (2) to file proof of service on ECF within two days. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. 28 U.S.C. § 636(b)(1) (2006 & Supp. V 2011); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. **Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or Court of Appeals.** Thomas v. Arn, 474 U.S. 140, 145 (1985) (“[A] party shall file objections with the district court or else waive right to appeal.”); Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008) (“[F]ailure to object timely to a magistrate’s report operates as a waiver of any further judicial review of the magistrate’s decision.”).

Dated: Central Islip, New York  
April 6, 2016

/s/ Anne Y. Shields  
ANNE Y. SHIELDS  
United States Magistrate Judge